

INTRODUCTION

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I. INTRODUCTORY

A. SCOPE

This work, issued in 2012, republishes the 1995 updated sixth edition of the *GATT Analytical Index – Guide to GATT Law and Practice*. The 1995 book provides a historical record of the General Agreement on Tariffs and Trade 1947, from its inception to the decisions made to terminate its provisional application. Except in this chapter and where otherwise specified, this 2012 republished edition has not been updated save for reformatting to make it available online. The WTO's interpretation and application of the GATT 1994 is covered by the *WTO Analytical Index – Guide to WTO Law and Practice*, compiled and published by the WTO Secretariat.

This book provides a guide to the interpretation and application of the General Agreement on Tariffs and Trade, drawn from official documentary sources of the GATT. The material is arranged in forty-three chapters covering the Preamble of the General Agreement, its thirty-nine Articles, Part IV, provisional application of the General Agreement, and the institutional and decision-making practice of the GATT, plus appendix tables and this introduction. Except where otherwise indicated, this edition has been updated to 1 January 1995, the date of entry into force of the Marrakesh Agreement Establishing the World Trade Organization. A new section in the chapter on Institutions and Procedure summarizes the decisions taken by the Preparatory Committee for the WTO and the CONTRACTING PARTIES to the GATT regarding the transition from the GATT to the WTO. A note at the end of this introductory chapter provides updated information on availability of GATT 1947 documents.

B. STRUCTURE

Each chapter is structured in four sections: the text of the relevant GATT provisions, the application and interpretation of those provisions, the drafting history, and relevant documents.

- Section I includes the text of the Article concerned, the Interpretative Notes relevant to that Article from Annex I of the General Agreement, the provisions of other Annexes to the General Agreement where appropriate, and the text of relevant Understandings incorporated in GATT 1994.

- Section II includes excerpts from documents bearing on the interpretation of the General Agreement and the Havana Charter, and the practice of the CONTRACTING PARTIES in applying the provisions of the General Agreement in question. The material in Section II is arranged systematically corresponding to the phrase or word of the General Agreement interpreted or other relevant categories. Some chapters also include tables or other descriptive material.
- Section III provides a general account of the relevant preparatory work of the Havana Charter and the General Agreement, and a discussion of any relevant amendments to the General Agreement. Additional material on drafting history also may appear in section II.
- Section IV provides a list of relevant documents from the preparatory work, the early years of the GATT, and the Review Session of 1954-55. The document references for Articles V through X appear at the end of the chapter on Article X. In the case of Part IV of the GATT, which is the sole amendment to the General Agreement since the Review Session, a list of relevant negotiating documents appears at the end of the chapter on Part IV.

II. EDITORIAL CONVENTIONS AND GUIDE TO REFERENCES

The text of the General Agreement provisions quoted at the head of each chapter has been taken from the edition published by the Secretariat. The asterisks therein indicate the portions of the text which should be read in conjunction with the Notes and Supplementary Provisions in Annex I. These asterisks do not have any independent legal basis.

The names used to refer to contracting parties in descriptive material conform in principle to the most recent United Nations list of Member States as of 1995. In historical references and in direct quotations, the names used at the time have been kept. References to the various European Communities (principally the European Economic Community) reflect those in the original documents referred to. The original spelling and punctuation have been kept in each quotation. Inconsistencies in these respects therefore reflect the variability of the original documents.

Because this work is both for general distribution and for use by contracting parties to the GATT, references are provided to some documents which are still subject to restriction. Verbatim quotations from unadopted panel reports that are still in a restricted status have generally been avoided except where the material has already appeared in derestricted GATT documents. The rules on document restriction and derestriction are discussed in the chapter on Institutions and Procedure.

As provided in Article XXV:1 of the General Agreement, wherever reference is made to the contracting parties acting jointly, they are designated as the “CONTRACTING PARTIES”. An individual government which has accepted or provisionally applies the General Agreement is referred to as a “contracting party”. Where a reference is prefaced by “it was agreed”, it reflects an agreed interpretation by the body which drafted or approved the text of the Article in question, by the CONTRACTING PARTIES, or by the body otherwise cited. Where a reference is prefaced by “it was stated”, this indicates that the statement was made by one or more delegates, but that the body in question did not pronounce itself on the validity or otherwise of the statement.

The indication that Reports of Panels and Working Parties were adopted on a certain date refers to adoption by the CONTRACTING PARTIES or from 1968 onwards, to the adoption by either the CONTRACTING PARTIES or the Council of Representatives (commonly referred to as the “GATT Council” or the “Council”). A reference to a panel report or working party report in relation to a particular year refers, unless indicated otherwise, to the year of adoption. In the case of reports which were not adopted or not subject to an adoption process, the year refers to the date of circulation of the report.

References to the Articles of the Havana Charter are given in Arabic numerals whereas the corresponding Articles in the General Agreement are given in Roman numerals. Whenever reference is made to an Article in the Charter, the corresponding Article of the General Agreement is often given within square brackets or otherwise indicated.

In this work, “General Agreement” has in general been used to refer to the agreement itself, and “GATT” to the institution or the institutional context, although the documents themselves are not always consistent in their usage. “WTO” refers to the World Trade Organization and “WTO Agreement” to the Agreement Establishing the World Trade Organization which was done at Marrakesh, Morocco on 15 April 1994 and entered into force on 1 January 1995. In conformity with Article II:4 of the WTO Agreement, “GATT 1947” refers to the General Agreement on Tariffs and Trade, annexed to the Final Act Adopted At the Conclusion of the Second Session of the Preparatory Committee of the Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified. “GATT 1994” is as defined in the text “General Agreement on Tariffs and Trade 1994” in Annex 1A of the WTO Agreement; see further in the chapter on Institutions and Procedure.

The material in this work has been taken from the preparatory work for the Havana Charter and the General Agreement; the decisions, panel reports, working party reports and legal instruments collected in the Basic Instruments and Selected Documents (BISD) series; the session records of the CONTRACTING PARTIES; the minutes of the Council of Representatives; and other GATT documents. A list of document series appears below.

Citations in footnotes generally include the original GATT document series symbol and number for the source document, a citation to its reprinted version in the BISD series, and the BISD page and paragraph number for the passage quoted. For instance, the citation “L/833, adopted on 23 October 1958, 7S/60, 63, para. 6” refers to paragraph 6 of a document which was originally issued as L/833, which was adopted by the CONTRACTING PARTIES on 23 October 1958 and which was then reprinted starting on page 60 of the Seventh Supplement of the Basic Instruments and Selected Documents series; the paragraph in question is to be found on page 63 of the Seventh Supplement. Repeated citations to the same material or the same document are indicated by the word “*Ibid.*” Where a document has been published twice and the texts diverge, the most widely available version (normally that printed in the BISD series) is used except where otherwise noted.

Information on how to obtain copies of the documents cited and other GATT documents appears at the end of this introduction.

III. DRAFTING OF THE HAVANA CHARTER AND THE GENERAL AGREEMENT ON TARIFFS AND TRADE

The General Agreement on Tariffs and Trade was agreed during negotiations which partially paralleled the negotiations for a larger agreement, the Havana Charter for an International Trade Organization. The negotiation of the Havana Charter took place during 1946-48, but the Charter never entered into force. The General Agreement was negotiated and agreed during 1946-47 and has been provisionally applied since 1 January 1948.

The idea of an International Trade Organization was developed in discussions during World War II on planning for reconstruction of the world trading system in the postwar period. The first public proposal was the 1945 document “Proposals for Consideration by an International Conference on Trade and Employment”. The Proposals were developed by the United States and were published separately by the United Kingdom, which stated it was “in full agreement with all important points in these proposals”. They proposed the establishment of an International Trade Organization of the United Nations, the members of which would agree to abide by the rules in the Charter of the Organization. The Proposals contained suggestions for rules to govern trade barriers, restrictive business practices, intergovernmental commodity arrangements, and the international aspects of domestic employment policies, and also proposed a structure for the Organization. Separate negotiations on reduction of tariff barriers were also to be conducted.

“Proposals for Consideration by an International Conference on Trade and Employment” in *Proposals for Expansion of World Trade and Employment*, US Department of State Publication 2411, Commercial Policy Series 79. Washington D.C. November 1945 (reprinted in Department of State Bulletin, Vol. XIII, Washington D.C., December 1945)

Proposals for Consideration by an International Conference on Trade and Employment, as transmitted by the US Secretary of State to H.M. Ambassador at Washington, 6th December 1945. HMSO. Cmd. 6709. London, 1945.

When it met for the first time in London in February 1946, the United Nations Economic and Social Council (ECOSOC) adopted a Resolution calling a United Nations Conference on Trade and Employment for the purpose of promoting the expansion of trade and production, exchange and consumption of goods. The Resolution established a Preparatory Committee of representatives of the governments of nineteen countries, to elaborate an annotated draft agenda, including a draft convention for consideration by the Conference, taking into consideration suggestions which might be submitted to it by ECOSOC or any Member of the United Nations.¹

In September 1946, the US Government published a more detailed “Suggested Charter” consisting of seven chapters, of which Chapter IV (Articles 8-33) dealt with commercial policy. This “US Draft Charter” became the basis for discussions at the First Session of the Preparatory Committee.

Suggested Charter for an International Trade Organization of the United Nations, US Department of State Publication 2598, Commercial Policy Series 93. Washington D.C. 1946.²

The First Session of the Preparatory Committee was held in London at Church House, Westminster from 15 October 1946 to 26 November 1946. The First Session adopted a Report of its deliberations (the “London Report”), which included a narrative account of the treatment of various agenda items, the draft Charter text provisionally agreed as of the end of the First Session, and various other documents.

“London Report”

Report of the First Session of the London Preparatory Committee of the United Nations Conference on Trade and Employment (UN Document EPCT/33). London: dated October 1946. Includes the “London Draft” of the Charter, as well as the ECOSOC Resolution of January 1946, the US Draft Charter, the agenda and rules of procedures for the Preparatory Committee, various other resolutions, and (in Annexure 10 at page 51) “Report on Procedures for Giving Effect to Certain Provisions of the Charter for an International Trade Organization by Means of a General Agreement on Tariffs and Trade Among Members of the Preparatory Committee”.

The “London draft” is also included in *Preliminary Proposals for an International Trade Organization*, US Department of State Publication No. 2456, Commercial Policy Series 99, Washington D.C., 1947.

At the First Session, chapters on commercial policy, employment, restrictive business practices and commodity agreements were worked out, and a new chapter on economic development was added. However, no agreement was reached on voting or other organizational provisions nor on state trading; the technical articles (corresponding to GATT Articles III-X) were left incomplete. Work on the commercial policy provisions of the Charter took place almost entirely in Committee II and in subgroups thereof such as the Working Party on Technical Articles (Articles III-X) and the Procedures Sub-Committee (the most-favoured-nation clause, tariff schedules and tariff negotiations).

The First Session decided to convene a Second Session the following April to do further work on the Charter, and agreed that the governments members of the Preparatory Committee should hold a round of trade and tariff negotiations at that time. The Procedures Sub-Committee drew up a “Resolution Regarding the Negotiation of a Multilateral Trade Agreement Embodying Tariff Concessions”,³ and “Procedures for

¹The members of the Preparatory Committee appointed by the Resolution were the representatives of the following countries: Australia, Belgium-Luxembourg Economic Union, Brazil, Canada, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Netherlands, New Zealand, Norway, South Africa, the Union of Soviet Socialist Republics, the United Kingdom and the United States. All of these countries except the USSR became contracting parties to the GATT under the Protocol of Provisional Application. See copy of the Resolution in Annexure 1, p. 42 of the London Report (EPCT/33). The Union of Soviet Socialist Republics “indicated that it did not feel able to participate in the work of the Preparatory Committee as it had not found it possible to devote sufficient preliminary study to the important questions which were the subject of the Committee’s discussion”. All other members of the Preparatory Committee participated in the First and Second Sessions and the Drafting Committee. In addition, Colombia, Denmark, Mexico, Peru and Poland sent observers to the First and Second Sessions; Colombia and Mexico to the Drafting Committee; and the following countries also sent observers to the Second Session: Afghanistan, Argentina, Ecuador, Egypt, Greece, Iran, Saudi Arabia, Sweden, Thailand, Turkey, Uruguay, Venezuela and Yugoslavia. In addition, representatives of the International Labour Organization, the Food and Agriculture Organization of the United Nations, the International Monetary Fund and the International Bank for Reconstruction and Development participated without vote on agenda matters within the scope of their respective activities. The arrangements agreed in ECOSOC for consultation with non-governmental organizations were applied in respect of consultation with certain organizations having Category A consultative status with ECOSOC (the American Federation of Labour, the International Chamber of Commerce, the International Co-operative Alliance and the World Federation of Trade Unions). Geneva Report, p. 6.

²The US Draft Charter also appears in the London Report, EPCT/33, as Annexure 11, pp. 52 *et seq.*

³London Report, Annexure 7, p. 47-48.

Giving Effect to Certain Provisions of the Charter of the International Trade Organization by Means of a General Agreement on Tariffs and Trade Among the Members of the Preparatory Committee".⁴ The Resolution, noting that the United States government had invited the members of the Preparatory Committee "to meet to negotiate concrete arrangements for the relaxation of tariffs and trade barriers of all kinds and the invitation has been accepted", recommended to the governments concerned "that the meeting envisaged by the invitations ... should be held under the sponsorship of the Preparatory Committee in connection with, and as a part of, the Second Session of the Committee".

The First Session also appointed a Drafting Committee of technical experts. The Drafting Committee met at Lake Success, New York from 20 January to 25 February 1947 and prepared a further draft of the Charter and a full draft of the General Agreement.⁵

"Drafting Committee Report" or "New York Report"

Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment (UN Document EPCT/34). Lake Success, N.Y.: dated 5 March 1947. Includes the "New York Draft" of the Charter, and a draft General Agreement at page 65.

The Second Session of the Preparatory Committee was then held at the European Office of the United Nations in Geneva from 10 April 1947 through 30 October 1947. The Preparatory Committee at this session was organized in two plenary Commissions, of which Commission A considered commercial policy matters and Commission B considered other issues including the structure of the Organization. The Preparatory Committee completed work on 22 August 1947 on a draft Charter as a basis for discussion at the Havana Conference and submitted this draft to governments in their Report in early September. Meanwhile, the first round of GATT multilateral tariff negotiations was conducted between members of the Preparatory Committee.

"Geneva Report"

Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (UN Document EPCT/186). 10 September 1947. Includes the "Geneva draft" of the Charter.

The tariff negotiations and the drafting of the General Agreement continued for two months afterward, principally in the Tariff Agreements Committee. Drafts of the General Agreement appear in the following Geneva documents: EPCT/135, EPCT/189, EPCT/196 and EPCT/214/Add.1/Rev.1. The results of the negotiations were embodied in the "Final Act Adopted at the Conclusion of the Second Session", signed at Geneva on 30 October 1947 by representatives of the twenty-five governments involved. The Final Act, including the 30 October 1947 text of the General Agreement, the Schedules of Tariff Concessions negotiated at Geneva in 1947 and the Protocol of Provisional Application, was published by the United Nations.

"Geneva Final Act"

Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment UN Sales No. 1947.II/10. Four volumes including text of Final Act and General Agreement on Tariffs and Trade, Schedules I-XX and Protocol of Provisional Application; 55 UNTS 187.

The following publications of the United States and United Kingdom Governments are also relevant:

US Government *Analysis of the General Agreement on Tariffs and Trade, signed at Geneva, 30 October 1947.* US Department of State Publications 2983, Commercial Policy Series 109. Washington, D.C. 1947

UK Government *Report on the Geneva Tariff Negotiations, with text of the General Agreement on Tariffs and Trade, and supplementary agreements with the United States and Canada.* HMSO. Cmd. 7258. London. 1947

Provisional application, under the Protocol, of the 30 October 1947 text of the General Agreement began as of 1 January 1948.

⁴London Report, Annexure 10, p. 48-52. See also generally the verbatim records of the Sub-Committee on Procedures, EPCT/C.II/PRO/PV/5-15 and its summary records in the series EPCT/C.II/W/2-31.

⁵The same eighteen governments were represented in the Drafting Committee, with observers from the same intergovernmental organizations, Colombia, and Mexico.

The United Nations Conference on Trade and Employment was then held at Havana, Cuba, from 21 November 1947 to 24 March 1948. At the conclusion of the Havana Conference the “Final Act and Related Documents of the United Nations Conference on Trade and Employment”, which included the text of the Havana Charter for an International Trade Organization, was published in English and French by the United Nations and in English, French and Spanish by the Interim Commission of the International Trade Organization. The text of the Havana Charter was also published in English by the United States and United Kingdom Governments. An authentic text of the Charter in Spanish was established in 1949 and appears in the Spanish-language ICITO edition of the Havana Final Act.

United Nations Conference on Trade and Employment held at Havana, Cuba, from 21 November 1947 to 24 March 1948: Final Act and Related Documents. UN Document E/Conf.2/78, dated April 1948. UN Sales No. 48.11.D.4. Includes the Havana Final Act, the Havana Charter and annexes, and Conference resolutions.

United Nations Conference on Trade and Employment held at Havana, Cuba, from 21 November 1947 to 24 March 1948: Final Act and Related Documents. Interim Commission for the International Trade Organization, Lake Success, New York (reprint of UN Document E/CONF.2/78), dated April 1948. Includes the Havana Final Act, the Havana Charter and annexes, and Conference resolutions.

Havana Charter for an International Trade Organization. US Department of State Publication No. 3117, Commercial Policy Series 113, Washington D.C. 1948. Also published with a commentary: *Havana Charter for an International Trade Organization, March 24, 1948, Including a Guide to the Study of the Charter*, by R.P. Terrill. US Department of State Publication 3206, Commercial Policy Series 114, Washington D.C. 1948.

United Nations Conference on Trade and Employment. November 21, 1947, to March 24, 1948. Final Act and the Havana Charter for an International Trade Organization, with related documents. HMSO. Cmd 7376. London 1948.

The Executive Committee of the Interim Commission for the International Trade Organization (ICITO), at its first meeting, directed the Executive Secretary to “publish the reports of the principal committees [of the Havana Conference], supplemented by such sub-committee reports and other documents or extracts as may be necessary for an understanding of such reports”.⁶ These were published by ICITO under the title *Reports of Committees and Principal Sub-Committees*: ICITO I/8, Geneva, September 1948 (reprinted by the GATT). In this Analytical Index, this publication is referred to as “Havana Reports”.

The Havana Charter never entered into force. No acceptances of the Charter were received by the Secretary-General of the United Nations, its depositary. On 6 December 1950 the United States Department of State issued a statement of policy indicating that the Havana Charter would not be submitted again to the United States Congress. It subsequently became evident that the establishment of the ITO would be indefinitely postponed.⁷

A. APPLICATION AND AMENDMENT OF THE GENERAL AGREEMENT

Article XXVI:6, as revised in 1955, provides that the General Agreement will enter into force, as between governments which have accepted it, on the thirtieth day following the day on which instruments of acceptance have been deposited on behalf of governments named in Annex H, representing 85 per cent of total external trade of the territories of such governments, computed in accordance with the percentages in Annex H. However, the GATT 1947 was accepted definitively only by Liberia and Haiti, and therefore never entered into force. Instead, the GATT 1947 was applied provisionally by contracting parties under the Protocol of Provisional Application or subsequent Protocols of Accession to the General Agreement.

The Protocol of Provisional Application, attached to the Final Act of the Second Session of the Preparatory Committee, provided that the signatory governments would apply provisionally on and after 1 January 1948 Parts I and III of the General Agreement, as well as Part II of the General Agreement to the fullest extent not inconsistent with existing legislation. All GATT 1947 accession protocols since the 1949 Annecy Protocol provided that acceding governments would provisionally apply the General Agreement in the same manner. See the chapters of this Index on the provisional application of the General Agreement and on Article XXVI.

⁶ICITO/EC.1/SR.1.

⁷Sec/36/53. The US announcement of its decision not to resubmit ITO to Congress appears in GATT/CP/86 dated 7 December 1950. See also under Article XXIX.

The text of the General Agreement, as agreed in 1947 and first provisionally applied beginning 1 January 1948, was based on the commercial policy provisions of the Geneva Draft Charter. It was envisioned that the general clauses in Part II might be further changed through negotiations at Havana; Article XXIX of the General Agreement therefore provided that when the Havana Charter entered into force, Part II of the General Agreement would be superseded by the corresponding provisions of the Charter. However, even after the Charter entered into force, Parts I and III of the General Agreement would remain in effect, and the ITO would coexist with the CONTRACTING PARTIES.

At the first three Sessions of the CONTRACTING PARTIES, amendments were agreed to bring the General Agreement text closer to the text of the Charter. The First Session of the CONTRACTING PARTIES, held during the Havana Conference, agreed to three protocols of amendment to enter into force before the Charter: two which replaced Articles XIV and XXIV respectively with provisions reflecting compromises reached at Havana⁸, and a third which amended accession provisions (inserting Articles XXV:5(b) and (c) and XXXV and amending Articles XXXII and XXXIII).⁹

At the Second Session of the CONTRACTING PARTIES, held in August and September 1948, a Working Party on Modifications to the General Agreement considered further incorporation of the results of the Havana Conference and decided to "limit amendments to cases where the retention of the present provisions of Part II would create serious difficulties for contracting parties".¹⁰ The Working Party decided on the replacement of Articles III, VI and XVIII by their Havana counterparts, rewording of Article XXIX and a few other minor amendments. Due to the different acceptance requirements applying to different provisions of the General Agreement under Article XXX, two protocols were prepared: the Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade¹¹ and the Protocol Modifying Part I and Article XXIX of the General Agreement on Tariffs and Trade¹².

The Third Session in 1949 agreed on amendments to the territorial application provisions of Article XXVI:4, effected through the Protocol Modifying Article XXVI of the General Agreement on Tariffs and Trade.¹³ The Fifth Session in 1950 agreed to an amendment to Article XXVIII, done by a paragraph added to the Torquay Protocol.

In 1953 it was decided to convene a session of the CONTRACTING PARTIES in late 1954 to review the operation of the General Agreement and to examine possible amendments or supplements thereto, and possible modifications to arrangements for its administration. The Review Session of 28 October 1954 to 8 March 1955 resulted in agreement on a number of amendments to the text of the General Agreement, and on an Agreement on the Organization for Trade Cooperation (OTC). These amendments were incorporated in three instruments, only one of which - the Protocol Amending the Preamble and Parts II and III - entered into force.¹⁴

In 1965 the Protocol to Introduce a Part IV on Trade and Development was drawn up. It entered into force on 27 June 1966.

⁸Special Protocol Modifying Article XIV of the General Agreement on Tariffs and Trade, signed at Havana on 24 March 1948, entered into force 9 May 1949, 62 UNTS 40; Special Protocol Relating to Article XXIV of the General Agreement on Tariffs and Trade, signed at Havana 24 March 1948, entered into force 7 June 1948, 62 UNTS 56.

⁹Protocol Modifying Certain Provisions of the General Agreement on Tariffs and Trade, signed at Havana 24 March 1948, entered into force 24 March 1948, 62 UNTS 30. See further in section III under Articles XXV, XXXIII and XXXV.

¹⁰Report of the Working Party on "Modifications to the General Agreement", adopted 1 and 2 September 1948, GATT/CP.2/22/Rev.1, II/39, para. 3.

¹¹Signed at Geneva 14 September 1948, entered into force 14 December 1948, 62 UNTS 80.

¹²Signed at Geneva 14 September 1948, entered into force 24 September 1952, 138 UNTS 334.

¹³Signed at Annecy 14 September 1948, entered into force 28 March 1950, 62 UNTS 113.

¹⁴As regards the other two instruments: the entry into force of the Protocol of Organizational Amendments was contingent upon the entry into force of the Agreement on the Organization for Trade Co-operation, done at Geneva on 10 March 1955, which never entered into force. The Protocol amending Part I and Articles XXIX and XXX failed to gain the required acceptance by all contracting parties. At their twenty-fourth session, the CONTRACTING PARTIES decided to abandon the Protocol if, by 31 December 1967, it had not entered into force. This condition having been fulfilled, the Protocol was abandoned; see 15S/65.

The text of the English language version of the General Agreement as provisionally applied since entry into force of the Part IV Protocol can be found in *The Text of the General Agreement*, published by the Secretariat.¹⁵

On 1 January 1995 when the WTO Agreement entered into force, the GATT 1947 and the WTO entered a brief period of coexistence as separate organizations with overlapping membership. The length of this period of coexistence was determined on 8 December 1994, when the Preparatory Committee of the World Trade Organization, and the CONTRACTING PARTIES meeting in Special Session, each adopted a decision on “Transitional Co-existence of the GATT 1947 and the WTO Agreement”. This decision provides, *inter alia*, that “The legal instruments through which the contracting parties apply the GATT 1947 are herewith terminated one year after the date of entry into force of the WTO Agreement. In the light of unforeseen circumstances, the CONTRACTING PARTIES may decide to postpone the date of termination by no more than one year”.¹⁶ On 31 December 1995, almost fifty years of provisional application of the GATT 1947 thus came to an end.

B. PUBLICATIONS COLLECTING THE PRACTICE OF THE CONTRACTING PARTIES

The principal widely-available printed source for documents on the GATT 1947 is the Basic Instruments and Selected Documents (BISD) series published from 1952 to 1996 by the Secretariat.¹⁷ Volume I of the BISD, published in 1952, includes the text of the General Agreement (incorporating the first six protocols of amendment) and other instruments and procedures¹⁸ and Volume II includes decisions, declarations, resolutions, rulings and reports of the first six sessions of the CONTRACTING PARTIES. Volume I (revised) of the BISD, published in 1955, included the text of the General Agreement incorporating all of the Review Session amendments, and the text of the Agreement on the Organization for Trade Cooperation. Volume III of the BISD, published in 1958, included the text of the General Agreement as in force in 1958. After the addition of Part IV, the text of the General Agreement as in force in 1969 was published as Volume IV of the BISD.¹⁹ Volume IV also includes the text of the Protocol of Provisional Application and, in an Appendix, a guide to the legal sources of all the GATT provisions and the titles, effective dates and UN Treaty Series (UNTS) references of all the Protocols of amendment. The text contained in Volume IV has been republished by the Secretariat in a separate volume entitled *The Text of the General Agreement*.

The BISD series contains the texts of legal instruments drawn up by the CONTRACTING PARTIES or under their auspices, as well as decisions, resolutions, recommendations, reports, texts of protocols of accession and other relevant material. Supplements to the BISD were published approximately annually from 1952 to 1996. After the Fourteenth Supplement, each Supplement included a cumulative index to all material in the Supplements and Volume II.

The periodically-updated loose-leaf publication *Status of Legal Instruments* lists the legal instruments drawn up by the CONTRACTING PARTIES or under their auspices under various titles (Protocol, Agreement, Declaration, Procès-Verbal, Memorandum, Certification, Arrangement), together with details of dates of signature, of entry into force and of termination (where applicable), registration with the United Nations, parties to each instrument, and publications containing the text of the instrument concerned.²⁰

¹⁵Sales No. GATT/1986-4. The English language text of the General Agreement is identical to the English language text in Volume IV of the Basic Instruments and Selected Documents, and is identical to the text which, with various other texts, is incorporated into the General Agreement on Tariffs and Trade 1994 (“GATT 1994”). The French and Spanish language texts published in Volume IV differ from the respective texts incorporated into GATT 1994, as the GATT 1994 texts in these languages include certain corrections and rectifications. See further under Article XXVI.

¹⁶PC/12, L/7583, adopted 8 December 1994, para. 3.

¹⁷For the earliest sessions of the GATT, the Secretariat issued compendia of the decisions of the CONTRACTING PARTIES and indexes listing the business that had been transacted at Sessions, with relevant document references. A number of compendia were issued in the CP/ series of intersessional documents, starting with CP/1 which lists the decisions of the First Session in 1948.

¹⁸Sales No. GATT/1952-3 (out of print). Earlier consolidated texts of the General Agreement were issued in the CP/ series.

¹⁹Sales No. 1969-1 (in print). BISD Volumes I(revised) and III are out of print. Volume IV included for the first time asterisks inserted into the text by the Secretariat for the convenience of the reader, marking the portions of the text which should be read in conjunction with the Notes and Supplementary Provisions in Annex I to the General Agreement. The asterisks have no independent legal status.

²⁰GATT/LEG/1.1971, with updating supplements (loose-leaf, English and French).

When Volumes I and II of the BISD were published in 1952, the first edition of the Analytical Index was compiled and published in 1953. Later editions were prepared in 1959, 1966, 1970 and 1985, and the sixth and final edition of the Analytical Index of the GATT was published in 1995.

The Summary Records of the sessions of the CONTRACTING PARTIES, the Minutes of the Council of Representatives, and most other documents issued by the GATT secretariat were not reproduced in the BISD for reasons of space. Instead they were published on microfiche, and more recently have been made available online. For the various document series, see the key to document symbols below.

IV. DOCUMENT REFERENCES

A key to the document symbols or short titles employed in this Index and in other GATT documents is given below. For information on how to obtain microfiche copies of these documents, see page 19 below. The list of negotiating documents reflects the holdings of the WTO Library in Geneva and the Secretariat's online catalogue of GATT documents.

A. DRAFTING OF THE GENERAL AGREEMENT AND THE HAVANA CHARTER

While Preparatory Committee documents have the United Nations symbol "E/PC/T", throughout the history of the GATT and in this Index these documents have been referred to as "EPCT".

1. First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (London, October-November 1946)

EPCT/1-33	Plenary documents including summary records and committee reports
EPCT/33	Final Report of the First Session ("London Report")
EPCT/INF/1-8	Information documents
EPCT/INF/9	Cumulative list of First Session documents
EPCT/PV/1-6	Plenary session verbatim reports
EPCT/DEL/1-17	Chairman's Committee (heads of delegations) papers and summary records
EPCT/EC/1-5, Corr.1	Executive Committee, summary records
EPCT/C.I/1-18	Committee I (Employment) papers and summary records
EPCT/C.I/PV/1-4	Committee I verbatim reports
EPCT/C.I&II/1-24	Joint session of Committees I & II (Industrial development)
EPCT/C.I&II/PV/1-4	Committees I and II, verbatim reports
EPCT/C.I&II/D/PV/7	Committees I and II, Drafting Sub-Committee, verbatim report
EPCT/C.II/1-66	Committee II (General commercial policy) papers and summary records
EPCT/C.II/PV/1-13	Committee II verbatim reports
EPCT/C.II/W/2-31	Committee II working papers including summary records of Technical Sub-Committee and Sub-Committee on Procedures
EPCT/C.II/PRO/PV/5-15	Committee II, Sub-Committee on Procedures, verbatim reports
EPCT/C.II/ST/PV/1-6	Committee II, Sub-Committee on State-Trading, verbatim reports
EPCT/C.II/QR/PV/1-6	Committee II, Sub-Committee on Quantitative Restrictions and Exchange Control, verbatim reports
EPCT/C.II&IV/PP/PV/1-2	Committees II and IV, Joint Drafting Sub-Committee on Subsidies on Primary Products, verbatim reports
EPCT/C.III/1-19	Committee III (Restrictive business practices) papers and summary records
EPCT/C.III/PV/1-9	Committee III verbatim reports
EPCT/C.IV/1-20	Committee IV (Commodity agreements) papers and summary records
EPCT/C.IV/PV/1-9	Committee IV verbatim reports
EPCT/C.V/1-35	Committee V (Administration and organization) papers and summary records
EPCT/C.V/PV/1-15	Committee V verbatim reports

2. Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment (New York, January-February 1947)

EPCT/34	Report of the Drafting Committee ("New York Report")
EPCT/C.6/1-108	Committee documents and summary records of Plenary and Sub-Committees
EPCT/C.6/107	Cumulative list of documents
EPCT/C.6/108	Index of Drafting Committee documents
EPCT/C.6/W/1-87	Working papers

3. Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (Geneva, April-October 1947)

EPCT/35-267	Plenary documents
EPCT/186	Report of the Second Session ("Geneva Report")
EPCT/INF/10-330	Information documents (periodic document lists in EPCT/INF/53, 92, 134, 193, 240, 285, 330)
EPCT/INF/331	Index of Second Session documents
EPCT/W/23-344	Plenary working papers
EPCT/EC/SR.2/1-22	Executive Committee, summary records
EPCT/EC/PV.2/1-21	Executive Committee, verbatim reports
EPCT/DEL/18-75	Chairman's Committee (heads of delegations) papers and summary records
EPCT/DEL/INF/1-6	Chairman's Committee document lists
EPCT/S/1-12	"Secret" documents relating to work plan and reports of Tariff Negotiations Working Party
EPCT/TRF/1-155	Tariff negotiation documents
EPCT/TAC/SR/1-18	Tariff Agreement Committee, summary records
EPCT/TAC/PV/1-28	Tariff Agreement Committee, verbatim reports
EPCT/A/SR/1-43	Commission A (chapters on employment, economic development, and general commercial policy except for Articles relating to subsidies), summary records
EPCT/A/PV/1-43	Commission A, verbatim reports
EPCT/B/SR/1-33	Commission B (chapters on purposes, organization, restrictive business practices, commodity agreements and Articles on subsidies), summary records
EPCT/B/PV/1-33	Commission B, verbatim reports
EPCT/WP.1/SR.1-11	Working Party on Technical Articles, summary records
EPCT/WP.1/AC/SR.1-3	Working Party on Technical Articles, Ad-Hoc Sub-Committee, summary records

4. United Nations Conference on Trade and Employment (Havana, November 1947 to March 1948)

Note: an asterisk* indicates the existence of other un-numbered informal conference "white papers" of the Sub-Committee concerned.

E/CONF.2/1-78	Plenary documents
E/CONF.2/78	Report of the Conference (Final Act and related documents; also published as ICITO/4)
E/CONF.2/SR/1-21	Plenary Summary Records
E/CONF.2/W/1-15	Plenary working papers
E/CONF.2/INF/37, 69, 89, 110, 131, 152, 172, 206	Periodic lists of documents
E/CONF.2/INF/1-206	Information documents
E/CONF.2/BUR/1-39	General Committee (conference management)
E/CONF.2/BUR/W/1	General Committee working paper
E/CONF.2/BUR/SR/1-12	General Committee summary records
E/CONF.2/CO/	Co-ordination Committee informal conference documents
E/CONF.2/C.1/1-26	Committee I (Employment and economic activity), Chapter II
E/CONF.2/C.1/SR/1-13	Committee I summary records
E/CONF.2/C.1/A/W/1*	Committee I, Sub-Committee A (Fair labour standards) report
E/CONF.2/C.1/B*	Committee I, Sub-Committee B (Other articles of Chapter II) informal documents
E/CONF.2/C.1/C/1-4	Committee I, Sub-Committee C (Resolution on employment)
E/CONF.2/C.1/C/W/1-11*	Committee I, Sub-Committee C working papers
E/CONF.2/C.2/1-50	Committee II (Economic development), Chapter III
E/CONF.2/C.2/A/1-3	Committee II, Sub-Committee A (Article 8)
E/CONF.2/C.2/B/1-6	Committee II, Sub-Committee B (Article 12)
E/CONF.2/C.2/B/W/1-14	Committee II, Sub-Committee B working papers
E/CONF.2/C.2/C/1-3	Committee II, Sub-Committee C (Articles 13 and 14)
E/CONF.2/C.2/C/W/1-16	Committee II, Sub-Committee C working papers
E/CONF.2/C.2/D/1-3	Committee II, Sub-Committee D (footnote to Chapter III on reconstruction)
E/CONF.2/C.2/D/W/1-3	Committee II, Sub-Committee D working papers
E/CONF.2/C.2&3/A/1-15	Joint Sub-Committee on Tariff Preferences
E/CONF.2/C.2&3/A/W/1-3	Joint Sub-Committee on Tariff Preferences working papers
E/CONF.2/C.2&6/A/1-24	Joint Sub-Committee on Articles 9, 10 and 11
E/CONF.2/C.2&6/A/W/1-33	Joint Sub-Committee on Articles 9, 10 and 11 working papers
E/CONF.2/C.3/1-88	Committee III (Commercial policy), Chapter IV
E/CONF.2/C.3/SR/1-48	Committee III summary records
E/CONF.2/C.3/A/	Committee III, Sub-Committee on Articles 16, 17, 18 and 19
E/CONF.2/C.3/A/W/1-55*	Committee III, Sub-Committee A working papers
E/CONF.2/C.3/B/	Committee III, Sub-Committee on proposed new Article 18A
E/CONF.2/C.3/B/W/1-7	Committee III, Sub-Committee B working papers
E/CONF.2/C.3/B/	Committee III, Sub-Committee on Articles 32-39
E/CONF.2/C.3/C/W/1-20*	Committee III, Sub-Committee C working papers
E/CONF.2/C.3/D/	Committee III, Sub-Committee D on Articles 40, 41 and 43
E/CONF.2/C.3/D/W/1-13	Committee III, Sub-Committee D working papers
E/CONF.2/C.3/E/	Committee III, Sub-Committee E on Articles 20 and 22

E/CONF.2/C.3/E/W/1-23	Committee III, Sub-Committee E working papers
E/CONF.2/C.3/F/	Committee III, Sub-Committee F on Articles 21, 23 and 24
E/CONF.2/C.3/F/W/1-32	Committee III, Sub-Committee F working papers
E/CONF.2/C.3/G/	Committee III, Sub-Committee G on the Swiss Proposal
E/CONF.2/C.3/G/W/1-13	Committee III, Sub-Committee G working papers
E/CONF.2/C.3/H/	Committee III, Sub-Committee H on Articles 25-29
E/CONF.2/C.3/H/W/1-9	Committee III, Sub-Committee H working papers
E/CONF.2/C.3/J/	Committee III, Sub-Committee J on Articles 30 and 31
E/CONF.2/C.3/J/W/1-8*	Committee III, Sub-Committee J working papers
E/CONF.2/C.4/1-25	Committee IV (Restrictive business practices), Chapter V
E/CONF.2/C.4/SR/1-25	Committee IV summary records
E/CONF.2/C.4/A/1-21	Committee IV Sub-Committee on amendments to Chapter V
E/CONF.2/C.4/A/W/1-9*	Committee IV Sub-Committee working papers
E/CONF.2/C.5/1-19	Committee V (Inter-governmental commodity agreements), Chapter VI
E/CONF.2/C.5/SR/1-15	Committee V summary records
E/CONF.2/C.5/W/1-6	Committee V working papers
E/CONF.2/C.5/A/1-2	Committee V, Sub-Committee on amendments to Chapter VI
E/CONF.2/C.5&6	Joint Sub-Committee on national security exception for commodity agreements; informal conference documents only
E/CONF.2/C.6/1-112	Committee VI (Organization), Chapters I, VII, VIII, IX
E/CONF.2/C.6/SR/1-41	Committee VI summary records
E/CONF.2/C.6/W/1-126	Committee VI working papers
E/CONF.2/C.7/1-2	Committee VII (Credentials)
E/CONF.2/C.8/1-28	Committee VIII (Central Drafting Committee)

See also:

ICITO/I/8 **Reports of Committees and principal Sub-Committees ("Havana Reports")²¹**

B. INTERIM COMMISSION FOR THE ITO

(meetings held in 1948, 1949, 1950, 1968, 1980, 1993 and 1994)

ICITO/I/1-39	Documents and summary records
ICITO/INF/8	Cumulative list of documents
ICITO/INF/1-8	Information papers
ICITO/I/SR.1	Summary Record of first meeting of ICITO
ICITO/I/W.1-4	Working papers
ICITO/EC.1/1-6	Executive Committee, First Session, documents
ICITO/EC.1/SR.1-2	Executive Committee, First Session, Summary Records
ICITO/EC.2/1-21	Executive Committee, Second Session, documents
ICITO/EC.2/SR.1-16	Executive Committee, Second Session, Summary Records
ICITO/EC.2/W.1-2	Executive Committee, Second Session, Working Papers
ICITO/EC.2/OD.1-18	Executive Committee, Second Session, Orders of the Day
ICITO/EC.2/SC.1/1-11	Executive Committee, Second Session, Sub-Committee on World Court
ICITO/EC.2/SC.2/1-2	Executive Committee, Second Session, Sub-Committee on Economic Development
ICITO/EC.2/SC.3/1-9	Executive Committee, Second Session, Sub-Committee on Administration

C. GATT DOCUMENTS

1. CONTRACTING PARTIES

Basic Instruments and Selected Documents

	Sessions	Dates	Symbol
Volume I: Text in force 1952, with text of other instruments and procedures			I/
Volume I revised: Text incorporating 1955 amendments, with text of Agreement on the Organization for Trade Cooperation			I (Rev.)
Volume II: Decisions, Declarations, Rulings and Reports	1-6	Feb. 1948 - Dec. 1951	II/
Volume III: Text in force 1958			III/
Volume IV: Text in force 1969			IV/

²¹ Out of print, but available from the WTO website at http://www.wto.org/gatt_docs/English/SULPDF/90180096.pdf.

	Sessions	Dates	Symbol
First Supplement	7	Oct.-Nov. 1952	1S/
Second Supplement	8	Sept.-Oct. 1953	2S/
Third Supplement	9 (Review)	Oct. 1954-Mar. 1955	3S/
Fourth Supplement	10	Oct.-Dec. 1955	4S/
Fifth Supplement	11	Oct.-Nov. 1956	5S/
Sixth Supplement	12	Oct.-Nov. 1957	6S/
Seventh Supplement	13	Oct.-Nov. 1958	7S/
Eighth Supplement	14-15	May-Nov. 1959	8S/
Ninth Supplement	16-17	May-Nov. 1960	9S/
Tenth Supplement	18-19	May-Dec. 1961	10S/
Eleventh Supplement	20	Oct.-Nov. 1962	11S/
Twelfth Supplement	21	Feb-Mar. 1964	12S/
Thirteenth Supplement	22, 2SS	Feb. 1964-Mar. 1965	13S/
Fourteenth Supplement	23	Apr. 1965-Apr. 1966	14S/
Fifteenth Supplement	24	May 1966-Nov. 1967	15S/
Sixteenth Supplement	25	Dec. 1967-Nov. 1968	16S/
Seventeenth Supplement	26	Dec. 1968-Feb. 1970	17S/
Eighteenth Supplement	27	Mar. 1970-Nov. 1971	18S/
Nineteenth Supplement	28	Nov. 1971-Nov. 1972	19S/
Twentieth Supplement	29	Nov. 1972-Nov. 1973	20S/
Twenty-first Supplement	30	Nov. 1973-Nov. 1974	21S/
Twenty-second Supplement	31	Nov. 1974-Nov. 1975	22S/
Twenty-third Supplement	32	Nov. 1975-Nov. 1976	23S/
Twenty-fourth Supplement	33	Nov. 1976-Nov. 1977	24S/
Twenty-fifth Supplement	34	Nov. 1977-Nov. 1978	25S/
Twenty-sixth Supplement	35	Nov. 1978-Nov. 1979	26S/
Twenty-seventh Supplement	36	Nov. 1979-Nov. 1980	27S/
Twenty-eighth Supplement	37	Nov. 1980-Nov. 1981	28S/
Twenty-ninth Supplement	38	Nov. 1981-Nov. 1982	29S/
Thirtieth Supplement	39	Nov. 1982-Nov. 1983	30S/
Thirty-first Supplement	40	Nov. 1983-Nov. 1984	31S/
Thirty-second Supplement	41, 4SS	Nov. 1984-Nov. 1985	32S/
Thirty-third Supplement	42	Nov. 1985-Nov. 1986	33S/
Thirty-fourth Supplement	43	Nov. 1986-Dec. 1987	34S/
Thirty-fifth Supplement	44	Dec. 1987-Nov. 1988	35S/
Thirty-sixth Supplement	45	Nov. 1988-Dec. 1989	36S/
Supplement No. 37	46	Dec. 1989-Dec. 1990	37S/
Supplement No. 38	47	Dec. 1990-Dec. 1991	38S/
Supplement No. 39	48	Dec. 1991-Dec. 1992	39S/
Supplement No. 40	49	Dec. 1992-Jan. 1994	40S/
Supplement No. 41 (2 vols.)	50, 6SS	Jan. 1994-Dec. 1994	41S/
Supplement No. 42	51	Jan. 1995-Dec. 1995	42S/

The summary records of the Sessions of the CONTRACTING PARTIES and most other documents have not been reproduced in the BISD and are referred to by their symbols.

Session documents and summary records

GATT/1/ GATT/1/SR.1-14	First Session	Havana	28 Feb-23 March 1948
GATT/CP.2/ GATT/CP.2/SR.1-25	Second Session	Geneva	17 Aug-15 Sept. 1948
GATT/CP.3/ GATT/CP.3/SR.1-44	Third Session	Annecy	8 Apr.-12 Aug. 1949
GATT/CP.4/ GATT/CP.4/SR.1-21	Fourth Session	Geneva	23 Feb.-3 April 1950
GATT/CP.5/ GATT/CP.5/SR.1-26	Fifth Session	Torquay	2 Nov.-19 Dec. 1950
GATT/CPS/ GATT/CPS/SR.1-5	First Special Session	Torquay	29 Mar.-3 Apr. 1951
GATT/CP.6/ GATT/CP.6/SR.1-27	Sixth Session	Geneva	17 Sept.-27 Oct. 1951
SR.7/1-17	Seventh Session	Geneva	2 Oct.-10 Nov. 1952
SR.8/1-21	Eighth Session	Geneva	17 Sept.-24 Oct. 1953
SR.9/1-47	Ninth Session	Geneva	28 Oct. 1954-8 March 1955
SR.10/1-21	Tenth Session	Geneva	27 Oct.-3 Dec. 1955
SR.11/1-18	Eleventh Session	Geneva	11 Oct.-17 Nov. 1956
SR.12/1-22	Twelfth Session	Geneva	17 Oct.-30 Nov. 1957
SR.12/1-21	Thirteenth Session	Geneva	16 Oct.-22 Nov. 1958
SR.14/1-11	Fourteenth Session	Geneva	11-30 May 1959
SR.15/1-18	Fifteenth Session	Tokyo	26 Oct.-20 Nov. 1959
SR.16/1-11	Sixteenth Session	Geneva	16 May-4 June 1960
SR.17/1-12	Seventeenth Session	Geneva	31 Oct.-19 Nov. 1960
SR.18/1-6	Eighteenth Session	Geneva	15-19 May 1961
SR.19/1-12	Nineteenth Session	Geneva	12 Nov.-9 Dec. 1961
SR.20/1-12	Twentieth Session	Geneva	23 Oct.-16 Nov. 1962
SR.21/1-11	21st Session	Geneva	24 Feb.-20 Mar. 1964
2SS/SR.1-5	2nd Special Session	Geneva	17 Nov. 1964-8 Feb. 1965
SR.22/1-11	22nd Session	Geneva	2-25 Mar. 1965
SR.23/1-11	23rd Session	Geneva	24 Mar.-6 Apr. 1966
SR.24/1-19	24th Session	Geneva	9-24 Nov. 1967
SR.25/1-11	25th Session	Geneva	12-29 Nov. 1968
SR.26/1-9	26th Session	Geneva	16-27 Feb. 1970
SR.27/1-12	27th Session	Geneva	16-26 Nov. 1971
SR.28/1-12	28th Session	Geneva	1-14 Nov. 1972
SR.29/1-3	29th Session	Geneva	12-14 Nov. 1973
SR.30/1-5	30th Session	Geneva	19-21 Nov. 1974
SR.31/1-4	31st Session	Geneva	26-27 Nov. 1975
SR.32/1-3	32nd Session	Geneva	22-23 Nov. 1976
SR.33/1-3	33rd Session	Geneva	29-30 Nov. 1977
SR.34/1-3	34th Session	Geneva	27-28 Nov. 1978
SR.35/1-5	35th Session	Geneva	26-29 Nov. 1979
3SS/SR/1	3rd Special Session	Geneva	28 April 1980
SR.36/1-4	36th Session	Geneva	24-26 Nov. 1980
SR.37/1-5	37th Session	Geneva	23-25 Nov. 1981
SR.38/1-10	38th Session	Geneva	22-30 Nov. 1982
SR.39/1-4	39th Session	Geneva	21-23 Nov. 1983
SR.40/1-9	40th Session	Geneva	26-30 Nov. 1984
4SS/SR/	4th Special Session	Geneva	30 Sept.-3 Oct. 1985

SR.41/	41st Session	Geneva	25-29 Nov. 1985
MIN(86)/SR/	Special Session at Ministerial level (Uruguay Round)	Punta del Este	15-20 Sept. 1986
SR.42/	42nd Session	Geneva	24-27 Nov. 1986
SR.43/	43rd Session	Geneva	1-3 Dec. 1987
SR.44/	44th Session	Geneva	7-8 Nov. 1988
SR.45/	45th Session	Geneva	4-5 Dec. 1989
SR.46/	46th Session	Geneva	12-13 Dec. 1990
SR.47/	47th Session	Geneva	3-4 Dec. 1991
SR.48/	48th Session	Geneva	2-3 Dec. 1992
5SS/SR/1	5th Special Session	Geneva	9 June 1993
SR.49/	49th Session	Geneva	26-27 Jan. 1994
6SS/SR/1	6th Special Session	Geneva	8 Dec. 1994
SR.50/1-4	50th Session	Geneva	8-9 Dec. 1994, 8 Feb. 1995
7SS/SR/1	7th Special Session	Geneva	24 March 1995
SR.51/	51st Session	Geneva	12 December 1995

Before the Seventh Session (1952), documents issued during a session of the CONTRACTING PARTIES or in connection with a session were issued under the session symbol, and intersessional documents were issued in the series CP/. As from the Seventh Session, inclusive summary records have been numbered SR.7/... etc. Except for summary records and working papers, the practice of issuing documents under a session symbol was discontinued after the Sixth Session. The following documents are issued for each session (taking as an example the 50th Session):

SR.50/	Summary records of Annual Sessions of the CONTRACTING PARTIES
SR.50/	Index of summary records for each Session
SR.50/ST/	Statements made at the Session
W.50/	Working papers, order of business, checklist of documents
FIFTY	Circular on administrative arrangements for the Session

2. GATT documents: active series as of 1995

The list below indicates those document series for which the body issuing the document was in existence and documents had been issued recently, as of 1 January 1995. ../INF/ and ../W/ subseries also exist for documents issued by committees or negotiating groups, and most often consist of delegate lists and working documents respectively. ../M/ subseries indicate minutes of the body issuing them. Since entry into force of the WTO Agreement on 1 January 1995, the bodies of the WTO have issued documents in new series which are not listed here.

General

L/	General documents: Notifications, communications, membership (since 1952)
Let/	Letter series of notifications of acceptances, invitations for informal meetings
DS/	Dispute settlement (since 1989)
DS[number]/	Consultation requests and dispute-related notifications, numbered consecutively by dispute
DS[number]/R	Dispute settlement panel reports
GATT/	Press releases and annual report on international trade, 1948-1994
GATT/AIR/	Airgrams notifying meeting dates and agendas
INF/	List and Index of GATT Documents, notices concerning document derestriction, informational notes

Spec(..) Special distribution series

Principal bodies of the GATT

C/ ***Council of Representatives***
C/M/ Council minutes
C/M/Index Index of the Council minutes
C/W/ Working papers, draft agenda, other relevant information
C/COM/ Communications; statements

COM.TD/ ***Committee on Trade and Development***
COM.TD/INF/, COM.TD/W/
COM.TD/LLDC/, ../W/, ../INF/ Sub-Committee on Trade of Least-Developed Countries

C/RM/ ***Trade Policy Review Mechanism***
C/RM/M, C/RM/W/, C/RM/INF Minutes, working papers, lists of representatives
C/RM/G/ Reports by governments
C/RM/S/ Reports by Secretariat
C/RM/OV/ Overview of developments in international trade and the trading system
C/RM/OV/M/ Same - Minutes of meeting

Other standing bodies

BOP/ ***Committee on Balance-of-Payments Restrictions***
BOP/R/ Reports of the Committee
BOP/INF, BOP/W

TAR/ ***Committee on Tariff Concessions***
TAR/INF/, TAR/M/,
TAR/Spec/ Working documents including acceptances of protocols
TAR/W/ Notification and results of Article XXVIII negotiations
SECRET/ Harmonized System negotiations, notification of HS changes
SECRET/HS, SECRET/C/HS ***Technical Group on Quantitative Restrictions and Other Non-Tariff Measures***
NTM/W/ ***Integrated Data Base:*** Information, progress reports, Secretariat notes,
IDB/, IDB/INF, IDB/W, outstanding questions, User Reference Manual
IDB/Q, IDB/URM

Committees established under certain arrangements

COM.TEX/ ***Textiles Committee and Textiles Surveillance Body***
COM.TEX/INF/, Information, reports, status of acceptances of MFA Protocols
COM.TEX/W/ Working papers, proposals, draft reports
COM.TEX/SB/ Textiles Surveillance Body notifications and reports
TEX.SB/ Bilateral agreements
TEX.SB/W/ Draft reports; draft agendas

CPC/ ***Committee of Participating Countries***
CPC/W

Committees and Councils established under the Tokyo Round agreements and arrangements

ADP/ ***Committee on Anti-Dumping Practices***
ADP/INF/, ADP/M/,
ADP/W/

AIR/ ***Committee on Trade in Civil Aircraft***
AIR/INF/, AIR/M/, AIR/W/
AIR/TSC/W/ Technical Sub-Committee

GPR/ ***Committee on Government Procurement***
GPR/INF/, GPR/M/,
GPR/W/, GPR/Spec/

GPR.DS/ Dispute settlement under the Agreement on Government Procurement

LIC/ *Committee on Import Licensing*

LIC/INF/, LIC/M/,
LIC/W/, LIC/Spec/

SCM/ *Committee on Subsidies and Countervailing Measures*

SCM/INF/, SCM/M/,
SCM/W/, SCM/Spec/

TBT/ *Committee on Technical Barriers to Trade*

TBT/INF/, TBT/M/,
TBT/W/, TBT/Spec/
TBT/Notif.

Notifications of technical regulations and certification systems

VAL/ *Committee on Customs Valuation*

VAL/INF/, VAL/M/,
VAL/W/, VAL/Spec/

Later inactive series

TRE/ *Group on Environmental Measures and International Trade*

TRE/M/, TRE/W/,
TRE/INF

Documents 1991-1994

DPG/ *Working Group on Export of Domestically
Prohibited Goods and other Hazardous Substances*

DPG/W/, DPG/Notif.

DPC/ *International Dairy Products Council* 1980-1994

DPC/INF/, DPC/W
DPC/PTL/, DPC/PTL/W
DPC/INV/
DPC/STAT/ Statistics

Committees of Protocols on Certain Cheeses, Milk Fat, Milk Powders
Inventory of information on domestic policies and trade measures

IMC/ *International Meat Council* 1980-1994

IMC/INF/, IMC/W

IMC/INV/

IMC/STAT/ Statistics

Inventory of domestic policies and trade measures

3. Document series of the Preparatory Committee for the WTO

PC/R Report of the Preparatory Committee

PC/W, PC/M, PC/INF

PC/BFA, ../W/, ../M/, ../INF

PC/IPL, ../W/, ../M/, ../INF/ Subcommittee on Institutional, Procedural and Legal Issues

PC/SCTE/, ../W/, ../M/, ../INF/ Subcommittee on Trade and Environment

PC/SCS Subcommittee on Services

TS/NGBT Negotiating Group on Basic Telecommunications Services

S/IGFS Interim Group on Financial Services

S/NGNP Negotiating Group on Movement of Natural Persons

S/NGMTS Negotiating Group on Maritime Services

4. Uruguay Round document series

Legal instruments

	Final Act text signed at Marrakesh 15 April 1994
MTN/FA/Corr.1-7	Corrections to Final Act text tabled in legal drafting process Feb.-Mar. 1994
MTN/FA	Text of the Final Act as adopted by TNC on 15 December 1993
MTN.TNC/W/FA	Draft text of the Final Act as issued by the Secretariat 20 December 1991 ("Dunkel Draft")
MTN.TNC/W/35	Draft text of the Final Act as issued 26 November 1990 for the Ministerial Meeting held at Brussels in December 1990
MTN.TNC/MIN(90)/	Trade Negotiations Committee - Meeting at Ministerial Level, Brussels, 1990 - Documents
MTN.TNC/MIN(88)/	Trade Negotiations Committee - Meeting at Ministerial Level, Montreal, 1988
MIN.DEC	Ministerial Declaration on the Uruguay Round 1986 (reprinted at 33S/19)
MIN.DEC/Chair	Statement by Chairman, Adoption of Ministerial Declaration 1986

Principal document series

MTN.INF/	List & Index of Uruguay Round Documents, lists of representatives, information bulletins
MTN.TNC/ MTN.TNC/INF/, MTN.TNC/W/	Trade Negotiations Committee
MTN.GNG/, ../INF/, ../W/ MTN.GNS/, ../INF/, ../W/	Group of Negotiations on Goods Group of Negotiations on Services
MTN.SB/, ../INF/, ../W/ MTN.SB/RBN/ MTN.SB/SN/	Surveillance Body Rollback notifications Standstill notifications

Document series 1991-1994

MTN.GNG/MA/, ../W/	Negotiating Group on Market Access
MTN.GNG/AG/, ../W/	Negotiating Group on Agriculture
MTN.GNG/INST/	Negotiating Group on Institutions
MTN.GNG/RM/, ../W/	Negotiating Group on Rule Making and Trade-Related Investment Measures
MTN.GNG/TC/	Negotiating Group on Textiles and Clothing
MTN.GNG/TRIPS/, ../W/	Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods
MTN.TNC/LD, ../W/	Legal Drafting Group 1992

Document series 1986-1990

(including INF/ and W/ documents in most cases)

MTN.GNG/NG1/	Negotiating Group on Tariffs
MTN.GNG/NG2/	Negotiating Group on Non-Tariff Measures
MTN.GNG/NG3/	Negotiating Group on Natural Resource-Based Products
MTN.GNG/NG4/	Negotiating Group on Textiles and Clothing
MTN.GNG/NG5/	Negotiating Group on Agriculture

MTN.GNG/NG6/	Negotiating Group on Tropical Products
MTN.GNG/NG7/	Negotiating Group on GATT Articles
MTN.GNG/NG8/	Negotiating Group on MTN Agreements and Arrangements
MTN.GNG/NG9/	Negotiating Group on Safeguards
MTN.GNG/NG10/	Negotiating Group on Subsidies and Countervailing Measures
MTN.GNG/NG11/	Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods
MTN.GNG/NG12/	Negotiating Group on Trade-Related Investment Measures
MTN.GNG/NG13/	Negotiating Group on Dispute Settlement
MTN.GNG/NG14/	Negotiating Group on Functioning of the GATT System

5. Documents of past negotiating rounds

Tokyo Round: Tokyo Round documents were issued in the MTN/ series with a blue band across the top. See also the MIN(73) series for the proceedings of the Ministerial Conference of 1973 which led to the Tokyo Declaration launching the Round, and the COM.IND/ and COM.AG/ series for work done preliminary to the Round in the Committee on Trade in Industrial Products and the Committee on Trade in Agriculture.

Kennedy Round documents were issued in the TN.64/ series with a blue band; Dillon Round documents were issued in the TN.60/ series; documents from the 1956 trade round at Geneva were issued in the TN.56/ series; Torquay Round documents were issued as TN.2/; and Annecy Round documents were issued as TN.1/. Each of these series includes session records (/SR/) and documents of working groups.

6. Lists and indexes of GATT documents

GATT 1947 documents were systematically listed in the following document series:

(1) *"List & Index of GATT Documents"*: Annual in the INF/ series since 1981: list of documents, titles and dates, with attached cross-indexes by subject, country, articles of main legal instruments referred to, products referred to, body issuing the document, and other GATT instruments. Monthly updates were cumulated in the annual List & Index.

INF/210 (1981), INF/204 (1982), INF/206 (1983), INF/214 (1984), INF/222 (1985), INF/229 (1986), INF/236 (1987), INF/242 (1988), INF/252 (1989), INF/256 (1990), INF/260 (1991), INF/263 (1992)

(2) *"List of Documents Issued"*: Approximately annual in the INF/ series up to 1980:

GATT/CP/INF/2/Rev.1 (21/9/48-29/2/52), CP/INF/16 (4/1/52-30/11/52), INF/19 (1/12/52-31/10/53), INF/23 (1/11/53-31/12/54); INF/23/Add.1 (1/1/55-31/3/55), INF/68 (1958), INF/79 (1959), INF/86 (1960), INF/95 (1961), INF/99 (1962), INF/105 (1963), INF/110 (1964), INF/118 (1965), INF/123 (1966), INF/129 (1967), INF/135 (1968), INF/138 (1969), INF/141 (1970), INF/148 (1971), INF/151 (1972), INF/155 (1973), INF/159 (1974), INF/165 (1975), INF/169 (1976), INF/173 (1977), INF/179 (1978), INF/189 (1979), INF/198 (1980)

(3) *"Documents Index"*: Approximately annual in the INF/ series up to 1980:

GATT/CP/INF/3/Rev.1 (21/9/48-5/11/51), INF/3/Rev.1/Add.1 (6/11/51-31/11/52), INF/3/Rev.1/Add.2 (1/12/52-31/12/53), INF/3/Rev.2 (1/1/54-10/10/55), INF/27 (Documents related to the Review Session), INF/44 (1956), INF/54 (1957), INF/67 (1958), INF/81 (1959), INF/87 (1960), INF/98 (1961), INF/100 (1962), INF/106 (1963), INF/111 (1964), INF/117 (1965), INF/124 (1966), INF/130 (1967), INF/135 (1968), INF/139 (1969), INF/142 (1970), INF/149 (1971), INF/153 (1972), INF/157 (1973), INF/161 (1974), INF/167 (1975), INF/171 (1976), INF/177 (1977), INF/180 (1978), INF/191 (1979), INF/200 (1980)

(4) *C/M/Index/*: Cumulative index to minutes of the Council and its predecessor body, the Intersessional Committee, since 1952, updated and reissued annually; the final edition was C/M/Index/28 dated 31 January 1996, indexing minutes through December 1995.

(5) *Session Record Indexes* for Annual Sessions of the CONTRACTING PARTIES, issued separately for each session; not cumulated. Issued as SR/--/Index in later years; early Sessions were indexed within the periodic indexes in the INF/ series.

7. Lists and indexes of documents of negotiating rounds

Documents associated with GATT negotiating rounds were listed in the following lists and index series:

(1) *"List & Index of Uruguay Round Documents"*: Annual from 1986 to 1994 in the MTN/INF/ series: list of documents, titles and dates, with attached cross-indexes by subject (including service sectors), country, articles of main legal instruments referred to, products referred to, and body issuing the document.

MTN.INF/1 (1986), MTN.INF/2 (1987), MTN.INF/5 (1988), MTN.INF/9 (1989), MTN.INF/12 (1990), MTN.INF/14 (1991), MTN.INF/16 (1992), MTN.INF/18 (1993), MTN.INF/19 (1994).

(2) *Tokyo Round*: Indexes of Tokyo Round documents were issued periodically in the MTN/INF series:

INDEXES: MTN/INF/2 (1974), MTN/INF/3 (1975), MTN/INF/6 (1976), MTN/INF/9 (1977), MTN/INF/44 (1978), INF/190 (1979)

LISTS: MTN/INF/1 (1974), MTN/INF/4 (1975), MTN/INF/7 (1976), MTN/INF/10 (1977), MTN/INF/48 (1978)

A cumulative index of selected documents oriented toward topics of interest to developing countries was also compiled, the final revision of which, updated to 2 August 1979, was issued as TA/INF/1/Rev.8.

(3) *Kennedy Round and earlier rounds*: see lists and indexes of GATT documents for the relevant years.

V. SOURCES FOR OBTAINING COPIES OF DOCUMENTS REFERRED TO IN THIS INDEX

GATT 1947 publications:

Copies of the GATT Basic Instruments and Selected Documents series, the texts of GATT legal instruments, the GATT Status of Legal Instruments, tariff protocols and schedules, this book, and other in-print GATT publications are available from the Publications Office of the WTO Secretariat and its sales agents. Price lists are available from the WTO Online Bookshop and from:

Publications Office
WTO Secretariat
Centre William Rappard
CH-1211 Geneva 21
Switzerland

Telephone: (022) 739 52 08/739 53 08
Fax: (022) 739 57 92

GATT 1947 documents and Uruguay Round documents:

On 15 May 2006, the General Council adopted a Decision on Derestriction of Official GATT 1947 Documents, providing that "in the interest of a better access of the general public to the work of the GATT 1947 ... All official restricted GATT 1947 documents shall be derestricted as of 1 June 2006."²² On 30 March

²² WT/L/647.

1994, the Uruguay Round Trade Negotiations Committee decided on derestriction policies for Uruguay Round documents. Most official restricted Uruguay Round documents were derestricted on 3 January 1997.²³

These derestricted documents, GATT 1947 publications, and copies of the negotiating documents for the GATT and the ITO Charter are available to the public through the WTO Library, located in the Centre William Rappard in Geneva. Some additional documents on the ITO Charter negotiations are available in the archives section of the United Nations Library in Geneva.

Most GATT 1947 documents did not exist in digital form. Many have been scanned to create a digital archive. Although scanning is not complete, about 51,000 of the roughly 88,000 documents issued under GATT 1947 are available through a specialized GATT documents webpage on the WTO website. Stanford University Library, which scanned much of the GATT collection, also makes the documents available on the Stanford GATT Digital Library website at <http://gatt.stanford.edu> with a search engine. The Stanford website also provides copies of GATT 1947 legal instruments such as tariff protocols and protocols of accession.

The WTO website and the Stanford website both make available in digital form the negotiating documents for the Havana Charter and the General Agreement.

Most official Uruguay Round documents were created digitally, and are available through the WTO Documents Online search facility. The reports of panels under the GATT 1947 and the Tokyo Round agreements that were adopted by the GATT Council or the relevant committees are also available in digital form on the WTO website.

²³ Derestriction procedures, MTN.TNC/42; lists of derestricted documents, MTN.TNC/46 Annex I, MTN.TNC/47 and MTN.TNC/47/Add.1.

PREAMBLE

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I. TEXT OF THE PREAMBLE

The Governments of the COMMONWEALTH OF AUSTRALIA, the KINGDOM OF BELGIUM, the UNITED STATES OF BRAZIL, BURMA, CANADA, CEYLON, the REPUBLIC OF CHILE, the REPUBLIC OF CHINA, the REPUBLIC OF CUBA, the CZECHOSLOVAK REPUBLIC, the FRENCH REPUBLIC, INDIA, LEBANON, the GRAND-DUCHY OF LUXEMBURG, the KINGDOM OF THE NETHERLANDS, NEW ZEALAND, the KINGDOM OF NORWAY, PAKISTAN, SOUTHERN RHODESIA, SYRIA, the UNION OF SOUTH AFRICA, the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, and the UNITED STATES OF AMERICA:

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce,

Have through their Representatives agreed as follows:

II. RELATIONSHIP WITH OTHER ARTICLES

References to “the objectives of this Agreement” appear in Articles XV:7(a), XVI:2, XVI:5, XVIII:1, XXIII:1, XXVIII*bis*:1, XXXVI:1, XXXVII:2(b)(iii), and the Notes Ad Articles XXIV:11 and XXXVI:1.

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

The material in paragraphs 2 and 3 of the Preamble was inserted at Geneva, and reflects some of the objectives listed in Article 1 of the Geneva Draft Charter. The document references below pertain either to Article 1 of the Charter or to the Preamble of the General Agreement.

At the Review Session held in 1954-55, the CONTRACTING PARTIES agreed to incorporate the Preamble to the GATT, with some additions, in the text of Part I of the Agreement as a new Article I entitled “Objectives.” However, this amendment was included in the Protocol Amending Part I and Articles XXIX and XXX of the

General Agreement, which failed to gain the requisite unanimous approval and was abandoned on 31 December 1967.¹ The text of the new Article I would have been as follows:

- “1. The contracting parties recognize that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods, and promoting the progressive development of the economies of all the contracting parties.
- “2. The contracting parties desire to contribute to these objectives through this Agreement by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.”

IV. RELEVANT DOCUMENTS

New York

Discussion: EPCT/C.6/23, 90, 91
 EPCT/C.6/31, 57, 83
 Reports: EPCT/34
 Other: EPCT/C.6/78, 99+Corr.1
 EPCT/C.6/W/1, 2, 84

Review Session

Discussion: SR.9/18, 19, 47
 Reports: W.9/164, 197, 198, 236
 Other: L/276, W.9/27

Geneva

Discussion: EPCT/EC/PV.2/22
 EPCT/B/SR/20, 21, 29
 EPCT/TAC/PV/26
 Reports: EPCT/139+Corr.1, 159,
 180+Corr.1-9, 186+Corr.1
 EPCT/135, 189, 196, 211,
 214/Add.1/Rev.1
 Other: EPCT/W/123, 176, 234, 236, 238

¹15S/65.

PART I

ARTICLE I

GENERAL MOST-FAVOURED-NATION TREATMENT

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I. TEXT OF ARTICLE I, ANNEXES A THROUGH G OF THE GENERAL AGREEMENT, AND INTERPRETATIVE NOTE AD ARTICLE I

Article I

General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

2. The provisions of paragraph 1 of this Article shall not require the elimination of any preferences in respect of import duties or charges which do not exceed the levels provided for in paragraph 4 of this Article and which fall within the following descriptions:

- (a) Preferences in force exclusively between two or more of the territories listed in Annex A, subject to the conditions set forth therein;
- (b) Preferences in force exclusively between two or more territories which on July 1, 1939, were connected by common sovereignty or relations of protection or suzerainty and which are listed in Annexes B, C and D, subject to the conditions set forth therein;
- (c) Preferences in force exclusively between the United States of America and the Republic of Cuba;
- (d) Preferences in force exclusively between neighbouring countries listed in Annexes E and F.

3. The provisions of paragraph 1 shall not apply to preferences between the countries formerly a part of the Ottoman Empire and detached from it on July 24, 1923, provided such preferences are approved under paragraph 5 of Article XXV, which shall be applied in this respect in the light of paragraph 1 of Article XXIX.

4. The margin of preference* on any product in respect of which a preference is permitted under paragraph 2 of this Article but is not specifically set forth as a maximum margin of preference in the appropriate Schedule annexed to this Agreement shall not exceed:

- (a) in respect of duties or charges on any product described in such Schedule, the difference between the most-favoured-nation and preferential rates provided for therein; if no preferential rate is provided for, the preferential rate shall for the purposes of this paragraph be taken to be that in force on April 10, 1947, and, if no most-favoured-nation rate is provided for, the margin shall not exceed the difference between the most-favoured-nation and preferential rates existing on April 10, 1947;
- (b) in respect of duties or charges on any product not described in the appropriate Schedule, the difference between the most-favoured-nation and preferential rates existing on April 10, 1947.

In the case of the contracting parties named in Annex G, the date of April 10, 1947, referred to in subparagraph (a) and (b) of this paragraph shall be replaced by the respective dates set forth in that Annex.

Interpretative Note *Ad* Article I from Annex I

Paragraph 1

The obligations incorporated in paragraph 1 of Article I by reference to paragraphs 2 and 4 of Article III and those incorporated in paragraph 2 (b) of Article II by reference to Article VI shall be considered as falling within Part II for the purposes of the Protocol of Provisional Application.

The cross-references, in the paragraph immediately above and in paragraph 1 of Article I, to paragraphs 2 and 4 of Article III shall only apply after Article III has been modified by the entry into force of the amendment provided for in the Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade, dated September 14, 1948.

Paragraph 4

The term "margin of preference" means the absolute difference between the most-favoured-nation rate of duty and the preferential rate of duty for the like product, and not the proportionate relation between those rates. As examples:

- (1) If the most-favoured-nation rate were 36 per cent *ad valorem* and the preferential rate were 24 per cent *ad valorem*, the margin of preference would be 12 per cent *ad valorem*, and not one-third of the most-favoured-nation rate;
- (2) If the most-favoured-nation rate were 36 per cent *ad valorem* and the preferential rate were expressed as two-thirds of the most-favoured-nation rate, the margin of preference would be 12 per cent *ad valorem*;
- (3) If the most-favoured-nation rate were 2 francs per kilogramme and the preferential rate were 1.50 francs per kilogramme, the margin of preference would be 0.50 franc per kilogramme.

The following kinds of customs action, taken in accordance with established uniform procedures, would not be contrary to a general binding of margins of preference:

- (i) The re-application to an imported product of a tariff classification or rate of duty, properly applicable to such product, in cases in which the application of such classification or rate to such product was temporarily suspended or inoperative on April 10, 1947; and
- (ii) The classification of a particular product under a tariff item other than that under which importations of that product were classified on April 10, 1947, in cases in which the tariff law clearly contemplates that such product may be classified under more than one tariff item.

ANNEX A

LIST OF TERRITORIES REFERRED TO IN PARAGRAPH 2 (a)
OF ARTICLE I

United Kingdom of Great Britain and Northern Ireland
 Dependent territories of the United Kingdom of Great Britain and Northern Ireland
 Canada
 Commonwealth of Australia
 Dependent territories of the Commonwealth of Australia
 New Zealand
 Dependent territories of New Zealand
 Union of South Africa including South West Africa
 Ireland
 India (as on April 10, 1947)
 Newfoundland
 Southern Rhodesia
 Burma
 Ceylon

Certain of the territories listed above have two or more preferential rates in force for certain products. Any such territory may, by agreement with the other contracting parties which are principal suppliers of such products at the most-favoured-nation rate, substitute for such preferential rates a single preferential rate which shall not on the whole be less favourable to suppliers at the most-favoured-nation rate than the preferences in force prior to such substitution.

The imposition of an equivalent margin of tariff preference to replace a margin of preference in an internal tax existing on April 10, 1947 exclusively between two or more of the territories listed in this Annex or to replace the preferential quantitative arrangements described in the following paragraph, shall not be deemed to constitute an increase in a margin of tariff preference.

The preferential arrangements referred to in paragraph 5(b) of Article XIV are those existing in the United Kingdom on April 10, 1947, under contractual agreements with the Governments of Canada, Australia and New Zealand, in respect of chilled and frozen beef and veal, frozen mutton and lamb, chilled and frozen pork and bacon. It is the intention, without prejudice to any action taken under sub-paragraph (h) of Article XX, that these arrangements shall be eliminated or replaced by tariff preferences, and that negotiations to this end shall take place as soon as practicable among the countries substantially concerned or involved.

The film hire tax in force in New Zealand on April 10, 1947, shall, for the purposes of this Agreement, be treated as a customs duty under Article I. The renters' film quota in force in New Zealand on April 10, 1947, shall, for the purposes of this Agreement, be treated as a screen quota under Article IV.

The Dominions of India and Pakistan have not been mentioned separately in the above list since they had not come into existence as such on the base date of April 10, 1947.

ANNEX B

LIST OF TERRITORIES OF THE FRENCH UNION REFERRED
TO IN PARAGRAPH 2 (b) OF ARTICLE I

France
 French Equatorial Africa (Treaty Basin of the Congo¹ and other territories)
 French West Africa
 Cameroons under French Trusteeship¹
 French Somali Coast and Dependencies
 French Establishments in Oceania
 French Establishments in the Condominium of the New Hebrides¹
 Indo-China
 Madagascar and Dependencies
 Morocco (French zone)¹
 New Caledonia and Dependencies
 Saint-Pierre and Miquelon
 Togo under French Trusteeship¹
 Tunisia

¹For imports into Metropolitan France and Territories of the French Union.

ANNEX C

LIST OF TERRITORIES REFERRED TO IN PARAGRAPH 2 (b) OF ARTICLE I
AS RESPECTS THE CUSTOMS UNION OF BELGIUM, LUXEMBURG
AND THE NETHERLANDS

The Economic Union of Belgium and Luxemburg
 Belgian Congo
 Ruanda Urundi
 Netherlands
 New Guinea
 Surinam
 Netherlands Antilles
 Republic of Indonesia

For imports into the territories constituting the Customs Union only.

ANNEX D

LIST OF TERRITORIES REFERRED TO IN PARAGRAPH 2 (b)
OF ARTICLE I AS RESPECTS THE UNITED STATES OF AMERICA

United States of America (customs territory)
 Dependent territories of the United States of America
 Republic of the Philippines

The imposition of an equivalent margin of tariff preference to replace a margin of preference in an internal tax existing on April 10, 1947, exclusively between two or more of the territories listed in this Annex shall not be deemed to constitute an increase in a margin of tariff preference.

ANNEX E

LIST OF TERRITORIES COVERED BY PREFERENTIAL ARRANGEMENTS BETWEEN CHILE
AND NEIGHBOURING COUNTRIES REFERRED TO IN PARAGRAPH 2 (d) OF ARTICLE I

Preferences in force exclusively between Chile on the one hand, and

1. Argentina
2. Bolivia
3. Peru

on the other hand.

ANNEX F

LIST OF TERRITORIES COVERED BY PREFERENTIAL ARRANGEMENTS BETWEEN LEBANON
AND SYRIA AND NEIGHBOURING COUNTRIES REFERRED TO IN PARAGRAPH 2 (d) OF ARTICLE I

Preferences in force exclusively between the Lebano-Syrian Customs Union, on the one hand, and

1. Palestine
2. Transjordan

on the other hand.

ANNEX G

DATES ESTABLISHING MAXIMUM MARGINS OF PREFERENCE
REFERRED TO IN PARAGRAPH 4 OF ARTICLE I

Australia.....	October 15, 1946
Canada.....	July 1, 1939
France	January 1, 1939
Lebano-Syrian Customs Union.....	November 30, 1938
Union of South Africa	July 1, 1938
Southern Rhodesia	May 1, 1941

II. INTERPRETATION AND APPLICATION OF ARTICLE I

A. SCOPE AND APPLICATION OF ARTICLE I

1. Interpretation and Application of Paragraph 1

(1) “customs duties and charges of any kind imposed on or in connection with importation or exportation or the international transfer of payments for imports or exports”

(a) Unbound tariffs

The Panel Report on “Spain - Tariff Treatment of Unroasted Coffee” includes the following Panel finding: “Having noted that Spain had not bound under the GATT its tariff rate on unroasted coffee, the Panel pointed out that Article I:1 equally applied to bound and unbound tariff items”.¹

(b) “charges of any kind”

The Chairman of the CONTRACTING PARTIES ruled on 24 August 1948 that “consular taxes would be included in ‘charges of any kind’; Article VIII merely dealt with the magnitude of such taxes in relation to the cost of services rendered, whereas Article I embodied the principle of non-discrimination”. Consequently the application by Cuba of a 5 per cent consular tax to certain countries, but only of 2 per cent to others, was inconsistent with Article I.² The Panel on “United States Customs User Fee” found, in connection with an argument that exemptions from this fee were inconsistent with Article I:1, that “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. ... No answer in opposition to these legal claims was given, nor was the Panel aware of any that could be given”.³

(c) Import surcharges

The Reports of the Working Parties on “United Kingdom Temporary Import Charges”⁴ and “United States Temporary Import Surcharge”⁵ each note the arguments of developing countries in favour of exempting from the surcharge products of developing countries or products of which developing countries were the principal supplier. These Reports also note the arguments in response that special exemption of imports by origin would produce trade diversion and, to the extent that it encouraged imports, delay removal of the surcharge.⁶ The Report in 1971 of the Group of Three (constituted of the Chairmen of the CONTRACTING PARTIES, the Council and the Committee on Trade and Development) recommended that if the United States surcharge were maintained beyond 1 January 1972, “the United States Government should take steps to exempt imports from developing countries from the charge”, and that the Danish temporary surcharge should exempt products covered by the Danish preference scheme for imports from developing countries.⁷ The Working Party Report on the “Danish Temporary Import Surcharge” provides that “Without prejudice to the legal issues involved, the Working Party noted that as from the introduction of the Danish general preference scheme on 1 January 1972, products included in that scheme would be exempted from the surcharge when imported from members of the Group of Seventy-Seven. Several members of the Working Party welcomed this decision of the Danish Government noting that this had been one of the recommendations of the Group of Three. Other members expressed concern that the exemption did not extend to all developing countries. Some other members said that the discrimination created by these exemptions gave their delegations cause for concern”.⁸

¹L/5135, adopted on 11 June 1981, 28S/102, 111, para. 4.3.

²II/12, CP2/SR.11, pp. 7-8.

³L/6264, adopted on 2 February 1988, 35S/245, 289-290, paras. 122-123.

⁴L/2676, adopted on 17 November 1966, 15S/113, 115, para. 10.

⁵L/3573, adopted on 16 September 1971, 18S/212, 220-222, paras. 34-38.

⁶15S/115-116, para. 10; 18S/218, para. 25.

⁷L/3610, 18S/70, 74, para. 17(ii) (US surcharge); 75, para. 20 (Danish surcharge).

⁸L/3648, adopted on 12 January 1972, 19S/120, 126, 129 (identical text in paras. 22 and 41).

Paragraph 2 of the 1979 Declaration on “Trade Measures Taken for Balance-of-Payments Purposes” provides that:

“If, notwithstanding the principles of this Declaration, a developed contracting party is compelled to apply restrictive import measures for balance-of-payments purposes, it shall, in determining the incidence of its measures, take into account the export interests of the less-developed contracting parties and may exempt from its measures products of export interest to those contracting parties”.⁹

A 1984 Statement by the Chairman of the Committee on Balance-of-Payments Restrictions to the Council, summarizing the result of discussions in 1982-83 concerning the work of the Committee and the role therein of balance-of-payments problems confronting heavily-indebted developing countries, notes *inter alia* that these discussions had endorsed the view that “any action taken in the balance-of-payments field should be consistent with the multilateral principles embodied in the General Agreement”,¹⁰ and adds:

“In clear language this means that actions should be taken on a most-favoured-nation basis or, pursuant to the provisions of Part IV of the General Agreement (particularly Article XXXVII) and the 1979 Decision on Differential and More Favourable, Treatment, Reciprocity and Fuller Participation of Developing Countries, in a manner consistent with that decision, including special treatment for the least-developed among the developing countries. It was noted that Paragraph 2(c) of the Decision allows for the possibility of more favourable treatment to be accorded among developing contracting parties. ...

“In view of the consensus to respect multilateral principles in responding to the needs of countries experiencing severe balance-of-payments difficulties, the possibility of focussing trade actions on such countries would depend on the choice of products for which a particular country is a principal or substantial supplier to a particular market, or on the choice of specific measures which would particularly benefit that country, it being understood that the implementation of each particular measure would be consistent with the multilateral principles referred to”.¹¹

(d) *Variable levies*

In 1961 Uruguay requested a ruling from the CONTRACTING PARTIES concerning whether the application of variable import duties was compatible with the General Agreement. A 1961 Note by the Executive Secretary on “Questions relating to Bilateral Agreements, Discrimination and Variable Taxes” states, *inter alia*:

“... the question might arise as to whether a variable import duty is consistent with the provisions of Article I on most-favoured-nation treatment. This question can, however, hardly be discussed *a priori* without a knowledge of the exact nature of the measure in question or the manner in which it is operated”.¹²

See also the discussion of this Note in summary records of the Nineteenth Session.¹³ The 1962 Panel Report on the “Uruguayan Recourse to Article XXIII” notes as follows:

“The Panel was faced with a particular difficulty in considering the status of variable import levies or charges. It noted the discussion which took place at the nineteenth session of the CONTRACTING PARTIES on this subject during which it was pointed out that such measures raised serious questions which had not been resolved. In these circumstances the Panel has not considered it appropriate to examine the consistency or otherwise of these measures under the General Agreement”.¹⁴

⁹26S/206, 207; for background to this provision see Report of the Working Party on “United States Temporary Import Surcharge”, L/3573, adopted 16 September 1971, 18S/212, 220-223, paras. 34-38, 40.

¹⁰C/125, dated 13 March 1984, approved by the Council on 15/16 May 1984 (C/M/178, p. 26), 31S/56, 60, para. 13.

¹¹*Ibid.*, 31S/60-61, paras. 14, 16.

¹²Note dated 21 November 1961, L/1636, para. 7.

¹³SR.19/8, pp. III-120.

¹⁴L/1923, adopted 16 November 1962, 11S/95, 100, para. 17.

(e) *Trade conducted at most-favoured-nation duty rates*

A Note by the Director-General of 21 June 1972 on “Main Findings Concerning Trade at Most-favoured-nation and at Other Rates” presents data gathered by a working party, in response to a decision reached at the Twenty-seventh Session, from 34 governments concerning the share of trade at most-favoured-nation rates, at preferential rates, and at higher-than-most-favoured-nation rates for the years 1955, 1961, 1964 and 1970.¹⁵

(2) *“the method of levying such duties and charges”*

In November 1968, at the Twenty-fifth Session, the Director-General was asked for a ruling on whether parties to the Agreement on Implementation of Article VI of the General Agreement had a legal obligation under Article I of the General Agreement to apply the provisions of the Anti-Dumping Code in their trade with all GATT contracting parties. The Director-General replied that “In my judgment the words of Article I – ‘the method of levying duties and charges (of any kind)’ and ‘all rules and formalities in connexion with importation’ – cover many of the matters dealt with in the Anti-Dumping Code, such as investigations to determine normal value or injury and the imposition of anti-dumping duties. ... Furthermore, for a contracting party to apply an improved set of rules for the interpretation and application of the GATT only in its trade with contracting parties which undertake to apply the same rules would introduce a conditional element into the most-favoured-nation obligations which, under Article I of GATT, are clearly unconditional”.¹⁶

In 1980 a Panel was established to examine the complaint of India that “the United States action to levy countervailing duties on imports of dutiable products from India without applying injury criteria referred to in paragraph 6 of Article VI, while extending the benefit of such criteria to imports from some other contracting parties, is not consistent with the obligations of the United States under GATT, including the provisions of Article I thereof”. However, the proceedings of the Panel were terminated in 1981 at the request of India, after resolution of the matter as a result of bilateral consultations between India and the United States.¹⁷ See also references to this dispute at page 46 below.

In a discussion in 1985 of the application of “value-for-duty” legislation by Canada to garments imported from Hong Kong, it was stated that country-specific discriminatory mark-ups for customs valuation purposes were contrary to the provisions of Articles I and VII.¹⁸

(3) *“all rules and formalities in connection with importation and exportation”*

The Panel Report on “United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil” includes the following finding:

“The Panel considered that the rules and formalities applicable to countervailing duties, including those applicable to the revocation of countervailing duty orders, are rules and formalities imposed in connection with importation, within the meaning of Article I:1”.¹⁹

(4) *“matters referred to in paragraphs 2 and 4 of Article III”*

This phrasing was inserted during the Geneva session of the Preparatory Committee in 1947, in order “to extend the grant of most-favoured-nation treatment to all matters dealt with in [these paragraphs] regardless of whether national treatment is provided for in respect of such matters”.²⁰

¹⁵Summing up by the Chairman at the Twenty-seventh Session, L/3641, 18S/37, 38, para. 4(d); Note by the Director-General, L/3708; see also discussion at C/M/78, C/M/79.

¹⁶L/3149, Note by the Director-General dated 29 November 1968.

¹⁷28S/113.

¹⁸C/M/165, p. 20; VAL/M/6, p. 9.

¹⁹DS18/R, adopted on 19 June 1992, 39S/128, 150, para. 6.8.

²⁰US proposal at EPCT/W/146; annotated agenda, EPCT/W/150; EPCT/A/PV/7, p. 14.

In response to a request for an interpretation of paragraph 1 of Article I with respect to rebates of excise duties, the Chairman of the CONTRACTING PARTIES ruled on 24 August 1948 that “the most-favoured-nation treatment principle embodied in that paragraph would be applicable to any advantage, favour, privilege or immunity granted with respect to internal taxes”.²¹

The 1952 Panel Report on “Belgian Family Allowances” discusses a Belgian system of tax exemptions for products imported from countries considered to have a system of family allowances similar to that of Belgium, in relation to Article I.²² See below at page 33.

Under the Protocol Amending Part I and Articles XXIX and XXX of the General Agreement, which was agreed in the Review Session of 1954-55, the words “and with respect to the application of internal taxes to exported goods” would have been included in paragraph 1 to remove any uncertainty as to the application of Article I to discrimination in the exemption of exports from the levy of an excise tax.²³

The Panel Report on “Japan - Trade in Semi-Conductors” examined, *inter alia*, measures by Japan to promote sales of foreign semi-conductors in Japan. The EEC claimed that Japan had thereby been granting preferential market access to US producers and exporters of semi-conductors and that, in the light of “the general tendency of the Agreement to address issues on a bilateral basis,” this “could not but have discriminatory effects contrary to Article I of the General Agreement”.²⁴ Japan denied that it granted preferential market access to the producers of the United States and claimed that its policy was to improve market access on a non-discriminatory basis.²⁵ The Panel considered these arguments but “found that the information submitted to it did not demonstrate that the Japanese measures to improve access to its market for semi-conductors favoured United States products inconsistently with Article I of the General Agreement”.²⁶

See also Interpretative Note *ad* Article I, paragraph 1.

(5) “any advantage, favour, privilege or immunity granted by any contracting party ...”

(a) Duty waiver conditional on certification by a particular government

The 1981 Panel Report on “European Economic Community - Imports of Beef from Canada” examined the compatibility with the General Agreement of EEC regulations implementing a levy-free tariff quota for high quality grain-fed beef; these regulations made suspension of the import levy for such beef conditional on production of a certificate of authenticity. The Panel found that “the only certifying agency authorized to certify the meat ... listed in Annex II of the Commission Regulation, was a United States agency mandated to certify only meat from the United States”, and concluded “that Commission Regulation (EEC) No. 2972/79 ... had the effect of preventing access of ‘like products’ from other origin than the United States, thus being inconsistent with the most-favoured-nation principle in Article I of the General Agreement”.²⁷

(b) Export price monitoring schemes

The 1988 Panel Report on “Japan - Trade in Semi-Conductors” examined the argument of the EC that the system of third country market monitoring²⁸ instituted by the Japan-US Agreement on Trade in Semi-Conductors was inconsistent with Article I since it was only applied to Japanese exports to 16 countries, 14 of which were contracting parties. The system, the EEC claimed, violated Article I “to the extent that Japan granted immunity to all but the 14 contracting parties and that the Community did not benefit from the advantages granted to those countries to which the system did not apply”. The Panel found the Japanese

²¹II/12, CP.2/SR.11, CP.3/SR.19.

²²G/32, adopted on 7 November 1952, 1S/59; GATT/CP.6/25 and Add.1.

²³3S/206, para. 3. This Protocol was abandoned as of 31 December 1967; see 15S/65.

²⁴L/6309, adopted on 4 May 1988, 35S/116, 135-136, paras. 60- 61.

²⁵*Ibid.*, 35S/136, para. 62.

²⁶*Ibid.*, 35S/161, para. 127.

²⁷L/5099, adopted on 10 March 1981, 28S/92, 98, paras. 4.2-4.3.

²⁸This system, as described in a Japanese position paper, consisted essentially of two mechanisms: requests by the Government to producers and exporters that dumping should be avoided, and export approval and monitoring costs and export prices, cf. 35S/116, 120, paras. 19-20.

measures to be inconsistent with Article XI:1 and “did not consider it necessary to make a finding on whether or not their administration was contrary to Article I:1 ... the Panel considered that, once a measure had been found to be inconsistent with the General Agreement whether or not it was applied discriminatorily, the question of its non-discriminatory administration was no longer legally relevant. The Panel noted that another Panel had also refrained from examining the alleged discriminatory aspects of a restriction after having found it to be inconsistent with Article XI”.²⁹

(c) *Exemption from charges*

In the panel proceeding on “United States - Customs User Fee”,³⁰ Canada and the EEC requested the Panel to find the United States merchandise processing fee enacted by the Omnibus Budget and Reconciliation Act 1986 to be in breach of Articles II and VIII. India, 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”.³¹ The issue was also raised by Australia and Singapore as intervening parties, but not by the two complainants which reserved their rights on the issue and did not object to the Panel dealing with it. The Panel refrained from a formal finding on the issue, in accordance with GATT practice, which it considered sound legal practice, to make findings only on those issues raised by the parties to the dispute. The Panel stated:

“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 ... 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’”.³²

(d) *Actions with respect to countervailing duties*

The Panel Report on “United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil” found that “... the automatic backdating of the effect of revocation of a preexisting countervailing duty order, without the necessity of the country subject to the order making a request for an injury review, is properly considered to be an advantage within the meaning of Article I:1”.³³

(6) *“originating in” and country of origin*

The wording “originating in” was deliberately chosen to exclude the concept of “provenance”. As stated in the course of the discussion at the London session of the Preparatory Committee, “what you need ... to obtain the benefit of the minimum rates is to prove the origin and those rates would apply even if [the products] entered the importing country by way of a third country”.³⁴ The Preparatory Committee did not consider it necessary to

²⁹L/6309, adopted on 4 May 1988, 35S/116, 159, para. 122. The reference in the text is to the Panel Report on “Canada - Administration of the Foreign Investment Review Act”, L/5504, adopted on 7 February 1984, 30S/140.

³⁰L/6264, adopted 2 February 1988, 35S/245.

³¹*Ibid.*, 35S/289, para. 121.

³²*Ibid.*, 35S/289-290, para. 122.

³³DS18/R, adopted on 19 June 1992, 39S/128, 150, para. 6.9.

³⁴EPCT/C.II/PV/11, p. 9.

define these phrases and suggested that such a definition should be studied by the ITO.³⁵ A sub-committee of the Preparatory Committee at its Geneva session considered it “to be clear that it is within the province of each importing member country to determine in accordance with the provisions of its law for the purpose of applying the most-favoured-nation provision, whether goods had in fact originated in a particular country”.³⁶

The 1991 Panel Report on “United States - Restrictions on Imports of Tuna,” which has not been adopted, examined, *inter alia*, the labelling provisions of the US Dolphin Protection Consumer Information Act (DPCIA), which provide that when a tuna product exported from or offered for sale in the United States bears the label “Dolphin Safe” or any similar label indicating it was fished in a manner not harmful to dolphins, this tuna product may not contain tuna harvested on the high seas by a vessel engaged in driftnet fishing, or harvested in the Eastern Tropical Pacific Ocean (ETP) by a vessel using a purse-seine net unless certain facts are certified under penalty of law. The use of such labels is not a requirement but is voluntary. The Panel examined Mexico’s secondary argument that these provisions were inconsistent with Article I:1 because they discriminated against Mexico as a country whose exclusive economic zone was entirely in the ETP. The panel noted that the harvesting of tuna by intentionally encircling dolphins with purse-seine nets was practised only in the ETP because of the particular type of association between dolphins and tuna observed only in that area.

“By imposing the requirement to provide evidence that this fishing technique had not been used in respect of tuna caught in the ETP the United States therefore did not discriminate against countries fishing in this area. The Panel noted that, under United States customs law, the country of origin of fish was determined by the country of registry of the vessel that had caught the fish; the geographical area where the fish was caught was irrelevant for the determination of origin. The labelling regulations governing tuna caught in the ETP thus applied to all countries whose vessels fished in this geographical area and thus did not distinguish between products originating in Mexico and products originating in other countries.

“... The Panel found for these reasons that the tuna products labelling provisions of the DPCIA relating to tuna caught in the ETP were not inconsistent with the obligations of the United States under Article I:1 of the General Agreement.”³⁷

Concerning the work done in the GATT on rules of origin for goods, see under Article VIII. On marking of origin, see under Article IX.

(7) “shall be accorded immediately and unconditionally”

(a) Reciprocity clauses

The 1952 Report of the Working Party on the “International Convention to Facilitate the Importation of Commercial Samples and Advertising Material” notes concerning the draft text of the Convention: “A proposal to insert in the Convention a reciprocity clause was considered by the majority of the members of the Working Party to be inconsistent with Article I of the General Agreement”.³⁸

(b) Tax exemptions on condition of existence of a tax system of family allowances in the exporting country

The 1952 Panel Report on “Belgian Family Allowances” contains the following finding.

“According to the provisions of paragraph 1 of Article I of the General Agreement, any advantage, favour, privilege or immunity granted by Belgium to any product originating in the territory of any country with respect to all matters referred to in paragraph 2 of Article III shall be granted immediately and unconditionally to the like product originating in the territories of all contracting parties. Belgium has

³⁵London Report, p. 9; EPCT/C.II/PV/12, pp. 3-4.

³⁶EPCT/174, p. 3.

³⁷DS21/R (unadopted), dated 3 September 1991, 39S/155, 203-204, paras. 5.43-5.44.

³⁸G/33, adopted on 7 November 1952, 1S/94, 98, para. 27.

granted exemption from the levy under consideration to products purchased by public bodies when they originate in Luxembourg and the Netherlands, as well as in France, Italy, Sweden and the United Kingdom. ... it is clear that that exemption would have to be granted unconditionally to all other contracting parties. The consistency or otherwise of the system of family allowances in force in the territory of a given contracting party with the requirements of the Belgian law would be irrelevant in this respect, and the Belgian legislation would have to be amended insofar as it introduced a discrimination between countries having a given system of family allowances and those which had a different system or no system at all, and made the granting of the exemption dependent on certain conditions.”³⁹

(c) *Exemptions on condition of minimum import price guarantees*

In the 1978 Panel Report on “EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables”

“The Panel ... examined the provision for an exemption from the lodging of the additional security associated with the minimum import price for tomato concentrates in relation to the obligations of the Community under Article I:1. The Panel noted that Article 10 of Council Regulation (EEC) No. 516/77 stated that the ‘lodging of such additional security shall not be required for products originating in non-member countries which undertake, and are in a position, to guarantee that the price on import into the Community shall be not less than the minimum price for the product in question, and that all deflection of trade will be avoided’. The Panel noted the argument by the representative of the United States that this provision amounted to conditional most-favoured-nation treatment inconsistent with Article I:1 of the General Agreement, since it removed one of the requirements for certain countries while leaving a burden on other countries. The Panel further noted the argument by the representative of the Community that this provision did not make any distinction based on the economic system or any other factor between third suppliers and that the possibility to guarantee that the minimum price would be respected was open to all unconditionally. The Panel considered that, regardless of whether a guarantee had to be provided by the importer or the government of the exporting country, so long as a guarantee was necessary for all imports from all potential third country suppliers, there would be no discrimination within the meaning of Article I:1. Therefore the Panel concluded that the provision for an exemption from the lodging of the additional security associated with the minimum import price for tomato concentrates was not inconsistent with the obligations of the Community under Article I:1.”⁴⁰

(d) *Reservation of import quotas for outward processing traffic*

During the discussions on proposals regarding the extension, modification or discontinuance of the Protocol Extending the Arrangement Regarding International Trade in Textiles in the ninth meeting of the Textiles Committee under the Arrangement as extended in 1977, several signatory states considered the proposed reservation of a portion of import quotas for outward processing traffic as being not consistent with either the Arrangement Regarding International Trade in Textiles or the provisions of GATT, in particular Article I.⁴¹

(e) *Tariff treatment conditional on the existence of a co-operation contract*

The 1973 Working Party Report on the “Accession of Hungary” notes the view of several delegations that the implementation of the regulations submitted by the Hungarian delegation with respect to co-operation contracts (countertrade), in particular as regards the question of tariff exemptions and reductions granted in this framework, would be inconsistent with Article I of the General Agreement. In response to a request for a legal opinion, “the GATT secretariat, while emphasizing that questions of interpretations of the General Agreement were matters for the CONTRACTING PARTIES and not for the secretariat, gave certain comments, *inter alia* that the prerequisite of having a co-operation contract in order to benefit from certain tariff treatment appeared to imply conditional most-favoured-nation treatment and would, therefore, not appear to be compatible with the General Agreement.”⁴²

³⁹G/32, adopted on 7 November 1952, 1S/59, 60, para. 3.

⁴⁰L/4687, adopted on 18 October 1978, 25S/68, 106, para. 4.19.

⁴¹COM.TEX/W/127.

⁴²L/3889, adopted on 30 July 1973, 20S/34, 36, para. 12.

(f) *Special treatment for diplomatic gifts, supplies and equipment accorded on the basis of reciprocity*

The Report of the Review Session Working Party on “Schedules and Customs Administration” records that:

“Referring to the provisions for most-favoured-nation treatment, the representative of Germany informed the Working Party that German customs law requires that special treatment for gifts to heads of foreign states, equipment for diplomatic and consular offices and goods for the use of representatives of foreign governments may be granted only on a basis of reciprocity, thus not permitting observance of most-favoured-nation obligations for such imports. Many other countries follow the same practice. The Working Party took note of this situation and saw no reason why established practice in these cases should be disturbed”.⁴³

(g) *Application to individual cases and “balancing”*

The Panel Report on “United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil” states with respect to Article I:1:

“The Panel ... considered that Article I:1 does not permit balancing more favourable treatment under some procedure against a less favourable treatment under others. If such a balancing were accepted, it would entitle a contracting party to derogate from the most-favoured-nation obligation in one case, in respect of one contracting party, on the ground that it accords more favourable treatment in some other case in respect of another contracting party. In the view of the Panel, such an interpretation of the most-favoured-nation obligation of Article I:1 would defeat the very purpose underlying the unconditionality of that obligation”.⁴⁴

(8) *“like product”*(a) *General*

During discussions at the London session of the Preparatory Committee, it was stated that “the expression had different meanings in different contexts of the Draft Charter”.⁴⁵ The Preparatory Committee did not think it necessary to define this phrase and recommended that such definition be studied by the ITO.⁴⁶ Both at that time and later at the Havana Conference, it was suggested that the method of tariff classification could be used for determining whether products were “like products” or not.⁴⁷

See also the discussion of “like product” in the context of Article III:2 and III:4. The term “like product” or “like domestic product” is used in several other GATT provisions as well, including Articles II:2(a); VI:1(a); VI:1(b); IX:1; XI:2(c); XIII:1; and XVI:4. Other terms such as “like commodity” (Article VI:7), “like merchandise” (Article VII:2), and “like or competitive products” (Article XIX:1) also occur. See also the classification problems arising under Articles II and XXIV:5 (“corresponding duties”).

The Panel Report on “United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil” notes with reference to this concept:

“The Panel noted that Article I would in principle permit a contracting party to have different countervailing duty laws and procedures for different categories of products, or even to exempt one category of products from countervailing duties altogether. The mere fact that one category of products is treated one way by the United States and another category of products is treated another is therefore in principle not inconsistent with the most-favoured-nation obligation of Article I:1. However, this provision clearly prohibits a

⁴³L/329, adopted 26 February 1955, 3S/205, 206 para. 3.

⁴⁴DS18/R, adopted on 19 June 1992, 39S/128, 151, para. 6.10.

⁴⁵EPCT/C.II/65, p. 2.

⁴⁶EPCT/C.II/PV/12, pp. 6-7; London Report, p. 9, para. A.1(c).

⁴⁷EPCT/C.II/PV/12, p. 7-8; E/CONF.2/C.3/SR.5, p. 4.

contracting party from according an advantage to a product originating in another country while denying the same advantage to a *like product* originating in the territories of other contracting parties”.⁴⁸

(b) *Examination of “like product” issues in particular cases*

The 1950 Report of the Working Party on “The Australian Subsidy on Ammonium Sulphate” examined a claim by Chile regarding the following facts: the Australian government had formerly subsidized the distribution of both imported and domestic ammonium sulphate and imported sodium nitrate fertilizers, and had ceased to subsidize distribution of imported sodium nitrate; the subsidy on ammonium sulphate was maintained because its users were subject to price ceilings, while the agricultural producers who used most of the sodium nitrate were not.

“As regards the applicability of Article I to the Australian measure, the working party noted that the General Agreement made a distinction between ‘like products’ and ‘directly competitive or substitutable products’. This distinction is clearly brought out in Article III, paragraph 2, read in conjunction with the interpretative note to that paragraph. The most-favoured-nation treatment clause in the General Agreement is limited to ‘like products’. Without trying to give a definition of ‘like products’, and leaving aside the question of whether the two fertilizers are directly competitive, the working party reached the conclusion that they were not to be considered as ‘like products’ within the terms of Article I. In the Australian tariff the two products are listed as separate items and enjoy different treatment. ... In the tariffs of other countries the two products are listed separately. In certain cases the rate is the same, but in others the treatment is different. ...”⁴⁹

The 1978 Panel Report on “EEC - Measures on Animal Feed Proteins” examined EEC measures requiring domestic producers or importers of oilseeds, cakes and meals, dehydrated fodder and compound feeds and importers of corn gluten feed to purchase and denature skimmed milk powder held by EEC intervention agencies, as a condition for the receipt of production subsidies (in the case of domestic producers) or as a condition on importation (in the case of importers). A security deposit could be substituted for proof of such purchase; the amount of the security varied depending on the type of feed. Examining *inter alia* a claim by the United States that, as proteins added to animal feeds should be considered to be like products, the requirement of different levels of security deposit for different vegetable proteins was inconsistent with Article I:1,

“The Panel began by examining whether all products used for the same purpose of adding protein to animal feeds should be considered to be ‘like products’ within the meaning of Articles I and III. Having noted that the General Agreement gave no definition of the concept of ‘like product’, the Panel reviewed how it had been applied by the CONTRACTING PARTIES in previous cases.”⁵⁰

“The Panel noted, in this case, such factors as the number of products and tariff items carrying different duty rates and tariff bindings, the varying protein contents and the different vegetable, animal and synthetic origins of the protein products before the Panel - not all of which were subject to the EEC measures. Therefore, the Panel concluded that these various protein products could not be considered as ‘like products’ within the meaning of Articles I and III”.⁵¹

“The Panel noted that the general most-favoured-nation treatment provided for in Article I:1 applied to ‘like products’ regardless of territorial origin but did not mention ‘directly competitive or substitutable products’. In this regard the Panel did not consider animal, marine and synthetic proteins to be products like those vegetable proteins covered by the measures. The Panel also noted that a significant proportion of EEC imports of ‘like products’, including soybeans, subject to the measures originated from contracting parties other than the United States”.⁵²

⁴⁸DS18/R, adopted on 19 June 1992, 39S/128, 151, para. 6.11.

⁴⁹GATT/CP.4/39, adopted on 3 April 1950, II/188, 191, para. 8.

⁵⁰The footnote to this sentence provides: “For instance BISD II/188, BISD 1S/53, BISD II/181, 183”.

⁵¹L/4599, adopted on 14 March 1978, 25S/49, 63, paras. 4.1-4.2.

⁵²*Ibid.*, 25S/68, para. 4.20.

The 1981 Panel Report on “Spain - Tariff Treatment of Unroasted Coffee” examined a claim of Brazil under Article I:1 with respect to a Spanish Royal Decree which divided unroasted coffee into five tariff classifications: “Colombian mild,” “other mild,” “unwashed Arabica,” “Robusta” and “other”. The first two were duty-free and the latter three were subject to a duty of 7 per cent *ad valorem*; the tariff on raw coffee was unbound.

“The Panel found that there was no obligation under the GATT to follow any particular system for classifying goods, and that a contracting party had the right to introduce in its customs tariff new positions or sub-positions as appropriate.⁵³ The Panel considered, however, that whatever the classification adopted, Article I:1 required that the same tariff treatment be applied to ‘like products’. The Panel therefore.. focused its examination on whether the various types of unroasted coffee listed in the Royal Decree 1764/79 should be regarded as ‘like products’ within the meaning of Article I:1. Having reviewed how the concept of ‘like products’ had been applied by the CONTRACTING PARTIES in previous cases involving, *inter alia*, a recourse to Article I:1,⁵⁴ the Panel noted that neither the General Agreement nor the settlement of previous cases gave any definition of such concept.

“The Panel examined all arguments that had been advanced during the proceedings for the justification of a different tariff treatment for various groups and types of unroasted coffee. It noted that these arguments mainly related to organoleptic differences resulting from geographical factors, cultivation methods, the processing of the beans, and the genetic factor. The Panel did not consider that such differences were sufficient reason to allow for a different tariff treatment. It pointed out that it was not unusual in the case of agricultural products that the taste and aroma of the end-product would differ because of one or several of the above-mentioned factors.

“The Panel furthermore found relevant to its examination of the matter that unroasted coffee was mainly, if not exclusively, sold in the form of blends, combining various types of coffee, and that coffee in its end-use, was universally regarded as a well-defined and single product intended for drinking.

“The Panel noted that no other contracting party applied its tariff régime in respect of unroasted, non-decaffeinated coffee in such a way that different types of coffee were subject to different tariff rates.

“In the light of the foregoing, the Panel *concluded* that unroasted, non-decaffeinated coffee beans listed in the Spanish Customs Tariff ... should be considered as ‘like products’ within the meaning of Article I:1.

“The Panel further noted that Brazil exported to Spain mainly ‘unwashed Arabica’ and also Robusta coffee which were both presently charged with higher duties than that applied to ‘mild’ coffee. Since these were considered to be ‘like products’, the Panel *concluded* that the tariff régime as presently applied by Spain was discriminatory vis-à-vis unroasted coffee originating in Brazil⁵⁵ and “not in conformity with the provision of Article I:1”.⁵⁶

The 1989 Panel Report on “Canada/Japan: Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber” examined Canada’s claim that Japan’s application of an 8 per cent tariff on imports of SPF “dimension lumber” (surfaced softwood lumber designed for use as framing members in construction) was inconsistent with Article I:1 because SPF dimension lumber and dimension lumber of other types, which benefited from a zero duty rate, were “like products” within the meaning of Article I:1. Citing documents dealing with the drafting history and interpretation of the “like products” concept⁵⁷ Japan argued that these were different products, in practical terms, physical origins, characteristics, end-uses, consumer perception, etc. and so were not “like products” in the sense of Article I:1; Japan noted that concessions distinguished by species had been exchanged and upheld in successive GATT tariff negotiations.⁵⁸ Canada argued that past panels had considered the

⁵³The footnote to this sentence provides: “Provided that a reclassification subsequent to the making of a concession under the GATT would not be a violation of the basic commitment regarding that concession (Article II:5)”.

⁵⁴The footnote to this sentence refers to BISD Vol. II/188; 15/53; 25S/49; 27S/98.

⁵⁵L/5135, adopted 11 June 1981, 28S/102, 111-112, paras. 4.4-4.10 *passim*.

⁵⁶*Ibid.* 28S/112, para. 4.11.

⁵⁷References given are to EPCT/C/II/65 p. 2; EPCT/C/II/PV.12 p. 7; EPCT/C/II/36 p. 8; E/CONF.2/C.III/SR.5 p. 4; GATT/CP/4/39 para. 8; IC/SR.9 p. 2; BISD 25S/49-53; and BISD 28S/92-98.

⁵⁸L/6470, adopted on 19 July 1989, 36S/167, 180, paras. 3.19-3.20.

interpretation of the “like product concept” to be the same in both Articles I and III, and that because these were trade-creating obligations a narrow definition of like products would not be appropriate; Japan argued that they were not the same.⁵⁹

“... In substance, Canada complains of the fact that Japan had arranged its tariff classification in such a way that a considerable part of Canadian exports of SPF dimension lumber to Japan was submitted to a customs duty of 8 per cent, whereas other comparable types of dimension lumber enjoy the advantage of a zero-tariff duty. The Panel considered it impossible to appreciate fully the Canadian complaint if it had not in a preliminary way clarified the bearing of some principles of the GATT-system in relation to tariff structure and tariff classification.

“The Panel noted in this respect that the General Agreement left wide discretion to the contracting parties in relation to the structure of national tariffs and the classification of goods in the framework of such structure ... The adoption of the Harmonized System, to which both Canada and Japan have adhered, had brought about a large measure of harmonization in the field of customs classification of goods, but this system did not entail any obligation as to the ultimate detail in the respective tariff classifications. Indeed, this nomenclature has been on purpose structured in such a way that it leaves room for further specifications.

“The Panel was of the opinion that, under these conditions, a tariff classification going beyond the Harmonized System’s structure is a legitimate means of adapting the tariff scheme to each contracting party’s trade policy interests, comprising both its protection needs and its requirements for the purposes of tariff- and trade negotiations. ...

“Tariff differentiation being basically a legitimate means of trade policy, a contracting party which claims to be prejudiced by such practice bears the burden of establishing that such tariff arrangement has been diverted from its normal purpose so as to become a means of discrimination in international trade. Such complaints have to be examined in considering simultaneously the internal protection interest involved in a given tariff specification, as well as its actual or potential influence on the pattern of imports from different extraneous sources ...⁶⁰

“... if a claim of likeness was raised by a contracting party in relation to the tariff treatment of its goods on importation by some other contracting party, such a claim should be based on the classification of the latter, i.e. the importing country’s tariff.

“The Panel noted in this respect that ‘dimension lumber’ as defined by Canada was a concept extraneous to the Japanese Tariff ... nor did it belong to any internationally accepted customs classification. The Panel concluded therefore that reliance by Canada on the concept of dimension lumber was not an appropriate basis for establishing ‘likeness’ of products under Article I:1 of the General Agreement.

“At the same time, the Panel felt unable to examine the Canadian complaint in a broader context ... Canada did not contend that different lumber species *per se* should be considered like products, regardless of the product-form they might take ... Thus there appeared to be no basis for examining the issue raised by Canada in the general context of the Japanese tariff classification.”⁶¹

In Council discussion when this panel report was adopted, Canada raised the concern that “this interpretation could lead to pre-eminence being given to the tariff classification of a contracting party when determining ‘like products’ under Article I ... this interpretation could well preclude a contracting party from exercising its rights under Article I:1 for equal treatment of like products if the products involved were not specifically identified in the tariff classification system of the importing contracting party. The Harmonized System of tariff classification was not designed with Article I:1 rights in mind ... Tariff classification systems cannot identify specifically each and every possible product which may be imported. In the tariff classification system of contracting parties it is

⁵⁹*Ibid.*, 36S/186-187, paras. 3.37-3.39.

⁶⁰*Ibid.*, 36S/197-198, paras. 5.7-5.10.

⁶¹*Ibid.*, 36S/199, paras. 5.13-5.15.

regularly the case that an individual tariff line or description will cover a wide range of different products, particularly in the example of lines which read 'other' or 'not elsewhere specified'. Additionally, there are new products continually entering the marketplace which are not identified in tariff schedules".⁶²

The 1990 Panel Report on "European Economic Community - Regulation on Imports of Parts and Components" examined Japan's claim that the imposition of anti-dumping duties on certain products assembled inside the Community on the basis of an earlier anti-dumping order applicable to imports of finished products was not permissible under Articles VI or XX (d) and thus violated Articles I, II, III and VI. During the dispute, "Japan pointed out that Article 13:10 of Council Regulation (EEC) No. 2423/88 provided for the imposition of duties on products produced or assembled in the EEC on the basis of the proportion of parts imported from Japan used in the production or assembly of such products. As such, these duties could be seen as a special type of customs duties levied on parts imported from Japan ... If one considered the duties imposed under Article 13:10 as customs duties on imported parts, these duties violated Article I:1 of the General Agreement because they were imposed only on parts imported from Japan; thus, discrimination occurred between parts originating in Japan and like products of third countries".⁶³ The Panel made no finding with respect to this claim.

The 1992 Panel Report on "United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil" examined a claim relating to the automatic backdating of the effect of revocation of a countervailing duty order (see above at page 32).

"The Panel ... examined whether the products to which the United States had accorded the advantage of automatic backdating are like the products to which this advantage had been denied. The Panel noted that the products to which the procedures under Section 331 of the Trade Act of 1974 had actually been applied (industrial fasteners, industrial lime, automotive glass) are not like the product to which Section 104(b) of the Trade Agreements Act of 1979 had been applied in the case of Brazil (non-rubber footwear). However, the Panel also noted that Brazil not only claimed that the application of these two Acts in concrete cases was inconsistent with Article I:1 of the General Agreement but also that the United States' legislation itself was inconsistent with that provision. The Panel recalled that neither Section 331 of the 1974 Act nor Section 104(b) of the 1979 Act makes any distinction as to the particular products to which each applies, other than that the former applies to duty-free products originating in the territories of contracting parties and the latter applies to dutiable products originating in the territories of contracting parties signatories to the Subsidies Agreement. The products to which Section 331 of the 1974 Act accords the advantage of automatic backdating are therefore in principle the same products to which Section 104(b) of the 1979 Act denies the advantage of automatic backdating".⁶⁴

(c) *Price discrimination*

The 1978 Note by the GATT Secretariat on "Modalities of Application of Article XIX" notes concerning actions notified as having been taken under Article XIX that

"A number of actions of a quantitative and tariff-type nature have been linked to the price of the products concerned. In practice, such measures, although applied on a global basis, may have been selective in their application to one or a limited number of countries. In the current ten-year period, ten such instances have been notified, compared to eight during the preceding twenty years. Some of these measures took the form of special customs valuation methods levied for imports at lower prices during a short agricultural or horticultural season. In addition to these measures, there were a few cases in the earlier years where specific duties or sur-taxes were replaced by ad valorem rates".⁶⁵

In Council discussion of a 1977 Article XIX action by Finland imposing a surcharge on imports of pantyhose (tights) below a basic price, the representative of Singapore noted that Article XIX referred to "any

⁶²L/6528; see also C/M/232, p. 9-12; C/M/234, p. 44-49; C/M/235, p. 15-18.

⁶³L/6657, adopted on 16 May 1990, 37S/132, 147, para. 3.32.

⁶⁴DS18/R, adopted on 19 June 1992, 39S/128, 151-152, para. 6.12.

⁶⁵L/4679, para. 45.

product” and stated that this action was aimed at low-cost suppliers in developing countries. The representative of Finland stated that the measure was fully in accordance with Article XIX.⁶⁶

During discussion in the Committee on Trade and Development in March 1983 of a Canadian Article XIX action on leather footwear, which exempted footwear above a certain value, it was stated that “This price discrimination was not only contrary to the letter and spirit of Article XIX, but also established a dangerous precedent, and had an adverse effect on the export interests of developing countries. The representative of Canada stated that in the view of his authorities, the Article XIX action referred to ... was consistent with the relevant provisions of the General Agreement, and the price discrimination element in the action did not constitute a new precedent under the GATT”. Several other contracting parties expressed concern at the price-discriminatory use of Article XIX and stated that they regarded a discrimination between suppliers, either geographically or on the basis of prices, as an infringement of GATT rules.⁶⁷ Canada’s Article XIX action on imports of footwear was discussed again in the GATT Council meeting in March 1985. Concern was expressed at “Canada’s application of price breaks in the context of this Article XIX action. Such devices could produce such a narrow and selective definition of source that the action could no longer be said to be truly non-discriminatory. This would appear to conflict with the fundamental principles of the General Agreement”.⁶⁸

2. Paragraphs 2 and 4: Historical preferences and margins of preference

For a general discussion of the negotiating history of the provisions of Article I on historical preferences, see section III below.

The interpretative Note *ad* Article I:4 provides that the margin of preference is the absolute difference between the most-favoured-nation rate of duty and the preferential rate of duty for the like product and not the proportionate relation between those rates; this definition was decided on (during the Geneva negotiations on the General Agreement) because of the difficulty of calculating a percentage margin when the preferential rate is zero, and because it was determined that only the absolute size of the margin, and not the percentage difference, was economically meaningful.⁶⁹

In discussions at the London session of the Preparatory Committee, it was agreed that the exemption to the most-favoured-nation clause for historical preferences refers only to preferences in the form of tariff margins and has “nothing to do with quotas or quantitative restrictions”.⁷⁰

The present form of Annex B (territories of the French Union) reflects the deletion in 1955 of certain territories, which had been raised to the status of French départements on 1 January 1948 and then formed part of the metropolitan customs territory.⁷¹

Many of the historical preferences referred to in paragraph 2 have been subsequently changed or terminated, although some still exist.

(1) *Modification of margins of preference*

(a) *Relationship between negotiated reductions in the most-favoured-nation duty rate and the margin of preference*

The rules for the tariff negotiations conducted in 1947 at the Geneva session of the Preparatory Committee, in connection with the conclusion of the General Agreement, referred to the provisions in Article 24 of the London Draft Charter that “Prior international commitments shall not be permitted to stand in the way of

⁶⁶C/M/119 p. 21-22.

⁶⁷COM.TD/114, p. 10, paras. 41-43.

⁶⁸C/M/186, p. 5.

⁶⁹EPCT/230; EPCT/TAC/PV/16, pp. 21-35. The method of calculation of margins of preference in paragraph 4 was utilized in the 1949 Report of the Working Party on “Brazilian Internal Taxes,” GATT/CP.3/42, II/181, 183-184, paras. 11-12.

⁷⁰EPCT/C.II/PV/4, p. 35; EPCT/C.II/PV/12, p. 9. See also Article XXIV:5(a).

⁷¹Fourth Protocol of Rectifications and Modifications to the Annexes and to the Texts of the Schedules of the General Agreement (done 7 March 1955, entered into force 23 January 1959); see also W.9/162. See also discussion of status of territories within French Union as of 1946 at EPCT/C.II/PV/4 p. 18-20.

negotiations with respect to tariff preferences, it being understood that action resulting from such negotiations shall not require the modification of existing international obligations except by agreement between the contracting parties or, failing that, by termination of such obligations in accordance with their terms. All negotiated reductions in most-favoured-nation tariffs shall operate automatically to reduce or eliminate margins of preference". These rules further stated that "all margins of preference remaining after negotiations would be bound against increase".⁷²

Similarly, the procedures for the Annecy tariff conference of 1949 and the Torquay tariff conference of 1950 each provided that

"The negotiations will be conducted in accordance with the rules set forth in paragraph 2 of Article 17 of the Havana Charter, *i.e.*,

...

"(c) in negotiations relating to any specific product with respect to which a preference applies,

- (i) when a reduction is negotiated only in the most-favoured-nation rate, such reduction shall operate automatically to reduce or eliminate the margin of preference applicable to that product;
- (ii) when a reduction is negotiated only in the preferential rate, the most-favoured-nation rate shall automatically be reduced to the extent of such reduction;
- (iii) when it is agreed that reductions will be negotiated in both the most-favoured-nation rate and the preferential rate, the reduction in each shall be that agreed by the parties to the negotiations; and
- (iv) no margin of preference shall be increased. ...

"(e) Prior international obligations shall not be invoked to frustrate negotiations with respect to preferences, it being understood that agreements which result from such negotiations and which conflict with such obligations shall not require the modification or termination of existing international obligations except with the consent of the parties to such obligations, or in the absence of such consent by modification or termination of such obligations in accordance with their terms".⁷³

The procedures for the 1956 tariff conference and for the Dillon Round in 1960-61 provided that "In so far as negotiations relate to preferences, the applicable provisions of the General Agreement shall be applied in accordance with the rules, as relevant, followed hitherto in negotiations sponsored by the CONTRACTING PARTIES".⁷⁴

During the Third Session, held at Annecy in 1949, Cuba sought a ruling that the reduction of most-favoured-nation tariff rates by the United States in the tariff negotiations conducted at that time at Annecy would be inconsistent with the provisions of a bilateral trade agreement between Cuba and the United States predating the General Agreement, which guaranteed certain percentage margins of preference. On 9 August 1949 the CONTRACTING PARTIES adopted a Decision on "Margins of Preference" which provided *inter alia*, that "A margin of preference, on an item included in either or both parts of a schedule, is not bound against decrease by the provisions of the General Agreement. This decision does not preclude the possibility of resort to Article XXIII".⁷⁵

⁷²London Report, p. 49. See also the discussion of the effect of preferences on tariff negotiations, in the Sub-Committee on Procedures (which drafted the procedures for the Geneva 1947 negotiations): EPCT/C.II/PRO/PV/12.

⁷³Procedures Adopted for Torquay Tariff Conference, I/104-105, para. 3; Memorandum on Tariff Negotiations to be held in Geneva commencing 11 April 1949, adopted 31 August 1948, GATT/CP.2/SR.15, p. 5, GATT/CP.2/26, para. III.1.

⁷⁴"Rules and Procedures for the Tariff Conference commencing in Geneva on 18 January 1956", 4S/79, 81, para. 11(d); "Rules and Procedures for the Tariff Conference commencing in Geneva on 1 September 1960", 8S/114, 118, para. VII(d).

⁷⁵Decision of 9 August 1949 on "Margins of Preference", II/11; see also draft decision and footnote in GATT/CP.3/71, statements of Cuba in GATT/CP.3/63 and GATT/CP.3/89, discussion at GATT/CP.3/SR.34-SR.38, and adoption of ruling and footnote by vote at GATT/CP.3/SR.38 p. 6-9. See also discussion of related Cuban legal claims and Article XXIII at II/152-153 paras. 22-25. See also reference to this Decision at pages 41, 45 below.

(b) Increase in margins of preference

It was stated during the negotiation of the General Agreement text in 1947 “that negotiations should not lead to the increase of margins of preference. This appears in Article 17 [of the Geneva Draft Charter], and is in fact our guiding thread to this Article”.⁷⁶

At the Review Session in 1954-1955, reference was made to the rigid “no-new-preference rule ... contained in Article I”.⁷⁷ Proposals to amend Article I:4 or Article XXIV to permit increase in margins of preference, even by negotiation, were unsuccessful; the Review Working Party on Schedules and Customs Administration which examined these proposals considered that the objectives of these proposals could best be sought by an application for a suitable waiver.⁷⁸ In 1954, Italy brought a complaint against the imposition by France of a temporary compensation tax on certain imports, from which certain imports from the French Union were exempted. During the 1954-55 Review Session the CONTRACTING PARTIES adopted conclusions that “the tax has increased the incidence of customs charges in excess of maximum rates bound under Article II, and the application of this tax introduces, in respect of the products affected, an increase in the incidence of preferences in excess of the maximum margins permissible under Article I; and it follows that the action of the French Government justifies the invocation of the provisions of Article XXIII and that any contracting party whose trade is adversely affected has grounds to propose under paragraph 2 of that Article such compensatory action as it may think appropriate for authorization by the CONTRACTING PARTIES”.⁷⁹

For examples of examination of preferential margins in the light of the rules in Article I on margins of preference, see the 1971 Panel Report on “Jamaica - Margins of Preference”⁸⁰ and the 1969 Working Party Report on “Malawi Tariff Preferences - Preferential Margins”.⁸¹

See also Article XXIV:9 and its interpretative note regarding the coexistence of margins of preference and customs unions or free-trade areas, and the adjustment of preferences by negotiation in conjunction with the formation of a customs union or free-trade area.

(c) Reinstatement of historical preferences

The wording “existing on 10 April 1947” in paragraph 4 was adopted in order to “include rates or margins which had legal existence on the base date but were not actually applied”.⁸² The Interpretative Note to paragraph 4 provides that the re-application to an imported product of a tariff classification or rate of duty, properly applicable to such product, in cases in which the application of such classification or rate to such product was temporarily suspended or inoperative on April 10, 1947, is not contrary to a general binding of margins of preference if taken in accordance with established uniform procedures.

(d) Change in historical preferences due to tariff reclassification

The Interpretative Note to paragraph 4 provides that the classification of a particular product under a tariff item other than that under which importations of that product were classified on April 10, 1947, in cases in which the tariff law clearly contemplates that such product may be classified under more than one tariff item, is not contrary to a general binding of margins of preference if taken in accordance with established uniform procedures. However, the preparatory work indicates that it was understood that the “general provisions relating

⁷⁶EPCT/TAC/PV.9, p. 16.

⁷⁷SR.9/17, p. 3.

⁷⁸L/329, adopted 26 February 1955, 3S/205, 207-208 para. 6 (proposals by Australia, New Zealand, Chile). See also the waivers of Article I:4 granted to the United Kingdom in 1953 for increases in margins of preference for items admitted duty-free from the Commonwealth (2S/20, amended at 3S/25) and in 1955 for preferential treatment for imports from overseas territories for whose international relations it is responsible (3S/21).

⁷⁹Decision of 17 January 1955 on “French Special Temporary Compensation Tax on Imports”, 3S/26, 27; see discussion and adoption at SR.9/28, 29; see also reference to this decision at 6S/96 para. 20.

⁸⁰L/3485, adopted on 2 February 1971, 18S/183.

⁸¹L/3194, adopted 15 April 1969, 17S/156.

⁸²EPCT/174, p. 5.

to the binding of margins would not override specific undertakings in the tariff schedules to maintain particular products under a particular tariff classification”.⁸³

(2) *Base dates for purposes of paragraph 4 and Annex G, and modification thereof*

The date of 10 April 1947 referred to in paragraph 4 was the opening date of the Second Session (held in Geneva) of the Preparatory Committee for the Havana Conference;⁸⁴ for those countries listed in Annex G this date is replaced by the dates specified in Annex G, except as modified by the waiver decisions listed below.

The 1971 Panel Report on “Jamaica - Margins of Preference” examined the base date applicable to Jamaica under Article I:4 and its implications for increases in margins of preference after 10 April 1947 and before the date of succession to the rights and obligations of a contracting party under Article XXVI:5(c).

“The Panel held that since Jamaica had acceded to the General Agreement on Tariffs and Trade under the provisions of Article XXVI:5(c) it had acquired the rights and obligations which had previously been accepted by the United Kingdom in respect of the territory of Jamaica. This meant that Jamaica assumed the rights and obligations involved in the application to it of the General Agreement by the United Kingdom before Jamaica became independent. On 6 August 1962, the day Jamaica became independent, Article I:4 formed part of the General Agreement as it had been applied by the United Kingdom on behalf of the territory of Jamaica. The provision of Article I:4 establishing 10 April 1947 as the base date for permissible margins of preference was therefore applicable to Jamaica”.⁸⁵

However, on recommendation of this Panel, a waiver changing the base date was granted to Jamaica; see below.

The date “April 10, 1947” under Article I:4 is replaced by other dates in certain protocols of accession:

- Cambodia, by “1 September 1960”, Protocol of Accession, IIS/13, para. 3; however, this Protocol has not been accepted by Cambodia; and
- Ireland, by “30 June 1967”, Protocol of Accession, 15S/42, para. 2.

The date “April 10, 1947” and the respective dates set forth in Annex G to the General Agreement are replaced by other dates in certain waiver decisions of the CONTRACTING PARTIES under Article XXV:5:

- Australia (“in relation to products of the Federation of Rhodesia and Nyasaland”), by “20 November 1959”, Decision of 19 November 1960, 9S/46;
- Rhodesia and Nyasaland (Malawi, Zambia and Zimbabwe), by “3 December 1955”, Decision of 19 November 1960, 9S/46;
- Union of South Africa (“in relation to products of the Federation of Rhodesia and Nyasaland”), by “30 June 1960”, Decision of 19 November 1960, 9S/46; and
- Jamaica, by “1 August 1962”, Decision of 2 March 1971, 18S/33.

(3) *“in respect of duties or charges”*

These words in paragraph 4 of Article I were inserted to make it clear that the obligations therein applied not only to ordinary customs duties but also to other charges such as primage and surtaxes.⁸⁶

⁸³EPCT/174, 194; EPCT/TAC/SR.16; EPCT/TAC/PV/28, p. 14; EPCT/EC/PV/2/22, pp. 30-32.

⁸⁴Concerning base dates for margins of preference, see also discussion in the Sub-Committee on Procedures at the London session of the Preparatory Committee, EPCT/C.II/PRO/PV/8 p. 25ff.

⁸⁵L/3845, adopted 2 February 1971, 18S/183, 187, para. 13. The Panel suggested that the CONTRACTING PARTIES consider granting a waiver to Jamaica to change the base date to 1 August 1962, and prepared a draft waiver decision; see Decision at L/3503, 18S/33.

⁸⁶EPCT/TAC/PV/26, pp. 11-12.

3. Paragraph 3

Paragraph 3 corresponds to Article 16, paragraph 3 of the Havana Charter; however, where the Charter paragraph referred to Charter Article 15 (for which no counterpart exists in the General Agreement), the General Agreement paragraph refers to the use of the waiver provisions of Article XXV in the light of Article XXIX.⁸⁷ This insertion was agreed by the Working Party on “Modifications to the General Agreement” which met during the Second Session of the CONTRACTING PARTIES in September 1948 to consider updating the General Agreement to reflect the results of the Havana Conference.⁸⁸ “The working party agreed to recommend the insertion of a new paragraph in Article I in order to provide for the special position of certain countries of the Near East. It was the view of the working party that, under the proposed new paragraph of Article I, the CONTRACTING PARTIES, in taking action pursuant to Article XXV with respect to preferences among countries formerly a part of the Ottoman Empire, would be required to make a decision in accordance with the principles and requirements of Article 15 of the Havana Charter”.⁸⁹

This preference exception was exercised on the occasion of the accession of the United Arab Republic in February 1970. The Report of the Working Party on “Provisional Accession of the United Arab Republic” notes:

“... the Working Party ... decided that the preferential arrangements under the Arab League Convention should be dealt with under paragraph 3 of Article I of the General Agreement. Although the United Arab Republic was detached from the Ottoman Empire prior to 24 July 1923, paragraph 3 of Article I could be considered as applying to the United Arab Republic by analogy. ... The Working Party considered that this matter could be appropriately dealt with in the instrument of accession of the United Arab Republic since the legal requirements of a two-thirds majority contained in Article XXV:5 would be covered by the requirements of a two-thirds majority for the vote on terms of accession. The Working Party recognized that any subsequent addition of new items to the number of those enjoying preferences on the base date could be dealt with when the question arose in accordance with paragraph 3 of Article I by a further Decision of the CONTRACTING PARTIES under Article XXV:5”.⁹⁰

Accordingly, the Protocol for the Accession of the United Arab Republic refers to Article I:3.⁹¹

B. RELATIONSHIP BETWEEN ARTICLE I AND OTHER PROVISIONS OF THE GENERAL AGREEMENT

In addition to Article I, the General Agreement contains a number of other most-favoured-nation or non-discrimination clauses, relating to internal quantitative regulations (Article III:7), cinematographic films (Article IV(b)), transit of goods (Article V:5, 6), marks of origin (Article IX:1), quantitative restrictions (Article XIII:1), state trading (Article XVII:1), governmental assistance to promote the establishment of a particular industry (Article XVIII:20), and measures essential to the acquisition or distribution of products in short supply (Article XX(j)).

1. Article III

See under Article III.

2. Article VI

See under Article VI.

⁸⁷E/CONF.2/C.3/77/Rev.1 and SR.44. Article 15 of the Charter permitted authorization of new preferential agreements between two or more countries in the interest of economic development or reconstruction.

⁸⁸GATT/CP.2/22/Rev.1, adopted on 1 and 2 September 1948, II/39, 40, para. 5.

⁸⁹*Ibid.*, II/43-44, para. 25; see also Havana Reports p. 40.

⁹⁰L/1876, adopted 13 November 1962, IIS/75, 76, para. 3.

⁹¹17S/2, 3, paragraph 2(b).

3. Article IX

See under Article IX.

4. Article XIII

See under Article XIII.

C. RELATIONSHIP OF ARTICLE I TO OTHER INTERNATIONAL AGREEMENTS

During the Third Session, held at Annecy in 1949, Cuba sought a ruling that the reduction of most-favoured-nation tariff rates by the United States in the tariff negotiations conducted at that time at Annecy would be inconsistent with the provisions of a bilateral trade agreement between Cuba and the United States predating the General Agreement, which guaranteed certain percentage margins of preference. The CONTRACTING PARTIES adopted a Decision by vote on “Margins of Preference” which provided *inter alia*, that “the determination of rights and obligations between governments arising under a bilateral agreement is not a matter within the competence of the CONTRACTING PARTIES”.⁹² This Decision was subject to the following footnote.

“¹This Decision by its terms clearly refers only to the determination of the rights and obligations as between the parties to the bilateral agreement and arising from the agreement. It is, however, within the competence of the CONTRACTING PARTIES to determine whether action under such a bilateral agreement would or would not conflict with the provisions of the General Agreement”.

In a Decision of 28 November 1979 on “Action by the CONTRACTING PARTIES on the Multilateral Trade Negotiations,” the CONTRACTING PARTIES reaffirmed “their intention to ensure the unity and consistency of the GATT system” and decided, with respect to the agreements reached in the Tokyo Round:

“3. The CONTRACTING PARTIES also note that existing rights and benefits under the GATT of contracting parties not being parties to these Agreements, including those derived from Article I, are not affected by these Agreements”.⁹³

The Decision of the same date on “Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries” provides, *inter alia*, that

“1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.

“2. The provisions of paragraph 1 apply to the following:

...

“(b) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT; ...

...

“(d) Special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.”

⁹²II/11; see also draft decision and footnote in GATT/CP.3/71, statements of Cuba in GATT/CP.3/63 and GATT/CP.3/89, discussion at GATT/CP.3/SR.34-SR.38, and adoption of ruling and footnote by vote at GATT/CP.3/SR.38 p. 6-9. See also discussion of related Cuban legal claims at II/152-153 paras. 22-25.

⁹³26S/201.

See further at page 53 below concerning this Decision. See also a Secretariat Note of 1987 on “MTN Agreements and Arrangements: Special and Differential Treatment for Developing Countries”, which lists provisions in the Tokyo Round agreements providing such special and differential treatment.⁹⁴

1. Agreement on Implementation of Article VI

In November 1968, at the Twenty-fifth Session, the Director-General was asked for a ruling on whether parties to the Agreement on Implementation of Article VI of the General Agreement had a legal obligation under Article I of the General Agreement to apply the provisions of the Anti-Dumping Code in their trade with all GATT contracting parties. The Director-General replied in the affirmative; see page 30 above.⁹⁵ At the first meeting of the Committee on Anti-Dumping Practices on 15 November 1968 the representative of the European Communities stated that “the Communities maintained the position they had taken at the discussion of the same question in April 1967, i.e. that the parties were under no obligation to apply the provisions of the Code to non-signatories”.⁹⁶

2. Agreement on Interpretation and Application of Articles VI, XVI and XXIII

In 1980 the Council established a Panel to examine the complaint of India that “the United States action to levy countervailing duties on imports of dutiable products from India without applying injury criteria referred to in paragraph 6 of Article VI, while extending the benefit of such criteria to imports from some other contracting parties, is not consistent with the obligations of the United States under GATT, including the provisions of Article I thereof”. In its panel request, India, referring to the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade of 12 April 1979, maintained “that as the U.S. government has taken the obligation to apply the injury test to subsidised products imported by it, it has to apply the test unconditionally to all contracting parties of the GATT irrespective of whether the new Agreement applies between the USA and other contracting parties”.⁹⁷ The proceedings of the Panel were terminated at the request of India after resolution of the matter as a result of bilateral consultations between India and the United States.⁹⁸ The matter was again raised by India in 1982 and referred to the Committee on Subsidies and Countervailing Measures for conciliation,⁹⁹ but was not pursued further.

The Report of the Panel on “United States - Definition of Industry Concerning Wine and Grape Products”, established under the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement to examine a dispute regarding a provision of the United States countervailing duty laws, notes that “the Panel held the view that Article VI of the GATT and the corresponding Code provision should, because they permitted action of a non-m.f.n. nature otherwise prohibited by Article I, be interpreted in a narrow way”.¹⁰⁰

3. Agreement on Government Procurement

Article II of the Agreement on Government Procurement provides:

“1. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, the Parties shall provide immediately and unconditionally to the products and suppliers of other Parties offering products originating within the customs territories (including free zones) of the Parties, treatment no less favourable than: ...

“(b) that accorded to products and suppliers of any other Party.

⁹⁴MTN.GNG/NG8/W/2, dated 4 May 1987.

⁹⁵L/3149.

⁹⁶COM.AD/1.

⁹⁷L/5062.

⁹⁸28S/113.

⁹⁹SCM/20, SCM/M/11, SCM/M/Spec/7.

¹⁰⁰SCM/71, adopted on 28 April 1992, 39S/436, 447, para. 4.5.

“2. The provisions of paragraph 1 shall not apply to customs duties and charges of any kind imposed on or in connexion with importation, the method of levying such duties and charges, and other import regulations or formalities”.

However, Article III:11 of the same Agreement provides:

“... The Parties may also grant the benefits of this Agreement to suppliers in the least-developed countries which are not Parties, with respect to products originating in those countries”.

D. EXCEPTIONS AND DEROGATIONS

1. “imports of products for immediate or ultimate consumption in governmental use”

Article 8 of the US Draft Charter (the most-favoured-nation clause) included within its scope “all matters relating to internal taxation or regulation referred to in Article 9” (the national treatment clause of the US Draft Charter, which included in turn “laws and regulations governing the procurement by governmental agencies of supplies for public use other than by or for the military establishment”). The last sentence of the proposed Article 8 provided: “The principle underlying this paragraph shall also extend to the awarding by Members of governmental contracts for public works, in respect of which each Member shall accord fair and equitable treatment to the commerce of other Members”. At the London session of the Preparatory Committee it was agreed to remove governmental contracts from the scope of the most-favoured-nation and national-treatment clauses.¹⁰¹ See the material in this Index on Article XVII:2 for a more detailed discussion of this question.

The scope of the exception for government procurement was discussed in the 1952 Panel Report on “Belgian Family Allowances”, which concerned a charge levied on foreign goods purchased by public bodies; the panel found that the charge was an internal charge under Article III:2, and therefore subject to the most-favoured-nation clause of Article I. The Panel Report notes that “As regards the exception provided in paragraph 2 of Article XVII, it would appear that it referred only to the principle set forth in paragraph 1 of that Article, i.e., the obligation to make purchases in accordance with commercial considerations and did not extend to matters dealt with in Article III.”¹⁰²

See also the exceptions for government procurement provided for in Articles III:8(a) and XVII:2 of the General Agreement. See also Articles II and III:11 of the Agreement on Government Procurement.

2. Exceptions and derogations provided in other Articles of the General Agreement

(1) *Anti-dumping and countervailing duties*

See material under Article VI on the relationship between Article VI and Article I.

(2) *Frontier traffic and customs unions*

See under Article XXIV.

The Report of the Sub-Committee of the Havana Conference which examined Articles 16 and 42 of the Havana Charter (corresponding to Articles I and XXIV of the General Agreement) notes as follows: “The Sub-Committee discussed with the delegate of Italy the latter’s proposal to except the special regime existing between the Republic of Italy and the Republic of San Marino and the State of the Vatican City from the provisions of paragraph 1 of Article 16. The Sub-Committee was of the opinion that the special arrangements existing between Italy and these two territories were not contrary to the Charter”.¹⁰³

¹⁰¹London Report, p. 9, Chapter III para. A.1((d)(i); see also EPCT/30.

¹⁰²G/32, adopted on 7 November 1952, 1S/59, 60, para. 4.

¹⁰³Havana Reports, p. 48, para. 11.

3. Exceptions and derogations authorized in Protocols of Accession and in Declarations on Provisional Accession

(1) *Protocol of Provisional Application*

The Interpretative Note to Article I paragraph 1 was based on a proposal by the United States the object of which was to reserve legislation regarding preferential internal taxes until definitive acceptance of the Agreement.¹⁰⁴

(2) *Protocols of Accession*

(a) *General*

Protocols for the Accession to the General Agreement on Tariffs and Trade contain a standard provision according to which the acceding government

“... shall, upon entry into force of this Protocol pursuant to paragraph 6, become a contracting party to the General Agreement, as defined in Article XXXII thereof, and shall apply to contracting parties provisionally and subject to this Protocol:

“(a) Parts I, III and IV of the General Agreement, and

“(b) Part II of the General Agreement to the fullest extent not inconsistent with its legislation existing on the date of this Protocol.

“The obligations incorporated in paragraph 1 of Article I by reference to Article III ... of the General Agreement shall be considered as falling within Part II for the purpose of this paragraph”.¹⁰⁵

(b) *Particular contracting parties*

Argentina - Preferences accorded to Bolivia, Brazil, Chile, Paraguay, Peru, Uruguay (Declaration on Provisional Accession, para.1(d));¹⁰⁶ however, on acceding under Article XXXIII in 1967 the Government of Argentina advised that tariff preferences were no longer granted, the beneficiaries now being members of the Latin American Free Trade Area.¹⁰⁷

Egypt - Preferences accorded to Jordan, Syria, Iraq, Lebanon, Libya, Saudi Arabia, and Yemen (Declaration on Provisional Accession and Protocol of Accession); however, see under Article I:3 above at page 44.¹⁰⁸

Germany - Provision in Decision on Accession that “notwithstanding the provisions of Article I ... the accession of the Government of the Federal Republic of Germany will not require any modification in the present arrangements for, or status of, intra-German trade in goods originating within Germany”.¹⁰⁹

Hungary - Maintenance of existing trading relations with the countries enumerated in Annex A to its protocol of accession.¹¹⁰ In a communication dated 5 May 1977, Hungary stated that, with effect from 1 July 1977, it would add the Republic of Cuba to the list of countries enumerated in Annex A, while respecting the obligations that it had entered into as set forth in the relevant paragraphs of the Protocol.¹¹¹

¹⁰⁴Proposal at EPCT/W/343; discussion at EPCT/TAC/PV/9, EPCT/TAC/PV/10, EPCT/TAC/PV/26, p. 9-11 (referring to preferential internal tax on processing of coconut oil from the Philippines, later notified as measure under the Protocol of Provisional Application; see L/309/Add.2).

¹⁰⁵E.g. paragraphs 1 in the Protocols for the Accession of Bolivia (L/6562), Costa Rica (L/6626), El Salvador (L/6795), Tunisia (L/6656), Venezuela (L/6717), 37S/5, 7, 27, 41, 72.

¹⁰⁶9S/12.

¹⁰⁷15S/99, para. 18.

¹⁰⁸11S/47, 11S/76, 17S/2.

¹⁰⁹II/34.

¹¹⁰20S/3, para. 3.

¹¹¹24S/4.

Japan - Provision that “so long as the status of any island referred to in Article 3 of the Treaty of Peace with Japan, of 8 September 1951, remains provisional under the terms of that treaty, the provisions of the General Agreement shall neither apply to such island nor require the modification of such treatment as is presently accorded by Japan to such island”.¹¹²

Portugal - maintenance of preferential treatment between customs territories in respect of which Portugal applies the General Agreement, provided that duties and other restrictive regulations of commerce are eliminated on substantially all such trade.¹¹³

Spain - Maintenance of preferential treatment of trade between customs territories listed in Annex B of accession protocol, provided that such trade is duty-free.¹¹⁴

Uruguay - Preferences accorded to Paraguay (Annex Protocol, para. 1(d));¹¹⁵ These preferences terminated as of 31 December 1961 when the Uruguayan-Paraguay Treaty was terminated.¹¹⁶

4. Waivers granted under the provisions of paragraph 5 of Article XXV

A table under Article XXV lists all waiver decisions by the CONTRACTING PARTIES. See also the discussion under Article XXV:5 concerning procedures for waivers to Article I.

(1) *Decision on “Generalized System of Preferences” of 25 June 1971*

This Decision¹¹⁷ waived the provisions of Article I for a period of ten years. Although it did not refer to paragraph 5 of Article XXV, this Decision was made on the basis of a Communication from the prospective preference-giving contracting parties (C/W/178) applying for a waiver in accordance with Article XXV:5. In the Council discussion regarding this Decision, it was pointed out that

- (i) the waiver made possible the implementation of a system of generalized non-reciprocal and non-discriminatory preferences as agreed at the Second UNCTAD (1968);
- (ii) the waiver did not specify the determination of the beneficiary countries and covered general guidelines for a decision on beneficiary countries presented by preference-giving countries in the UNCTAD, “according to which donor countries would in general base themselves on the principle of self-election”;
- (iii) the waiver is without prejudice to any Article of the General Agreement other than Article I; rights under Article XXIII are fully preserved;
- (iv) an amendment proposed to add the word “developed” in operative paragraph (a) of the waiver so as to permit preferences to developing countries “without according such treatment to like products of other *developed* contracting parties ...” was not accepted.¹¹⁸

The 1971 waiver was not renewed in the light of the Decision of 28 November 1979 on “Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries” (“Enabling Clause”), which authorizes “preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences”. See section 0 below.

The 1972 Working Party Report on the “Danish Temporary Import Surcharge” provides that “Without prejudice to the legal issues involved, the Working Party noted that as from the introduction of the Danish general preference scheme on 1 January 1972, products included in that scheme would be exempted from the surcharge

¹¹²4S/7, para. 1(d).

¹¹³11S/20, 21, para. 3.

¹¹⁴12S/27, 28, paras. 3-4.

¹¹⁵1/79.

¹¹⁶L/1845.

¹¹⁷L/3545, 18S/24.

¹¹⁸C/M/69.

when imported from members of the Group of Seventy-Seven. Several members of the Working Party welcomed this decision of the Danish Government noting that this had been one of the recommendations of the Group of Three. Other members expressed concern that the exemption did not extend to all developing countries. Some other members said that the discrimination created by these exemptions gave their delegations cause for concern".¹¹⁹

(2) Decision on "Trade negotiations among developing countries" of 26 November 1971

This Decision¹²⁰ waived Article I:1 to the extent necessary to permit each contracting party participating in the arrangements set out in the Protocol relating to Trade Negotiations among Developing Countries¹²¹ to accord preferential treatment as provided in the Protocol with respect to products originating in other parties to the Protocol. While the Decision contains no reference to paragraph 5 of Article XXV, the Chairman of the CONTRACTING PARTIES noted that there was no formal request for a ballot and therefore concluded that the conditions for the grant of a waiver under paragraph 5 of Article XXV had been met and that the Decision had been adopted in accordance with the requirements of that paragraph.¹²²

The Chairman of the Contact Group put on record a statement by the countries participating in the negotiations that the Protocol would be open for accession to all developing countries and that, according to the participating countries, paragraph 14 of the Protocol would enable them to give, on a case by case basis, sympathetic consideration to a request from a least developed among developing countries to accede to the Protocol without negotiations; and secondly, that the Committee of Participating Countries to be established under paragraph 4 of the Protocol would study, examine and consider, on a case by case basis, the question of accession of developing dependent territories as and when a request for accession was received from any developing dependent territory.¹²³

In reply to a question, the Director-General explained that a waiver from the provisions of paragraph 1 of Article I related solely to the obligation to grant most-favoured-nation treatment in respect of the matters expressly referred to in that paragraph and in respect of which there was no obligation under other provisions of the General Agreement to grant non-discriminatory or most-favoured-nation treatment. It was clear from the text of paragraph (a) of the Decision that the stipulations contained in other provisions of the General Agreement were not affected.¹²⁴ The representative of India stated that the States which had participated in the negotiations had taken note of the statement by the Director-General and would consult with the CONTRACTING PARTIES if they needed any further legal coverage.

GSP Schemes Notified to the GATT 1947

Australia	L/3982+Adds., L/7205+Adds.
Canada	L/4027+Adds.
Hungary	L/4106+Adds.
Japan	L/3559; L/3691; L/3876; L/4397; L/4531+Adds.; L/7035
New Zealand	L/3693; L/4366+Adds.
Norway	L/3570; L/4242+Adds.; L/7042+Adds.
Switzerland	L/3667; L/4020+Adds.
United States	L/4299+Adds.; L/5153+Adds.; L/7072+Adds.
European Communities	L/3550; L/3671; L/3954; L/4000; L/4161; L/4282; L/4468; L/4624; L/4804+Adds.; L/5116+Adds.; L/7376

* GSP schemes that have been replaced by the EC's due to accession to the EC, or where the contracting party no longer exists (Czechoslovak Republic) do not appear. See earlier editions of this work for document references.

¹¹⁹L/3648, adopted on 12 January 1972, 19S/120, 126, 129 (identical text in paras. 22 and 41).

¹²⁰18S/26.

¹²¹L/3643 and Add.1, 18S/11.

¹²²SR.27/12.

¹²³SR.27/6.

¹²⁴SR.27/12.

The Protocol relating to Trade Negotiations among Developing Countries entered into force 11 February 1973.¹²⁵ As of June 1993, the Protocol had been ratified by fifteen developing countries: Bangladesh, Brazil, Chile, Egypt, India, Israel, Mexico, Pakistan, Peru, Republic of Korea, Romania, Tunisia, Turkey, Uruguay and Yugoslavia; Paraguay had signed the Protocol *ad referendum* and the Philippines had signed but not ratified the Protocol.¹²⁶ India withdrew from the Protocol effective 29 March 1993.¹²⁷

Referring to the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries ("Enabling Clause") referred to below, the Committee of Participating Countries stated in its Seventh Annual Report to the CONTRACTING PARTIES: "There is thus a standing legal basis resulting from the Tokyo Round for the Protocol Relating to Trade Negotiations Among Developing Countries".¹²⁸ The annual reports of the Committee have stated: "The Protocol is applied under the provisions of the Enabling Clause, and in particular under the terms of its paragraph 2(c)".¹²⁹ See also the references to preferential arrangements under the Enabling Clause, below at page 57.

(3) *Waivers granted to individual contracting parties*

See the table of waivers under Article XXV:5.

5. Preferential arrangements authorized by Decisions of the CONTRACTING PARTIES without reference to paragraph 5 of Article XXV

(1) *First Agreement on Trade Negotiations Among Developing Member Countries of the Economic and Social Commission for Asia and the Pacific (Bangkok Agreement)*

The Decision of 14 March 1978 on "First Agreement on Trade Negotiations Among Developing Member Countries of the Economic and Social Commission for Asia and the Pacific (Bangkok Agreement)"¹³⁰ was drafted by the Working Party which examined the provisions of this agreement, concluded between Bangladesh, India, Laos, Philippines, Republic of Korea, Sri Lanka and Thailand. The Report of the Working Party records that the spokesman for the parties to the Agreement stated

"that Articles I, XXIV and XXXVII of the General Agreement all had equal force. In the Bangkok Agreement, the participating States were fulfilling the commitments and undertakings accepted by developing contracting parties in Part IV of the General Agreement in a manner which was consistent with their individual development, financial and trade needs ...".

In the view of the participating States, a waiver of GATT obligations under Article XXV of the General Agreement was not necessary for the implementation of the Bangkok Agreement.¹³¹ In the view of the other members of the Working Party

"the Bangkok Agreement which was not aimed at the establishment of a customs union or a free-trade area in accordance with Article XXIV of the General Agreement, introduced an element of discrimination against traditional suppliers in a way which could affect their trade. As, in their view, the Bangkok Agreement was not covered by Article I of the General Agreement and Part IV did not override other Parts of the General Agreement, a waiver or other appropriate decision by the CONTRACTING PARTIES seemed called for in this case".¹³²

¹²⁵Status of Legal Instruments, p. 15-1.1.

¹²⁶See also Decisions on Accession to the Protocol by Bangladesh, 23S/157 (entry into force: 29 March 1977); Paraguay, 23S/154 (not yet in force); Romania, 25S/174 (entry into force: 15 September 1978). See also annual reports of the Committee of Participating Countries at 21S/126, 22S/73, 23S/147, 24S/154, 25S/163, 26S/337, 27S/172, 28S/129, 29S/155, 30S/203, 31S/291, 32S/191, 33S/224, 34S/218, 35S/409, 36S/475, 37S/325, 38S/114.

¹²⁷Let/1790, dated 15 October 1992.

¹²⁸27S/172.

¹²⁹See, e.g., L/7106, CPC/W/161.

¹³⁰25S/6.

¹³¹L/4635, adopted 14 March 1978, 25S/109, III, para. 7.

¹³²*Ibid.*, 25S/110-III, para. 5.

The US delegate “stated his delegation’s understanding that the draft Decision was intended to meet the waiver requirements of Article XXV:5”.¹³³

The Report of the Working Party states: “It was understood that the Agreement would in no way be considered as affecting the legal rights of contracting parties under the General Agreement”.¹³⁴

The Standing Committee of the Bangkok Agreement has submitted biennial reports to the Committee on Trade and Development “having regard to paragraph 2(c) of the CONTRACTING PARTIES Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries”.¹³⁵ See also the references to preferential arrangements under the Enabling Clause, below at page 57.

(2) *Agreement on the Association of South-East Asian Nations (ASEAN) Preferential Trading Arrangements*

The Decision of 29 January 1979 on “Agreement on ASEAN Preferential Trading Arrangements”¹³⁶ was drafted by a Working Party which examined the provisions of this Agreement between Indonesia, Malaysia, the Philippines, Singapore and Thailand. The Report of the Working Party notes that the parties to the Agreement were not claiming that it constituted a free-trade area or an interim agreement leading to the formation of a free-trade area, and also provides:

“A number of members of the Working Party stated their belief that some form of GATT cover should be provided for the Agreement, since in their view it was not fully consistent with the provisions of the General Agreement. While some of these members believed that an Article XXV:5 waiver would be most appropriate, they were prepared to recommend a decision by the CONTRACTING PARTIES. The spokesman for the parties to the Agreement stated that in the view of the ASEAN countries, the Agreement followed the letter and spirit of the provisions of the General Agreement, especially those in Part IV. However, in the light of a previous developments in GATT with regard to the examination of economic groupings among developing countries, the ASEAN countries would be prepared to accept a decision”.¹³⁷

“The United States delegate stated his delegation’s understanding that the Draft Decision was intended to meet the waiver requirements of Article XXV:5 ... It was also understood that the Agreement would in no way be considered as affecting the legal rights of contracting parties under the General Agreement”.¹³⁸

Reports on trade co-operation among ASEAN member states have been submitted and examined under the Enabling Clause; see also the references at page 57 below to preferential arrangements between developing countries under the Enabling Clause.¹³⁹ The ASEAN Common Effective Preferential Tariff Scheme (CEPT) and Framework Agreement on Enhancing ASEAN Economic Cooperation were notified under the Enabling Clause (see page 57).

(3) *Trade Expansion and Economic Co-operation Agreement*

A Decision of 14 November 1968 on the “Trade Arrangement between India, the United Arab Republic and Yugoslavia” provided that the three participating contracting parties may implement the Trade Expansion and Economic Co-operation Agreement between them notwithstanding the provisions of Article I:1, subject to certain

¹³³*Ibid.* 25S/113, para. 18.

¹³⁴Para. 21.

¹³⁵L/5243 and COM.TD/112; report and review in 1990, L/6718 and L/6744. Report to the Committee on Trade and Development in 1982 and Committee review,

¹³⁶L/4768, 26S/224.

¹³⁷L/4735, 26S/321, 326, para. 19.

¹³⁸*Ibid.*, paras. 21, 23.

¹³⁹The most recent such report is L/7111.

conditions and procedures including a review at the Twenty-sixth Session.¹⁴⁰ This Decision was renewed successively through 1983.¹⁴¹

The Report of the Working Party in 1968 which examined this agreement and drafted the Decision notes that several representatives considered that “Part IV ... did not override the obligations of other parts of the General Agreement. In their view the Tripartite Agreement was inconsistent with the basic most-favoured-nation provision of Article I of GATT and accordingly some decision of the CONTRACTING PARTIES was required”.¹⁴² The US representative said “that in the view of his Government the draft decision ... was intended to meet the requirements of Article XXV:5 of the General Agreement”.¹⁴³ “The representatives of the three countries reiterated that the Agreement was in pursuance of their obligations under Part IV and consistent with the spirit of the General Agreement”.¹⁴⁴

The different views on the compatibility of the Agreement with the General Agreement were maintained in the Working Party which carried out the review of this Decision¹⁴⁵ and in a 1973 Working Party reviewing the renewal Decision of 1970, in which several members stated that “in their view the Agreement was in full conformity with the provisions and spirit of the General Agreement, in particular Article XXXVII. ... The representative of the participating States ... could not agree that the Tripartite Agreement was inconsistent with the GATT even though it involved a departure from Article I”.¹⁴⁶

See also the references to preferential agreements under the “Enabling Clause” below at page 57.

6. Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (“Enabling Clause”)

The Decision of the CONTRACTING PARTIES of 28 November 1979¹⁴⁷, insofar as it provides for departures from Article I of the General Agreement, provides as follows.

“1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries¹, without according such treatment to other contracting parties.

“2. The provisions of paragraph 1 apply to the following:²

“(a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,³

“(b) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;

“(c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another;

“(d) Special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.

¹⁴⁰16S/17.

¹⁴¹Decision of 20 February 1970, 17S/21, expiry 31 March 1973; extended by Decision of 22 March 1973, 20S/23, until the 29th Session; Decision of 13 November 1973, 20S/23, expiry 31 March 1978; Decision of 14 March 1978, 25S/8, expiry 31 March 1983.

¹⁴²L/3032, adopted on 14 November 1968, 16S/83, 87, para. 12.

¹⁴³*Ibid.*, 16S/88, para. 16.

¹⁴⁴*Ibid.*, 16S/87, para. 13.

¹⁴⁵L/3341, adopted on 13 February 1970, 17S/138, 143, para. 14.

¹⁴⁶L/3950, adopted on 7 November 1973, 20S/224, 227-228, paras. 12-13.

¹⁴⁷26S/203.

- “3. Any differential and more favourable treatment provided under this clause:
- “(a) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;
 - “(b) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;
 - “(c) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.
- “4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:⁴
- “(a) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;
 - “(b) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties”.

The footnotes 1 - 4 state:

¹The words ‘developing countries’ as used in this text are to be understood to refer also to developing territories.

²It would remain open for the CONTRACTING PARTIES to consider on an *ad hoc* basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph.

³As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of ‘generalized non-reciprocal and non-discriminatory preferences beneficial to the developing countries’ (BISD 18S/24).

⁴Nothing in these provisions shall affect the rights of contracting parties under the General Agreement”.

(1) *Scope*

The Report of the Working Party on “United States Caribbean Basin Economic Recovery Act (CBERA)” notes that at “the request of the Working Party, the representative of the secretariat described the secretariat’s understanding of the meaning of footnote 2 of paragraph 2 of the Enabling Clause. In brief, the Enabling Clause provided authority or cover only for the kinds of preferential treatment described therein. Footnote 2 of paragraph 2 of the Enabling Clause recognized that there could be other situations involving preferential treatment not falling within the scope of paragraph 2 which the CONTRACTING PARTIES might wish to cover under the GATT provisions for joint action. The provisions in question could not be those of Part IV, including Article XXXVIII thereof, as these did not provide authority for preferential treatment. The joint action envisaged had to be in terms of paragraph 5 of Article XXV irrespective of whether this was specifically mentioned or not”.¹⁴⁸

¹⁴⁸L/5708, adopted on 6-8 and 20 November 1984, 31S/180, 189-190, para. 31.

Regarding the application of the Enabling Clause to preferences extended to least-developed countries and not to less-developed countries generally, see the material from the Panel Report on “United States - Customs User Fee” above at page 32.

The 1990 Report of the Working Party on “Accession of Tunisia” records the request of a member, referring to Tunisia’s preferential agreements, for “information on the meaning and method of implementation of the ‘principle of priority supply’, in the context of non-tariff import trade preferences ... The representative of Tunisia said that the principle of priority supply which appeared in certain trade agreements with the Maghreb and Arab countries was not a specific trade measure but rather a political and moral commitment to seek to increase their mutual trade. In his view, the principle of priority supply was in conformity with Part IV of the General Agreement and paragraph 2(c) of the Enabling Clause Decision of November 1979 which had authorized developing countries to exchange tariff and non-tariff measure preferences in the context of regional or global arrangements”.¹⁴⁹

The 1992 Panel Report on “United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil” examined arguments of Brazil concerning the scope of the exception to Article I under the Enabling Clause, and its application to Section 331 of the Tariff Act of 1930, which provided certain treatment in the case of revocation of countervailing duty orders:

“... the United States accords duty-free status under a variety of laws only to products of a particular origin, the most important being the law establishing the GSP. The GSP programme of the United States, both in its nature and in its design, accords duty-free status to only certain products originating in only certain developing countries. The Panel noted that, together with the grant of a tariff advantage to the designated beneficiary countries under this programme, Section 331 of the Trade Act of 1974 accords a *non-tariff advantage* to the same beneficiary countries in the form of the automatic backdating of countervailing duty revocation orders. The Panel considered that the grant of this non-tariff advantage under Section 331 of the 1974 Act to duty-free products originating in a country beneficiary of the GSP programme, which advantage is denied to dutiable products originating in the territory of a Subsidies Agreement signatory, is inconsistent with the most-favoured-nation provision of Article I:1 of the General Agreement.

“The Panel then examined whether the CONTRACTING PARTIES had taken any action which would permit the United States to accord the non-tariff advantage of Section 331 of the Trade Act of 1974 to duty-free products emanating from countries beneficiaries of the GSP programme, without unconditionally and immediately according this same advantage to dutiable products originating in the territories of signatories of the Subsidies Agreement. In this regard, the Panel noted that ... the ‘Enabling Clause’ permits, in paragraph 2(a) thereof, ‘preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences ...’, notwithstanding the provisions of Article I. It was clear that the Enabling Clause expressly limits the preferential treatment accorded by developed contracting parties in favour of developing contracting parties under the Generalized System of Preferences to tariff preferences only.

“The Panel referred in this context to a discussion of this issue by an earlier panel concerned with the customs user fee of the United States.¹⁵⁰ The panel in that case considered the claim that exemption from a merchandise processing fee granted to the beneficiaries of the Caribbean Basin Economic Recovery Act was not authorized by the waiver granting the United States authority to extend duty-free treatment to these beneficiaries, and that it was also not authorized by the Enabling Clause. That panel noted that no answer in opposition to this legal claim was given and that it was not aware of any that could be given. However, in view of the fact that this claim was raised by third parties and not by the parties to the dispute, this earlier panel did not consider it appropriate to make a formal finding on the issue.

“Accordingly, the Panel found that there is no decision of the CONTRACTING PARTIES justifying the given inconsistency with Article I:1 of the non-tariff advantage accorded to duty-free products originating in

¹⁴⁹L/6277, adopted on 12 December 1990, 37S/30, 39, para. 33.

¹⁵⁰The footnote to this sentence refers to the Panel report on “United States - Customs User Fee,” adopted on 2 February 1988, BISD 35S/245, 290.

countries beneficiaries of the United States GSP programme in the backdating of the effect of the revocation of countervailing duty orders".¹⁵¹

(2) Preference schemes

The 1980 Report of the Committee on Trade and Development refers to a statement from a representative of a developing country that the preferential treatment of certain textile imports under the European Communities' GSP scheme for 1980 had not been extended to all beneficiaries of the Communities' GSP scheme and amounted to discrimination inconsistent with the spirit of the GSP. The representative of the European Communities replied that in view of the increasingly serious difficulties in the textiles sector, the Communities had to limit their zero duty treatment for textile imports under the GSP to countries which were either a signatory of the MFA or had entered into a commitment to abide by obligations similar to those under that Arrangement.¹⁵²

The July 1992 session of the Committee on Trade and Development discussed the issue of extension of GSP treatment to East European countries and republics of the former USSR; however, no consensus has yet been reached on this issue.¹⁵³

See also the section on "graduation" below.

Concerning the Lomé Convention, see Article XXIV.

(3) Preferential arrangements notified under the Enabling Clause

When an agreement is notified under the Enabling Clause, it is inscribed on the agenda of the Committee on Trade and Development (CTD). Subsequent actions of the CTD may include "noting" the agreement, requesting additional information, establishing a working party and adopting its reports, and reviewing reports made by members on developments under the agreement. The following trade arrangements had been notified under the Enabling Clause as of March 1994:

- 1971 Protocol relating to Trade Negotiations among Developing Countries¹⁵⁴
- 1980 Montevideo Treaty establishing the Latin American Integration Association (ALADI)¹⁵⁵
 - ALADI bilateral economic complementarity agreements¹⁵⁶
 - Southern Common Market Agreement (MERCOSUR)¹⁵⁷
- Association of South-East Asian Nations (ASEAN)
 - Asian Trade Expansion Programme (1975 Bangkok Agreement)¹⁵⁸

¹⁵¹DS18/R, adopted on 19 June 1992, 39S/128, 152-153, paras. 6.14-6.17.

¹⁵²L/5074, adopted 26 November 1980, 27S/48, 51, paras. 10-11.

¹⁵³COM.TD/132, L/7124.

¹⁵⁴See Seventh Report of the Committee at 27S/172; activities in framework of Protocol are annually reviewed by CTD. See further at page 51 above.

¹⁵⁵Successor to the 1960 Montevideo Treaty for the establishment of LAFTA. Members: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela. Notification in 1982 (L/5342, C/M/144) reviewed by CTD (COM.TD/112); reports in 1984 (L/5859) reviewed by CTD (COM.TD/118); 1985 (COM.TD/W/423) reviewed by CTD (COM.TD/120); 1987 (L/6158+Add.1) supplemented in 1988 (L/6158/Add.1, COM.TD/W/469) reviewed by CTD in 1987, 1988, 1989 (COM.TD/126, L/6241, L/6418, COM.TD/129); 1989 (L/6531, reviewed by CTD (L/6605); 1991 (L/6946).

¹⁵⁶L/5689, L/6158+Add.1, COM.TD/W/469, L/6531, L/6946, discussed at COM.TD/127, COM.TD/128, L/6418 (35S/31, 34).

¹⁵⁷Members: Argentina, Brazil, Paraguay and Uruguay. Notified 1992, L/6985+Add.1, L/7044; see also COM.TD/W/496, COM.TD/W/497. Working party established on 28 May 1993 under the Committee on Trade and Development: terms of reference at L/7373, circulation of text in L/7370 and L/7370/Add.1, notification of implementation of common external tariff from 1 January 1995 in L/7615, questions and replies in L/7540.

¹⁵⁸Authorized initially through Decision of 14 March 1978; reports submitted under Enabling Clause in 1982 (L/5243) reviewed by CTD (COM.TD/112); 1990 (L/6718) reviewed by CTD (L/6744, 37S/76).

- 1978 Agreement on ASEAN Preferential Trading Arrangements¹⁵⁹
- Common Effective Preferential Tariff Scheme (CEPT) for the ASEAN Free Trade Area and Framework Agreement on Enhancing ASEAN Economic Cooperation¹⁶⁰
- 1980 South Pacific Regional Trade and Economic Cooperation Agreement (SPARTECA)¹⁶¹
- 1982 Unified Economic Agreement among member states of the Gulf Cooperation Council¹⁶²
- 1987 Cartagena Agreement (Andean Group) on sub-regional trade liberalization and adoption of a common external tariff¹⁶³
- 1989 Global System of Trade Preferences Among Developing Countries (GSTP)¹⁶⁴
- 1991 Trade Agreement between Thailand and the Lao People's Democratic Republic¹⁶⁵
- 1991 Additional Protocol on Preferential Tariffs negotiated among members of the Organization for Economic Cooperation¹⁶⁶

In addition, as noted above, the Protocol relating to Trade Negotiations among Developing Countries and the 1967 Trade Expansion and Co-operation Agreement ("Tripartite Agreement") between Egypt, India and Yugoslavia, both of which predated the Enabling Clause, have since 1979 been treated as having a basis in the Enabling Clause.

The 1989 Report of the Committee on Trade and Development records that in response to a question in the Committee on Trade and Development regarding whether the CONTRACTING PARTIES were expected to approve the GSTP, which had been notified under the Enabling Clause,

"a representative of the Secretariat said that the Committee has not established detailed procedures for the examination of arrangements which were notified under the Enabling Clause. The Committee was given from the CONTRACTING PARTIES in 1980 the responsibility for supervising the operation of the Enabling Clause. Under this mandate the Committee had so far received a limited number of notifications on arrangements concluded in accordance with paragraph 2(c) of the Enabling Clause. The practice of the Committee so far had been to take note of these arrangements after having duly examined them and completed such examination. On that basis the Committee reported statements made in regard

¹⁵⁹Authorized initially by Decision of 29 January 1979 (L/4768, 26S/224). Members of ASEAN: Indonesia, Malaysia, Philippines, Singapore and Thailand (Brunei Darussalam joined in 1984). Notification under Enabling Clause in 1982 (L/5243), reviewed by CTD (COM.TD/112); report (L/5455) reviewed by CTD (COM.TD/114); notification in 1989 (L/6569) reviewed by CTD (L/6605, 36S/49, 55); 1990 (L/6718) reviewed by CTD (L/6744, 37S/76).

¹⁶⁰Members: Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore and Thailand. Notified in L/7111; supplements the 1978 Agreement on ASEAN Preferential Trading Arrangements.

¹⁶¹Members: Australia and New Zealand, and Cook Islands, Fiji, Kiribati, Niue, Papua New Guinea, Solomon Islands, Tonga, Tuvalu and Western Samoa; extension to Nauru and Vanuatu by New Zealand notified 1982.. Notified at L/5100, L/5488; Council decision 26 November 1971 to require submission of reports by Australia and New Zealand in accordance with procedure for the examination of biennial reports on regional agreements, C/M/148, p. 12.

¹⁶²Members: Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and United Arab Emirates. See L/5676, L/5735.

¹⁶³Members: Bolivia, Colombia, Ecuador, Peru and Venezuela. The 1987 Cartagena Agreement superseded the 1969 Cartagena Agreement which established the Andean Group, concluded in the context of the 1960 Treaty of Montevideo establishing the Latin American Free Trade Association (LAFTA). In 1988, the Cartagena Agreement became independent as regards aspects relating to the Montevideo Treaty which had expired. The Andean Group originally was composed of Bolivia, Chile, Colombia, Ecuador and Peru. Chile withdrew from the Treaty in October 1976 and Venezuela acceded in 1973. Agreement notified 1990 (L/6737), noted by CTD (L/6744, 37S/76-77); further notification 1991 (L/6841) reviewed by CTD (COM.TD/131); notification 1992 (L/7088, L/7089).

¹⁶⁴Notified 1989 (L/6564 + Add.1); reviewed by CTD in 1989 (L/6605, 36S/55-58, paras. 22-28, 30) and 1990 (COM.TD/130).

¹⁶⁵Notified under Enabling Clause, L/6947.

¹⁶⁶Members: original: Iran, Pakistan and Turkey; subsequent: Azerbaijan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan. Notified 1992 (L/7047).

to such arrangements and any action taken in relation to them in its annual reports to the CONTRACTING PARTIES".¹⁶⁷

During 1992, there were extensive discussions in the Council and the Committee on whether the MERCOSUR Agreement should be notified and examined under the Enabling Clause or under Article XXIV. This agreement was notified under the Enabling Clause and the Committee established a working party with the following terms of reference:

"To examine the Southern Common Market Agreement (MERCOSUR) in the light of the relevant provisions of the Enabling Clause and of the General Agreement, including Article XXIV and to transmit a report and recommendations to the Committee for submission to the CONTRACTING PARTIES, with a copy of the report transmitted as well to the Council. The examination in the Working Party will be based on a complete notification and on written questions and answers."¹⁶⁸

(4) "Graduation"

The question of the compatibility of "graduation" with the Enabling Clause was discussed in 1981-82 in the Committee on Trade and Development and the Council.¹⁶⁹

At the Fifty-eighth Session of the Committee on Trade and Development, one representative stated that in the view of her authorities "the Enabling Clause had provided a useful mechanism for permitting temporary departures from the most-favoured-nation principle, and this had been achieved with a minimum of damage to the integrity of the General Agreement. However, this would continue to be the case only if the use of preferential treatment was gradually phased out. Contracting parties should give high priority to ensuring a timely transition to fuller participation in the framework of rights and obligations under the General Agreement. The Enabling Clause provided the legal basis for GSP programmes and the GSP had offered an opportunity for developing countries to expand and diversify their exports to the developed countries. ... She said that the guidelines provided in paragraph 3 of the Enabling Clause were important, and particularly paragraph 3(c), which indicated that special and differential treatment should be provided on a dynamic basis, taking into account changes in development levels and the development, financial and trade needs of developing countries. ... She noted that paragraph 7 required differentiation between developing countries beyond that envisaged for the least-developed countries. In the light of the economic progress made by some countries there should be a greater degree of differentiation among developing countries in regard to access to preferential treatment and to the degree of reciprocity required in negotiations".¹⁷⁰ "In regard to the provisions of paragraph 7 of the Enabling Clause, some representatives said that this paragraph did not provide the basis for discrimination among developing countries. ... Another representative noted that the decision to participate more fully in the GATT system of obligations was an autonomous decision to be taken in terms of a country's own judgment of its development, trade and financial needs".¹⁷¹

During the review of the implementation of Part IV and of the operation of the Enabling Clause at the Sixty-third Session of the Committee on Trade and Development on 19 April 1988, the representative of Brazil stated that "although preferential concessions constituted a unilateral act of the donor country the exclusion of countries from GSP was *per se* a discrimination which was not based on the agreed principles some countries were clearly moving away from the observance of the basic principles set out in the Decision of the CONTRACTING PARTIES of 25 June 1971 and of 28 November 1979 concerning the granting of preferential treatment to products originating in developing countries. ... developed contracting parties acting individually had been authorized to grant such a preferential treatment provided that the corresponding schemes were of a generalized, non-discriminatory and non-reciprocal nature. The fact that such schemes were of a voluntary character and did not constitute a binding obligation for the preference-giving countries did not in his view give

¹⁶⁷L/6605, adopted 4 December 1989, 36S/49, 57, para. 25.

¹⁶⁸L/7029 (request); L/7373 (WP terms of reference) see Council discussion in C/M/202, C/M/223, C/M/226, C/M/247, C/M/249, C/M/254, C/M/255, C/M/258, C/M/259, C/M/260; see discussion in Committee on Trade and Development, COM.TD/132, L/7124; SR.48. See also documents listed under MERCOSUR above.

¹⁶⁹C/M/152.

¹⁷⁰L/5913, adopted 28 November 1985, 32S/21, 32-33, para. 34.

¹⁷¹*Ibid.*, 32S/33, para. 36.

them the right to ignore the legal framework under which they had been authorized to implement such schemes".¹⁷²

See also above under "Preference schemes".

7. Coexistence of the GATT 1947 and the WTO Agreement

On 8 December 1994, the Preparatory Committee for the WTO, meeting on the occasion of the Implementation Conference, adopted a Decision on "Coexistence of the General Agreement on Tariffs and Trade 1947 and the World Trade Organization". The CONTRACTING PARTIES meeting in Special Session on the same date also adopted this decision, which provides *inter alia*:

"The CONTRACTING PARTIES to the General Agreement on Tariffs and Trade (hereinafter referred to as 'GATT 1947'),

"Noting that not all contracting parties to the GATT 1947 meeting the conditions for original membership in the World Trade Organization ... will be able to accept the Marrakesh Agreement Establishing the WTO ... as of its date of entry into force, and that the stability of multilateral trade relations would therefore be furthered if the GATT 1947 and the WTO Agreement were to co-exist for a limited period of time;

"Considering that, during that period of co-existence, a contracting party which has become a Member of the WTO should not be under a legal obligation to extend the benefits accruing solely under the WTO Agreement to contracting parties that have not yet become WTO Members and should have the right to act in accordance with the WTO Agreement notwithstanding its obligations under the GATT 1947; ...

"Decide as follows:

"1. The contracting parties that are Members of the WTO may, notwithstanding the provisions of the GATT 1947,

"(a) accord to products originating in or destined for a Member of the WTO the benefits to be accorded to such products solely as a result of concessions, commitments or other obligations assumed under the WTO Agreement without according such benefits to products originating in or destined for a contracting party that has not yet become a Member of the WTO; and

"(b) maintain or adopt any measure consistent with the provisions of the WTO Agreement."¹⁷³

Concerning the transition to the WTO, see further in the chapter on Institutions and Procedure.

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

Article I of the General Agreement corresponds to Article 16 of the Havana Charter, Article 8 of the US Draft, Article 14 in the London and New York Drafts, and Article 16 in the Geneva Draft Charter. Paragraph 1 is modelled on the standard League of Nations most-favoured-nation clause.¹⁷⁴ References to

¹⁷²COM.TD/127, p. 5.

¹⁷³PC/12, L/7583, preamble and para. 1.

¹⁷⁴London Report, p. 9. See also EPCT/C.II/W/10 (Note by the Preparatory Committee Secretariat comparing the League of Nations clause with Article 8:1 of the US Draft Charter).

“international transfer of payments” and “internal taxes” were introduced into the standard clause by the United States in the US Draft.¹⁷⁵

Article 8 of the US Draft Charter included both a general most-favoured-nation clause and an exemption therefrom of certain preferences in the rate of ordinary import customs duties. The margin of preference could not be increased above the level existing on 1 July 1946, and would be subject to negotiations for its elimination.¹⁷⁶ The London Draft Charter provided an m.f.n. exemption for (1) preferences in force exclusively between territories in respect of which there existed on 1 July 1939 common sovereignty or relations of protection or suzerainty; (2) Imperial preferences; (3) U.S.-Cuban preferences; and (4) preferences in force on 1 July 1946 exclusively between neighbouring countries. The margin of preference could not exceed the level remaining after negotiations which were to be conducted to reduce tariffs and preferences. All negotiated reductions in m.f.n. tariffs would operate automatically to reduce or eliminate margins of preference.¹⁷⁷ The Geneva Draft Charter limited the maximum margin of preference to the maximum margin permitted under the General Agreement, or, if not thus provided for, the margin existing on 10 April 1947 or any earlier base date established for GATT negotiations; it was at this point that the Annexes took the form that they have in the General Agreement.¹⁷⁸ At Havana, the Charter was amended to provide for additional groups of preferences; these preferences appear in the Havana Charter but were not as such taken into the General Agreement.¹⁷⁹

Paragraph 4 is more precise than the corresponding Havana Charter paragraph (Article 16:4) as it had to cover all the cases resulting from the tariff negotiations.¹⁸⁰ Also, the word “margins” is used in paragraph 2 of the Charter Article instead of “levels;” the preferences between the United States and the Philippines are set out as a sub-paragraph of paragraph 2 in the Charter, and in the General Agreement are listed in Annex D; and the final paragraphs of Annexes A and D concerning certain preferential internal taxes are included in the Charter as paragraph 5.

Article I has been amended only once, in 1948, through the Protocol Amending Part I and Article XXIX; the amendments (insertion of paragraph 3) are discussed above at page 44. Amendment of Article I was again discussed in the Review Session of 1954-55. A number of amendments were proposed then regarding margins of preference and failed to gain acceptance; see above at page 42. One amendment of substance was agreed, the inclusion in paragraph 1 of a reference to internal taxes applied to exported goods; see page 31 above. In addition, it was agreed to group into one Annex all preferences between neighbouring countries under paragraph 2(d) and to include in it the preferences provided for between Uruguay and Paraguay in the Annecy Protocol of Accession, and to delete Annex F since Lebanon and Syria were no longer contracting parties.¹⁸¹ These amendments were effected through the Protocol Amending Part I and Articles XXIX and XXX, which failed to gain the requisite unanimous acceptance and was abandoned at the end of 1967.¹⁸²

¹⁷⁵EPCT/C.II/25, p. 2.

¹⁷⁶US Draft Charter, Art. 8(2).

¹⁷⁷London Draft Charter Arts. 14(2), 24(1)(c). See also initial discussion of historical preferences in EPCT/C.II/PRO/PV/5.

¹⁷⁸Geneva Draft Charter Article 16.

¹⁷⁹Preferences between Portugal and Portuguese territories; Colombia, Ecuador and Venezuela; republics of Central America; and Argentina and neighbouring countries. Havana Charter Annexes E, H, I, J.

¹⁸⁰EPCT/TAC/PV/9, pp. 16-23.

¹⁸¹L/329, adopted 26 February 1955, 3S/205, 206-207, para. 5.

¹⁸²15S/65.

IV. RELEVANT DOCUMENTS*London*

Discussion: EPCT/C.II/7, 25, 27, 41, 65
 EPCT/C.II/PV/4, 11(a), 12
 Reports: EPCT/30

New York

Discussion: EPCT/C.6/10, 106
 Reports: EPCT/C.6/97/Rev.1
 Other: EPCT/C.6/W.8, 25

Geneva

Discussion: EPCT/EC/SR.2/6, 7, 8, 22
 EPCT/EC/PV.2/22
 EPCT/A/SR.7, 42, 43
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 39, 43, 44
 E/CONF.2/19, 23
 Reports: Havana Reports pp.40-41, 47-49,
 53, 55
 E/CONF.2/C.3/59, 78, 79
 E/CONF.2/C.2 & 3/A/14
 Other: E/CONF.2/C.3/77/Rev.1
 E/CONF.2/C.3/A/15
 E/CONF.2/C.3/SR.29

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ARTICLE II

SCHEDULES OF CONCESSIONS

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I. TEXT OF ARTICLE II, INTERPRETATIVE NOTE AD ARTICLE II, AND UNDERSTANDING ON THE INTERPRETATION OF ARTICLE II:1(B) OF THE GATT 1994

Article II

Schedules of Concessions

1. (a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

(b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

(c) The products described in Part II of the Schedule relating to any contracting party which are the products of territories entitled under Article I to receive preferential treatment upon importation into the territory to which the Schedule relates shall, on their importation into such territory, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for in Part II of that Schedule. Such products shall also 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 or mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date. Nothing in this Article shall prevent any contracting party from maintaining its requirements existing on the date of this Agreement as to the eligibility of goods for entry at preferential rates of duty.

2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

- (a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III* in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;
- (b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI;*
- (c) fees or other charges commensurate with the cost of services rendered.

3. No contracting party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement.

4. If any contracting party establishes, maintains or authorizes, formally or in effect, a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement, such monopoly shall not, except as provided for in that Schedule or as otherwise agreed between the parties which initially negotiated the concession, operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule. The provisions of this paragraph shall not limit the use by contracting parties of any form of assistance to domestic producers permitted by other provisions of this Agreement.*

5. If any contracting party considers that a product is not receiving from another contracting party the treatment which the first contracting party believes to have been contemplated by a concession provided for in the appropriate Schedule annexed to this Agreement, it shall bring the matter directly to the attention of the other contracting party. If the latter agrees that the treatment contemplated was that claimed by the first contracting party, but declares that such treatment cannot be accorded because a court or other proper authority has ruled to the effect that the product involved cannot be classified under the tariff laws of such contracting party so as to permit the treatment contemplated in this Agreement, the two contracting parties, together with any other contracting parties substantially interested, shall enter promptly into further negotiations with a view to a compensatory adjustment of the matter.

6. (a) The specific duties and charges included in the Schedules relating to contracting parties members of the International Monetary Fund, and margins of preference in specific duties and charges maintained by such contracting parties, are expressed in the appropriate currency at the par value accepted or provisionally recognized by the Fund at the date of this Agreement. Accordingly, in case this par value is reduced consistently with the Articles of Agreement of the International Monetary Fund by more than twenty per centum, such specific duties and charges and margins of preference may be adjusted to take account of such reduction; *Provided* that the CONTRACTING PARTIES (*i.e.*, the contracting parties acting jointly as provided for in Article XXV) concur that such adjustments will not impair the value of the concessions provided for in the appropriate Schedule or elsewhere in this Agreement, due account being taken of all factors which may influence the need for, or urgency of, such adjustments.

(b) Similar provisions shall apply to any contracting party not a member of the Fund, as from the date on which such contracting party becomes a member of the Fund or enters into a special exchange agreement in pursuance of Article XV.

7. The Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement.

Interpretative Note *Ad* Article II from Annex I

Paragraph 2 (a)

The cross-reference, in paragraph 2 (a) of Article II, to paragraph 2 of Article III shall only apply after Article III has been modified by the entry into force of the amendment provided for in the Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade, dated September 14, 1948.¹

Paragraph 2 (b)

See the note relating to paragraph 1 of Article I.

Paragraph 4

Except where otherwise specifically agreed between the contracting parties which initially negotiated the concession, the provisions of this paragraph will be applied in the light of the provisions of Article 31 of the Havana Charter.

**UNDERSTANDING ON THE INTERPRETATION OF ARTICLE II:1(b)
OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994**

Members hereby agree as follows:

1. In order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article II, the nature and level of any "other duties or charges" levied on bound tariff items, as referred to in that provision, shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff item to which they apply. It is understood that such recording does not change the legal character of "other duties or charges".
2. The date as of which "other duties or charges" are bound, for the purposes of Article II, shall be 15 April 1994. "Other duties or charges" shall therefore be recorded in the Schedules at the levels applying on this date. At each subsequent renegotiation of a concession or negotiation of a new concession the applicable date for the tariff item in question shall become the date of the incorporation of the new concession in the appropriate Schedule. However, the date of the instrument by which a concession on any particular tariff item was first incorporated into GATT 1947 or GATT 1994 shall also continue to be recorded in column 6 of the Loose-Leaf Schedules.
3. "Other duties or charges" shall be recorded in respect of all tariff bindings.
4. Where a tariff item has previously been the subject of a concession, the level of "other duties or charges" recorded in the appropriate Schedule shall not be higher than the level obtaining at the time of the first incorporation of the concession in that Schedule. It will be open to any Member to challenge the existence of an "other duty or charge", on the ground that no such "other duty or charge" existed at the time of the original binding of the item in question, as well as the consistency of the recorded level of any "other duty or charge" with the previously bound level, for a period of three years after the date of entry into force of the WTO Agreement or three years after the date of deposit with the Director-General of the WTO of the instrument incorporating the Schedule in question into GATT 1994, if that is a later date.
5. The recording of "other duties or charges" in the Schedules is without prejudice to their consistency with rights and obligations under GATT 1994 other than those affected by paragraph 4. All Members retain the right to challenge, at any time, the consistency of any "other duty or charge" with such obligations.
6. For the purposes of this Understanding, the provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply.
7. "Other duties or charges" omitted from a Schedule at the time of deposit of the instrument incorporating the Schedule in question into GATT 1994 with, until the date of entry into force of the WTO Agreement, the Director-General to the CONTRACTING PARTIES to GATT 1947 or, thereafter, with the Director-General of the WTO, shall not subsequently be added to it and any "other duty or charge" recorded at a level lower than that prevailing on the applicable date shall not be restored to that level unless such additions or changes are made within six months of the date of deposit of the instrument.
8. The decision in paragraph 2 regarding the date applicable to each concession for the purposes of paragraph 1(b) of Article II of GATT 1994 supersedes the decision regarding the applicable date taken on 26 March 1980 (BISD 27S/24).

II. INTERPRETATION AND APPLICATION OF ARTICLE II

A. SCOPE AND APPLICATION OF ARTICLE II

1. Paragraph 1(a): “treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule”

(1) “Treatment” and interpretation of the scope of concessions in Schedules

The 1981 Panel Report on “Spain - Tariff Treatment of Unroasted Coffee”, which examined the tariff treatment of imports of unroasted coffee into Spain, states:

“The Panel found that there was no obligation under the GATT to follow any particular system for classifying goods, and that a contracting party had the right to introduce in its customs tariff new positions or subpositions as appropriate”.¹

This finding was subject to the following footnote: “Provided that a re-classification subsequent to the making of a concession under the GATT would not be a violation of the basic commitment regarding that concession (Article II:5)”.

The 1982 Report of the “Panel on Vitamins” (see below at page 71) provides, *inter alia*: “The Panel considers that the United States did not have an obligation to maintain the de facto tariff rate differentiation between feedgrade and pharmaceutical quality vitamins, provided that the method used for the conversion of the previous common bound rate was neutral and did not involve any arbitrary increase”.²

At the special meeting of the Council in October 1988 to review developments in the trading system, the Director-General informed the Council that in April 1988, Canada and the EC had asked him, with reference to paragraph 8 of the 1979 Understanding, to render an advisory opinion on whether a tariff concession granted by Portugal to Canada in 1961 was applicable to wet salted cod. This issue had arisen in tariff negotiations between Canada and the EC under Article XXIV:6. He had agreed on 15 April to render such an opinion and on 15 July had made it available to the two parties concerned.³

The 1989 Panel Report on “Canada/Japan: Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber” examined Canada’s claim that Japan’s application of an 8 per cent tariff on imports of SPF dimension lumber was inconsistent with Article I:1 because SPF dimension lumber and dimension lumber of other types, which benefited from a zero duty rate, were “like products” within the meaning of Article 1:1.

“... The Panel considered it impossible to appreciate fully the Canadian complaint if it had not in a preliminary way clarified the meaning of some principles of the GATT system in relation to tariff structure and tariff classification.

“The Panel noted in this respect that the General Agreement left wide discretion to the contracting parties in relation to the structure of national tariffs and the classification of goods in the framework of such structure (see the report of the Panel on Tariff Treatment of Unroasted Coffee, BISD 28S/102, at 111, paragraph 4.4). The adoption of the Harmonized System, to which both Canada and Japan have adhered, had brought about a large measure of harmonization in the field of customs classification of goods, but this system did not entail any obligation as to the ultimate detail in the respective tariff classifications. Indeed, this nomenclature has been on purpose structured in such a way that it leaves room for further specifications.

“The Panel was of the opinion that, under these conditions, a tariff classification going beyond the Harmonized System’s structure is a legitimate means of adapting the tariff scheme to each contracting

¹L/5135, adopted on 11 June 1981, 28S/102, 111, para. 4.4.

²L/5331, adopted on 1 October 1982, 29S/110, 117, para. 22(e).

³C/M/225, p. 2.

party's trade policy interests, comprising both its protection needs and its requirements for the purposes of tariff- and trade negotiations. ...

"Tariff differentiation being basically a legitimate means of trade policy, a contracting party which claims to be prejudiced by such practice bears the burden of establishing that such tariff arrangement has been diverted from its normal purpose so as to become a means of discrimination in international trade. Such complaints have to be examined in considering simultaneously the internal protection interest involved in a given tariff specification, as well as its actual or potential influence on the pattern of imports from different extraneous sources ...⁴

"The Panel considered that the tariffs referred to in the General Agreement are, quite evidently, those of the individual contracting parties. This was inherent in the system of the Agreement and appeared also in the current practice of tariff negotiations, the subject matter of which were the national tariffs of the contracting parties. It followed that, if a claim of likeness was raised by a contracting party in relation to the tariff treatment of its goods on importation by some other contracting party, such a claim should be based on the classification of the latter, i.e. the importing country's tariff."⁵

In Council discussion when this panel report was adopted, Canada raised the concern that "this interpretation could lead to pre-eminence being given to the tariff classification of a contracting party when determining 'like products' under Article I ... Tariff classification systems cannot identify specifically each and every possible product which may be imported. In the tariff classification system of contracting parties it is regularly the case that an individual tariff line or description will cover a wide range of different products, particularly in the example of lines which read 'other' or 'not elsewhere specified'. Additionally, there are new products continually entering the marketplace which are not identified in tariff schedules".⁶

See also the material on Greek reclassification of gramophone records below at page 96.

(a) *Tariff escalation*

The Ministerial Decision of 29 November 1982 on "Tariffs" provides, *inter alia*, that "prompt attention should be given to the problem of escalation in tariffs on products with increased processing with a view to effective action towards the elimination or reduction of such escalation where it inhibits international trade, taking into account the concerns relating to exports of developing countries".⁷

See also various Secretariat Notes from 1981-85 on the theory and practice of measurement of tariff escalation.⁸ See also records of discussions in the Committee on Trade and Development and the Committee on Tariff Concessions, on the basis and methodological issues involved in studies on tariff escalation.⁹

⁴L/6470, adopted on 19 July 1989, 36S/167, 197-198, paras. 5.7-5.10.

⁵*Ibid.*, 36S/199, para. 5.13.

⁶L/6528; see also C/M/232, p. 9-12; C/M/234, p. 44-49; C/M/235, p. 15-18.

⁷L/5424, 29S/9, 18, para. 1.

⁸"Tariff Escalation", COM.TD/W/315, dated 4 July 1980; "Measurement of Tariff Escalation", TAR/W/18, dated 5 March 1981; "Study by the Secretariat on the Copper Producing and Copper Consuming Industries", Note dated 7 April 1982 issued as TAR/W/26 and COM.TD/W/361; "Tariff Escalation", Note dated 8 June 1982 issued as TAR/W/29 and COM.TD/W/369; and "Tariff Escalation", COM.TD/W/425, dated 22 March 1985. See also Report of Group of Governmental Experts on "Measures Affecting the World Market for Copper Ores and Concentrates", L/6167, adopted on 2 December 1987, 34S/168, and Note by the Director-General on "Measures Affecting the World Market for Copper Ores and Concentrates", L/6456, 36S/199.

⁹COM.TD/108; L/5253, 28S/53, 64-65, para. 36; L/5401, 29S/66, 73, para. 25; TAR/34, 28S/68, 70-71, para. 9; TAR/63, 29S/75, 76-77, para. 7. Tariff escalation affecting tropical products was also discussed in 1965-66 in the Expert Group on Trade and Aid Studies of the Committee on Trade and Development: see "Secretariat Note on the Effects of Differential Tariffs" (estimating effective protection of groundnuts and cocoa), Spec(65)144 dated 17 December 1965.

(b) Replacement of quantitative restrictions by tariffs

The Report of the Review Session Working Party on “Schedules and Customs Administration” notes as follows:

“Some members of the Working Party proposed that it should be recognized that when quantitative restrictions imposed for balance-of-payments reasons are removed an increase of customs duties or other charges on imports, having the effect of impairing the benefits which might reasonably be expected from removal of the restrictions, could be referred to the CONTRACTING PARTIES by a contracting party having a substantial interest in the export of the products affected. They admitted that the CONTRACTING PARTIES when considering any such reference, should take account of all relevant considerations including the fiscal, developmental, strategic and other needs of the contracting party concerned, and also the relative progress of both parties in the reduction of tariffs and other obstacles to trade. This proposal was supported by some other members, but the majority of the Working Party opposed it mainly on the ground that it might result in an extension of control of the CONTRACTING PARTIES over unbound rates of duty. The majority decision, however, is without prejudice to the operation of Articles XXII and XXIII with respect to such cases as could appropriately be brought under those Articles”.¹⁰

See also the unadopted panel report of 1994 on “EEC - Import Régime for Bananas”.¹¹

(1) Maintenance of “treatment” versus modification of a concession

The 1984 Report of the “Panel on Newsprint” examined the claim of Canada concerning the application of a tariff concession on newsprint established by the European Communities. The concession in the EC’s Schedule LXXII provided for an annual tariff quota of 1.5 million tonnes duty-free, leaving the bound duty rate at 7 per cent for imports exceeding that quota. Under agreements between the EC and the EFTA countries, newsprint imports from EFTA countries became duty-free as from 1 January 1984, and the EC then opened a duty-free tariff quota for m.f.n. suppliers of 500,000 tonnes for newsprint for the year 1984.

“The Panel could not share the argument advanced by the EC that their action did not constitute a change in their GATT tariff commitment. It noted that under longstanding GATT practice, even purely formal changes in the tariff schedule of a contracting party, which may not affect the GATT rights of other countries, such as the conversion of a specific to an ad valorem duty without an increase in the protective effect of the tariff rate in question, have been considered to require renegotiations. By the same token, the EC action would, in the Panel’s view, have required the EC to conduct such negotiations. The Panel also noted that in granting the concession in 1973, the EC had not made it subject to any qualification or reservation in the sense of Article II:1(b) although at the time the concession was made, it was known that agreement had already been reached that the EFTA countries would obtain full duty-free access to the Community market for newsprint from 1 January 1984 onward. The Panel therefore found that although in the formal sense the EC had not modified its GATT concession, it had *in fact* changed its GATT commitment unilaterally, by limiting its duty-free tariff quota for m.f.n. suppliers for 1984 to 500,000 tonnes. ...

“Taking all factors mentioned above into account, the Panel concluded that the EC, in unilaterally establishing for 1984 a duty-free quota of 500,000 tonnes, had not acted in conformity with their obligations under Article II of the GATT. The Panel shared the view expressed before it relating to the fundamental importance of the security and predictability of GATT tariff bindings, a principle which constitutes a central obligation in the system of the General Agreement”.¹²

¹⁰L/329, adopted 26 February 1955, 3S/205, 220 para. 40; for discussion and rejection of the proposed interpretation by majority vote, see SR.9/37 p. 7-9.

¹¹DS38/R, dated 11 February 1994, para. 136.

¹²L/5680, adopted on 20 November 1984, 31S/114, 131-132, paras. 50, 52.

(a) *Alteration in tariff nomenclature*

The 1954 Report of the Ninth Session Working Party on Schedules, on “Transposition of Schedule XXXVII (Turkey)” notes that “The adoption of the Brussels nomenclature presents no basic problem so far as schedules to the General Agreement are concerned. At their Fifth Session, the CONTRACTING PARTIES agreed that a contracting party wishing to change the nomenclature of its schedule could resort to the normal rectification procedures. ... In the event of an objection being lodged concerning the change in nomenclature of any time, consultations should be held between Turkey and the governments concerned”.¹³

The Decision of 12 July 1983 on “GATT Concessions under the Harmonized Commodity Description and Coding System” notes, *inter alia*:

“... The fact that one bound tariff line is divided up into a number of new lines, without changing the content of the original line, will not create any problem for the maintenance of the concession. Since, however, the introduction of the Harmonized System will result in a considerable number of cases where tariff lines with different bound rates are combined or bound rates combined with unbound rates, renegotiations under Article XXVIII will in many cases be necessary”.¹⁴

(b) *Alteration of the basis for levying duties*

The 1953 Report of the Working Party at the Eighth Session on “Rectifications and Modifications of Schedules” notes:

“The Working Party also concerned itself with the proposal of the Greek Government to introduce a minimum *ad valorem* rate in certain specific rates and came to the conclusion that such changes could not be considered rectifications to be dealt with by the Working Party. It decided therefore to refer the question to the CONTRACTING PARTIES so that such changes could form the object of consultations and negotiations with the parties having an interest in those items. After the conclusion of the negotiations, the changes agreed upon could be embodied in a protocol of rectifications and modifications”.¹⁵

In approving this report, the CONTRACTING PARTIES authorized the Government of Greece to enter into consultations and negotiations with the interested contracting parties.¹⁶

The 1955 Report of the Ninth Session Working Party on Schedules, on “Transposition of Schedule XXXVII (Turkey)” notes:

“... The Working Party considered the proposals [of Turkey] in relation to the provisions of the Agreement and to the practices of the CONTRACTING PARTIES which deal with the modification of schedules. It was found that there is no provision in the General Agreement which authorizes a contracting party to alter the structure of bound rates of duty from a specific to an *ad valorem* basis.

“The obligations of contracting parties are established by the rates of duty appearing in the schedules and any change in the rate such as a change from a specific to an *ad valorem* duty could in some circumstances adversely affect the value of the concessions to other contracting parties. Consequently, any conversion of specific into *ad valorem* rates of duty can be made only under some procedure for the modification of concessions”.¹⁷

¹³L/294, adopted on 20 December 1954, 3S/127, 128, para. 2. For Fifth Session decision on modification of schedules consequent to adherence to the Brussels Convention for Tariff Nomenclature, see GATT/CP.5/7 (Secretariat proposal), GATT/CP.5/SR.3 p. 1-3 (discussion).

¹⁴L/5470/Rev.1, 30S/17, 18-19, para. 3.1.

¹⁵G/62, adopted on 24 October 1953, 2S/63, 2S/66, para. 8. See also similar decision at Fifth Session, GATT/CP.5/45, II/144, 145, section (3).

¹⁶SR.8/20, p. 5.

¹⁷L/294, adopted on 20 December 1954, 3S/127, 128, paras. 3-4; see also SR.9/4 p. 12.

The 1958 Working Party Report on “Conversion of Specific Duties in the Norwegian Schedule” cites this passage in discussing the proposal of Norway to establish simplified procedures for the conversion of specific to ad valorem duties, and observes that “It was obvious, therefore, that the relevant procedures were those of Article XXVIII which related to modifications of concessions in the Schedules”.¹⁸

The 1954 Report of the Ninth Session Working Party on Schedules on the “Fourth Protocol of Rectifications and Modifications” discusses whether, even in the case where the existing (specific duty) concession reserved the right to convert specific duties into *ad valorem* rates, the retention of the former specific rate would constitute a modification of that concession:

“... Among the rectifications requested by the Austrian Government were those relating to Items 140 to 144 of the Austrian Tariff which were being made under the authority of the Note to these items included in the Austrian Schedule XXXII which granted the Austrian Government freedom to change the specific into ad valorem rates. The Austrian Government felt that it would not be impairing the value of the concessions if it retained beside the ad valorem duty the old specific rate as a minimum rate.

“The Working Party took the view that such changes would constitute modifications of Austria’s obligations and that it could not recommend their acceptance as rectifications. Such modifications could only be inserted in a protocol of rectifications and modifications after negotiations authorized by the CONTRACTING PARTIES in accordance with the proper procedures ...”.¹⁹

The 1978 Panel Report on “Canada - Withdrawal of Tariff Concessions”, which examined a withdrawal resulting from negotiations concerning the EC’s conversion to ad valorem duties of specific duties on unwrought lead and unwrought zinc, notes that:

“The Panel based its consideration of the case on Article XXVIII of the GATT which, as both parties agreed, was the applicable provision, *inter alia*, for negotiations which are undertaken with the aim of converting specific rates of duty into ad valorem rates”.²⁰

Concerning the application of Article II to a conversion from ad valorem rates to specific duty rates, see the unadopted panel report on “EEC - Import Régime for Bananas”.²¹

See further under Article XXVIII.

(c) *Conversion of rates to reflect change in customs valuation*

The 1982 Report of the “Panel on Vitamins” examined the application of the Kennedy Round concession on feed-grade and pharmaceutical-grade Vitamin B12 by the United States. While the nominal bound duty rate for both qualities of Vitamin B12 was the same, this rate was subject to the “American selling price” (“ASP”) method of tariff valuation applied by the United States under the Protocol of Provisional Application. Under the ASP method, the dutiable value imputed to feed-grade Vitamin B12 (and thus its effective duty rate) was lower than that on pharmaceutical-grade Vitamin B12. The granting of the concession had been subject to a general note reserving the ability of the US to adjust the duty rate in the event of elimination of ASP valuation. In the Tokyo Round, the US agreed to eliminate “ASP” valuation and to incorporate the extra duties charged as a result of this valuation method into the new base rate for Tokyo Round duty reductions. In the conversion, the effective rates of duty for both qualities of Vitamin B12 were converted together on the basis of a trade-weighted average, resulting in a single concession rate for Vitamin B12. The Panel Report provides, *inter alia*:

“The Panel considers that the United States did not have an obligation to maintain the de facto tariff rate differentiation between feedgrade and pharmaceutical quality vitamins, provided that the method used for the conversion of the previous common bound rate was neutral and did not involve any arbitrary increase.

¹⁸L/913, adopted on 14 November 1958, 7S/112, para. 3.

¹⁹L/335, adopted on 3 March 1955, excerpted at 3S/130, para. 1-2.

²⁰L/4636, adopted on 17 May 1978, 25S/42, 47, para. 14.

²¹DS38/R, dated 11 February 1994, paras. 134-135.

The Panel believes the method used by the United States for the calculation of the level of the base rate - the weighted average of actual duties collected for feedgrade and pharmaceutical quality vitamins - to be in conformity with that proviso".²²

In the Council discussion of this report, several contracting parties stated their view that the use of a trade-weighted average in conversion of tariffs should not constitute a precedent for future cases such as transposition of existing bound tariffs into the Harmonized Commodity Description and Coding System nomenclature, in view of the particular procedures outside Article XXVIII that had been adopted by the parties to the dispute.²³

See also the discussion below of Schedules of Concessions.

(d) *Imposition of a variable import duty on bound items*

In 1961 Uruguay requested a ruling from the CONTRACTING PARTIES concerning whether the application of variable import duties was compatible with the GATT. A 1961 Note by the Executive Secretary on "Questions relating to Bilateral Agreements, Discrimination and Variable Taxes" states, *inter alia*:

"The General Agreement contains no provision on the use of 'variable import duties'. It is obvious that if any such duty or levy is imposed on a 'bound' item, the rate must not be raised in excess of what is permitted by Article II of the Agreement. ... It should be noted that if a variable levy system should be accompanied by the imposition of restrictions by specified volume, or a prohibition, of imports such measures would of course be subject to the examinations and considerations referred to in sections (a) and (b) above [relating to Articles XI, XIII, XII, XVIII:B and XIV]".²⁴

See also the discussion of this Note in summary records of the Nineteenth Session.²⁵ The 1962 Panel Report on the "Uruguayan Recourse to Article XXIII" notes as follows:

"The Panel was faced with a particular difficulty in considering the status of variable import levies or charges. It noted the discussion which took place at the nineteenth session of the CONTRACTING PARTIES on this subject during which it was pointed out that such measures raised serious questions which had not been resolved. In these circumstances the Panel has not considered it appropriate to examine the consistency or otherwise of these measures under the General Agreement".²⁶

In the Agriculture Committee in 1984, it was stated that where a variable levy was applicable to a product in respect of which the tariff duty rate was bound, the bound tariff rate constituted a maximum upper limit for the levy.²⁷

(e) *Tariff reclassification*

Concerning tariff reclassification, see various notes by the Secretariat and the minutes of the Committee on Tariff Concessions²⁸ discussing the legal consequences of reclassification, and methods for maintaining GATT bindings in cases of tariff reclassification. In one discussion of this subject in the Committee on Tariff Concessions in 1980, it was noted by the representative of Austria that "The problem only arose directly in respect of [bound] items but it affected indirectly all items, since when transferring a GATT bound item from one heading to another with the same rate of duty, there might be a difference with respect to the so-called 'other charges'".²⁹

²²L/5331, adopted on 1 October 1982, 29S/110, 117, para. 22(e).

²³C/M/160, 161.

²⁴Note dated 21 November 1961, L/1636, paras. 7-8.

²⁵SR.19/8, p. 111-120.

²⁶L/1923, adopted 16 November 1962, 11S/95, 100, para. 17.

²⁷AG/M/3, p. 63.

²⁸TAR/W/14, TAR/W/19, TAR/M/3, TAR/M/4.

²⁹TAR/M/3, p. 12, para. 5.3.

(3) “Treatment”: Schedule concessions other than duties on importation

(a) Export duties

The United Kingdom Schedule XIX, Section D (Malayan Union) attached to the 30 October 1947 text of the General Agreement contained a concession on export duties on tin ore and tin concentrates, to the effect that “The products comprised in the above item shall be assessed for duty on the basis of their tin content; the rate to be levied on such tin content being the same as the rate chargeable on smelted tin, *Provided* that the rate of duty on this item may exceed the rate chargeable on smelted tin in the event that and so long as the United States of America subsidised directly or indirectly the smelting of tin in the United States”.

(b) Schedule commitments by certain contracting parties

The US “Suggested Charter for an International Trade Organization” contained a separate Article 28 concerning expansion of trade by any Member establishing or maintaining a complete or substantially complete monopoly of its import trade. This Article envisaged the negotiation by each such Member of an arrangement providing for a minimum periodic value of imports from the other Members. This Article was kept with the same wording provisionally in the London and New York Draft Charters, and was deleted at Geneva. The Geneva Report states that the Preparatory Committee believed that the text of the revised Article 31 (requiring negotiations to limit or reduce protection afforded by import or export monopolies) would be sufficiently flexible to permit any appropriate negotiations with a Member which maintained a complete or substantially complete monopoly of its external trade, and that since no representative of such a country had attended the sessions of the Committee, the matter remained open for the Havana Conference.³⁰

The Report of the Working Party on the “Accession of Poland” records that

“The Working Party noted that the foreign trade of Poland was conducted mainly by State enterprises and that the Foreign Trade Plan rather than the customs tariff was the effective instrument of Poland’s commercial policy. The present customs tariff was applicable only to a part of imports effected by private persons for their personal use and it was in the nature of a purchase tax rather than a customs tariff. The Working Party agreed that due consideration had to be given to these facts in drawing up the legal instruments relating to Poland’s accession to the General Agreement. The representative of Poland stressed that, as a result of possible changes in the economic system of Poland, a different situation might arise enabling Poland to renegotiate its position towards the provisions of the General Agreement.

“It was agreed that in view of the nature of the foreign trade system of Poland its main concession in the negotiations would be commitments relating to an annual increase in the value of its imports from contracting parties”.³¹

Paragraph 1 of Poland’s Schedule LXV, as set out in Annex B to the Protocol for the Accession of Poland, provides: “Subject to paragraph 2 below, Poland shall, with effect from the date of this Protocol, undertake to increase the total value of its imports from the territories of contracting parties by not less than 7 per cent per annum”.³² Schedule LXV and the Polish import commitment were modified on 5 February 1971.³³ In December 1989 Poland announced its intention to request renegotiation of its terms of accession in view of the entry into force 1 January 1990 of laws establishing a market economy for which the customs tariff would be the effective instrument of commercial policy.³⁴ At the February 1990 Council meeting a Working Party was established to

³⁰London Report, p. 18, New York Report p. 29, Geneva Report p. 29. See also Secretariat Note of 1988 on this issue in MTN.GNG/NG7/W/15/Add.1 p. 1-3.

³¹L/2806, adopted on 26 June 1967, 15S/109, 110, paras. 7-8.

³²15S/52. Paragraph 2 provides, *inter alia*, that Poland may modify the commitment under paragraph 1 by negotiation and agreement, on 1 January 1971 and thereafter on the “open season” dates specified in Article XXVIII:1.

³³L/3416 (notification by Poland of intent to renegotiate); C/M/64, p. 17-18; L/3475, “Third Review under the Protocol of Accession”, adopted on 2 February 1971, 18S/188, section C, “Renegotiation of Schedule LXV - Poland”, 18S/198-200 (noting adoption 5 February 1971 of modification of Schedule LXV by postal ballot).

³⁴SR.45/ST/11, L/6634, C/M/238 p. 10-13.

examine the request of the Government of Poland to renegotiate the terms of accession of Poland.³⁵ This working party did not conclude its work before 1 January 1995.

The Working Party Report on "Accession of Romania" records that "It was agreed that because of the absence of a customs tariff in Romania the main concession to be incorporated in its Schedule would be a firm intention to increase imports from contracting parties at a rate not lower than the growth of total Romanian imports provided for in its Five-Year Plans".³⁶ Accordingly, paragraph 1 of Romania's Schedule LXIX provides that "Subject to paragraph 2 below, Romania, on the basis of mutual advantage which is inherent in the General Agreement, will develop and diversify its trade with the contracting parties as a whole, and firmly intends to increase its imports from the contracting parties as a whole at a rate not smaller than the growth of total Romanian imports provided for in its Five-Year Plans".³⁷ In 1974 a working party was established to examine the customs tariff introduced by Romania from 1 January 1974.³⁸ In 1991, Romania was granted a temporary waiver of its obligations under Article II in order to enable it to implement a new customs tariff in the context of measures for transition to a market economy, and pending renegotiation of its Schedule; Romania also requested renegotiation of its accession protocol in the light of, *inter alia*, the abolition of its former system of central planning.³⁹ At the February 1992 Council meeting a Working Party was established to examine the request of the Government of Romania to renegotiate the terms of accession of Romania.⁴⁰ This working party did not conclude its work before 1 January 1995.

(c) *Other non-tariff concessions*

See material at page 89 on concessions made on monopoly markups and minimum importation by monopolies, and material under Article IV regarding screen quota concessions made during the period 1947-1950. Concessions have also been made with respect to mixing requirements.⁴¹ In recent years certain governments acceding to the GATT have included in their Schedules, in addition to tariff concessions, such non-tariff commitments as minimum import quotas⁴², or commitments for elimination of import permit requirements, import licensing schemes, or import prohibitions.⁴³

The Review Working Party on "Other Barriers to Trade" which considered proposals for strengthening the provisions of the Agreement on subsidies and state trading, "also agreed that there was nothing to prevent contracting parties, when they negotiate for the binding or reduction of tariffs, from negotiating on matters, such as subsidies, which might affect the practical effects of tariff concessions, and from incorporating in the appropriate schedule annexed to the Agreement the results of such negotiations; provided that the results of such negotiations should not conflict with other provisions of the Agreement".⁴⁴ In this context the 1989 Panel Report on "United States - Restrictions on Imports of Sugar" found that "Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the General Agreement, but not acts diminishing

³⁵C/M/239, p. 5.

³⁶L/3557, adopted on 6 October 1971, 18S/94, 95, para. 7.

³⁷18S/10.

³⁸L/3989 (notification of tariff by Romania); C/M/94. The working party did not make a report.

³⁹L/6967, Decision of 4 December 1991, 38S/80.

⁴⁰C/M/254 p. 5-6; see also L/6838 and Add.1, L/6981, SR.47/2 p. 15-16.

⁴¹Benelux Schedule II (1947), Items ex 68 and 75 (binding on mixing requirement for imported wheat and wheat flour).

⁴²Schedule XXXII - Austria, Part III, non-tariff concessions (1979); Schedule XX - United States, note 2 to chapter 2, unit B.

⁴³See Schedule LXXVII - Mexico (indication in Column 7 of items to be exempt from prior import permit requirement); Schedule LXXXVI - Venezuela (indication in Column 7 of items for which certain notes to Venezuelan tariff to cease to apply); Schedule LXXXVIII - Guatemala (indication in Column 7 of items to be exempt from prohibitions, licensing and restrictive permits, and other quantitative import restrictions); Schedule LXXXV - Costa Rica (indication in Column 7 of items to be exempt from licensing or quantitative restrictions or from duties and charges inconsistent with Articles III and VIII); Schedule LXXXVII - El Salvador (indication in Column 7 of items to be free from quantitative restrictions except to protect health or morals or national security, and free from charges and taxes inconsistent with Article III); Schedule LXXXIV - Bolivia (exemption from import licensing or quantitative restriction for items for which US has initial negotiating rights); Schedule LXXXIII - Tunisia (indication of exemption from import licensing or other quantitative restrictions for certain items).

⁴⁴L/334, and Add., adopted on 3 March 1955, 3S/222, 225, para. 14.

obligations under that Agreement”⁴⁵ and that “Article II gives contracting parties the possibility to incorporate into the legal framework of the General Agreement commitments additional to those already contained in the General Agreement and to qualify such additional commitments, not however to reduce their commitments under other provisions of that Agreement”.⁴⁶ See below at page 76.

Concerning negotiations on concessions other than on tariffs, see Article XXVIII *bis*.

(4) *Withholding or withdrawal of concessions*

See below at page 115 and see the material under Article XXVII.

2. Paragraphs 1(b) and (c)

The 1988 Panel Report on “United States - Customs User Fee” notes generally with respect to paragraph 1(b): “... 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”.⁴⁷

(1) *“products of territories of other contracting parties”*

(a) *Origin of goods for the purposes of most-favoured-nation treatment*

In discussions on the General Agreement at the Geneva session of the Preparatory Committee it was decided that it was unnecessary to add the words “originating in” to the phrase “products of territories of other contracting parties” (1(b) and (c)).⁴⁸ It was agreed that “it is within the province of each importing member country to determine, in accordance with the provisions of its law, for the purpose of applying the most-favoured-nation provisions whether goods do, in fact, originate in a particular country”.⁴⁹

Concerning work done in the GATT on rules of origin and origin of imported goods generally, see Article VIII; concerning rules of origin applied in the context of regional trade agreements see Article XXIV.

(b) *Direct consignment requirements*

The last sentence of paragraph 1(c) preserves the ability of a contracting party to maintain “its requirements existing on the date of this Agreement as to the eligibility of goods for entry at preferential rates of duty”. (See also the reference in Article V:6 to “requirements of direct consignment existing on the date of this Agreement” as a condition for eligibility for entry at preferential rates.) However, in discussions on the draft text of the General Agreement during the Geneva session of the Preparatory Committee it was agreed that “direct shipping requirements would not be permitted” as a condition of granting the most-favoured-nation rate of duty.⁵⁰

(2) *“subject to the terms, conditions or qualifications set forth in that schedule”*

The 1981 Panel Report on “European Economic Community - Imports of Beef from Canada” examined a 10,000-ton levy-free tariff quota for fresh, chilled or frozen high quality grain-fed beef included within a global tariff quota of 21,000 tons in the EEC schedule of concessions annexed to the Geneva (1979) Protocol. In a footnote to the concession it was provided that “Entry under this subheading is subject to conditions to be determined by the competent authorities”. The concession was implemented through Commission Regulations which provided for a certificate of authenticity; Annex II of one of these Regulations listed the issuing authorities

⁴⁵L/6514, adopted on 22 June 1989, 36S/331, 342, para. 5.2.

⁴⁶*Ibid.*, para. 5.3.

⁴⁷L/6264, adopted on 2 February 1988, 35S/245, 273, para. 70.

⁴⁸EPCT/TAC/PV/23, p. 23.

⁴⁹EPCT/TAC/PV/23, p. 31-33.

⁵⁰EPCT/TAC/PV/23 p. 31.

for such certificates; and the sole such agency listed for high-quality grain-fed beef was the US Department of Agriculture.

“The Panel found that the European Economic Community had, by virtue of the footnote in the Schedule reserved its right to set conditions for the entry under the levy-free tariff quota in question. The Panel further found that the right to set conditions was presupposed in Article II:1(b) of the General Agreement. The Panel found, however, that the words ‘terms, conditions or qualifications’ in paragraph 1(b) of Article II could not be interpreted to mean that countries could explicitly or by the manner in which a concession was administered actually limit a given concession to the products of a particular country. The Panel further found that the fact that in Annex II there was only one certifying agency for the meat in question and that this agency only certified meat of United States origin in effect prevented access of high quality meat ... from other countries.

“Consequently, the Panel concluded that the manner in which the EEC concession on high quality beef was implemented accorded less favourable treatment to Canada than that provided for in the relevant EEC Schedule, thus being inconsistent with the provisions of paragraph 1 of Article II of the General Agreement”.⁵¹

In the 1989 Panel Report on “United States - Restrictions on Imports of Sugar”, the Panel examined quantitative restrictions by the US on the importation of raw and refined sugar. The United States claimed that the proviso “subject to the terms, conditions or qualifications set forth in that Schedule” in Article II:1(b) permitted contracting parties to include qualifications relating to quantitative restrictions in their Schedule; in a headnote to the tariff concession on raw and refined sugar in Schedule XX the United States had reserved the right to impose quota limitations on imports of sugar under certain circumstances.

“The Panel first examined the issue in the light of the wording of Article II. It noted that ... the words ‘subject to the ... qualifications set forth in that Schedule’ are used in conjunction with the words ‘shall ... be exempt from ordinary customs duties in excess of those set forth in [the Schedule]’. This suggests that Article II:1(b) permits contracting parties to qualify the obligation to exempt products from customs duties in excess of the levels specified in the Schedule, not however to qualify their obligations under other Articles of the General Agreement. The Panel further noted that the title of Article II is ‘Schedules of Concessions’ and that the ordinary meaning of the word ‘to concede’ is ‘to grant or yield.’ This also suggests, in the view of the Panel, that Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the General Agreement, but not acts diminishing obligations under that Agreement.

“The Panel then examined the issue in the light of the purpose of the General Agreement. It noted that one of the basic functions of the General Agreement is, according to its Preamble, to provide a legal framework enabling contracting parties to enter into ‘reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade.’ Where the General Agreement mentions specific types of negotiations, it refers to negotiations aimed at the reduction of barriers to trade (Articles IV(d), XVII:3 and XXVIII bis). This supports in the view of the Panel the assumption that Article II gives contracting parties the possibility to incorporate into the legal framework of the General Agreement commitments additional to those already contained in the General Agreement and to qualify such additional commitments, not however to reduce their commitments under other provisions of that Agreement.

“The Panel then proceeded to examine the issue in the context of the provisions of the General Agreement related to Article II. It noted that negotiations on obstacles to trade created by the operation of state-trading enterprises may be conducted under Article XVII:3 and that a note to that provision provides that such negotiations

⁵¹L/5099, adopted on 10 March 1981, 28S/92, 99, paras. 4.5-4.6.

‘may be directed towards the reduction of duties and other charges on imports and exports or towards the conclusion of *any other mutually satisfactory arrangement consistent with the provisions of this Agreement* (see paragraph 4 of Article II and the note to that paragraph).’ (emphasis added).

“The negotiations foreseen in Article XVII:3 are thus not to result in arrangements inconsistent with the General Agreement, in particular not quantitative restrictions made effective through state-trading that are not justified by an exception to Article XI:1. The Panel saw no reason why a different principle should apply to quantitative restrictions made effective by other means.

“The Panel then examined the issue in the light of the practice of the CONTRACTING PARTIES. The Panel noted that the CONTRACTING PARTIES adopted in 1955 the Report of the Review Working Party on Other Barriers to Trade, which had concluded that:

‘there was nothing to prevent contracting parties, when they negotiate for the binding or reduction of tariffs, from negotiating on matters, such as subsidies, which might affect the practical effects of tariff concessions, and from incorporating in the appropriate schedule annexed to the Agreement the results of such negotiations; *provided that the results of such negotiations should not conflict with other provisions of the Agreement.*’ (emphasis added) (BISD 3S/225).

“Whether the proviso in this decision is regarded as a policy recommendation, as the United States argues, or as the confirmation of a legal requirement, as Australia claims, it does support, in the view of the Panel, the conclusion that the CONTRACTING PARTIES did not envisage that qualifications in Schedules established in accordance with Article II:1(b) could justify measures inconsistent with the other Articles of the General Agreement.

“The Panel finally examined the issue in the light of the drafting history. It noted that the reference to ‘terms and qualifications’ was included in a draft of the present Article II:1(b) during the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment. The original draft had referred only to ‘conditions’. This amendment was proposed and adopted ‘in order to provide more generally for the sort of qualifications actually provided in the form of notes in the specimen Schedule. A number of these notes are, in effect, additional concessions rather than conditions governing the tariff bindings to which they relate’ (E/PC/T/153 and E/PC/T/W/295). Schedule provisions qualifying obligations under the General Agreement were not included in the specimen Schedule nor was the possibility of such Schedule provisions mentioned by the drafters. The Panel therefore found that the drafting history did not support the interpretation advanced by the United States.

“For the reasons stated in the preceding paragraphs, the Panel found that Article II:1(b) does not permit contracting parties to qualify their obligations under other provisions of the General Agreement and that the provisions in the United States GATT Schedule of Concessions can consequently not justify the maintenance of quantitative restrictions on the importation of certain sugars inconsistent with the application of Article XI:1.⁵²

The 1990 Panel Report on “United States - Restrictions on the Importation of Sugar and Sugar Containing Products Applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions” examined the claim by the EEC that US import fees and import restrictions on sugar under Section 22 of the US Agricultural Adjustment Act were inconsistent with Articles II and XI interpreted in the light of the 1989 Panel Report on “United States - Restrictions on Imports of Sugar”, and were not justified by the waiver accorded to the United States in 1955 for actions taken under Section 22.

“... As to the fees on refined sugar, the Panel noted that the United States made its concession for sugars, and covering refined sugar, subject to the existence of Title II of the Sugar Act of 1948 or substantially equivalent legislation. The United States considers that, given the lapse of the Sugar Act and the absence of substantially equivalent legislation, its tariff rates for sugars are presently not bound. In the view of the United States, Article II:1(b), which allows contracting parties to make the tariff bindings in

⁵²L/6514, adopted on 22 June 1989, 36S/331, 342-343, paras. 5.2-5.7.

their Schedule of Concessions ‘subject to ... terms, conditions or qualifications’, allows contracting parties to make tariff concessions subject to the existence of domestic legislation. The EEC considers this qualification of the tariff concession to be inconsistent with the General Agreement and consequently not a valid limit of the concession.

“The Panel examined the EEC’s claim in the light of Article II:1(b) and the above-mentioned report. The Panel noted that the report states that ‘Article II gives contracting parties the possibility to incorporate into the legal framework of the General Agreement commitments additional to those already contained in the General Agreement and to qualify such additional commitments, not however to qualify their obligations under other articles of the General Agreement’ (L/6514, page 13). The Panel found that the United States assumed in its Schedule of Concessions a commitment additional to the commitments already contained in the General Agreement, namely the avoidance of import duties beyond specified levels, and qualified this additional commitment by making it dependent on the existence of certain domestic legislation. This qualification does not constitute a qualification of a commitment of the United States under provisions of the General Agreement other than Article II; it merely qualifies the commitment under Article II not to impose import duties in excess of the rates set forth in the Schedule. Although the granting of concessions conditional upon the discretion of the concession-granting government may not be meaningful because of the obvious legal uncertainty thereby created, the General Agreement does not oblige contracting parties to make concessions and specifically allows them in Article II:1(b) to subject to conditions the concessions they decide to make. The fact that the United States subjected the effectiveness of the tariff rates for sugars to the existence of domestic legislation is for these reasons not inconsistent with the General Agreement. The Panel recognized that a concession cannot validly be subjected to a qualification that is inconsistent with the General Agreement. Such a qualification would be contrary to the principle recognized by the contracting parties that the results of negotiations included in a Schedule of Concessions must be consistent with the General Agreement (BISD 3S/225). The Panel however found that the evidence submitted to it by the parties did not permit it to conclude that legislation equivalent to Title II of the Sugar Act of 1948 would necessarily be inconsistent with the General Agreement, in particular Article XI:2. The Panel therefore concluded that, while sugars are subject to tariff concessions in the United States’ Schedule of Concessions, the maximum rates for sugars set forth in that Schedule are, in the absence of legislation substantially equivalent to Title II of the expired Sugar Act of 1948, presently not effective. The imposition of the fees on refined sugar therefore does not entail the imposition of duties in excess of those set forth in the United States’ Schedule of Concessions”.⁵³

(3) “ordinary customs duties”

The word “ordinary” was used to distinguish between the rates on regular tariffs shown in the columns of the schedules (in French: “*droits de douane proprement dit*”) and the various supplementary duties and charges [imposed on imports] such as primage duty.⁵⁴

(4) “other duties or charges of any kind”

The Council Decision of 26 March 1980 on “Introduction of a Loose-Leaf System for the Schedules of Tariff Concessions” states with regard to the term “other duties or charges” that “such ‘duties or charges’ are in principle only those that discriminate against imports”⁵⁵ – i.e., they do not include charges applied to imports and domestic goods alike. The Decision further states that “As can be seen from Article II:2 of the General Agreement, such ‘other duties or charges’ concern neither charges equivalent to internal taxes, nor anti-dumping or countervailing duties, nor fees or other charges commensurate with the cost of services rendered”.⁵⁶

In 1953, the United States brought a complaint that a French statistical tax of 0.4 per cent ad valorem of imports and exports was inconsistent with Article II:2(c) and thus with Article II:1(b). The French government

⁵³L/6631, adopted on 7 November 1990, 37S/228, 255-256, paras. 5.7-5.8.

⁵⁴EPCT/TAC/PV/23, p. 24-25.

⁵⁵C/107/Rev. 1, adopted on 26 March 1980, 27S/22, 24, para. 9.

⁵⁶*Ibid.*

“agreed that it did infringe the provisions of the General Agreement” and took steps to abolish the tax.⁵⁷ In 1955, the United States brought a complaint against the increase in the rate of stamp tax on customs duties in France, which was stated to be inconsistent with Article II and Article VIII as revised at the Review Session. “The CONTRACTING PARTIES took note of the undertaking of the French Government to cancel the measure ... which was inconsistent with the obligation of the French Government under the General Agreement”.⁵⁸

(a) *Import surcharges*

In a Decision of 17 January 1955 on a “French Special Temporary Compensation Tax on Imports”, which had been stated by the French Government to be a temporary and transitional device designed to facilitate the removal of quantitative restrictions on imports from OEEC member countries, and an alternative to action under Article XII, the CONTRACTING PARTIES ruled that “whatever may have been the reasons which motivated the French Government’s decision ... the tax has increased the incidence of customs charges in excess of maximum rates bound under Article II ...”.⁵⁹ Similarly, in a Decision of 21 November 1958 on “Peruvian Import Charges”, the CONTRACTING PARTIES decided that Article XII could not be invoked to justify, as an alternative to the imposition of import restrictions, the imposition of surcharges on products described in schedules to the General Agreement.⁶⁰ The CONTRACTING PARTIES then granted a waiver to the Government of Peru covering the levying of such surcharges as an emergency measure designed to overcome a threat to Peru’s monetary reserves and to ensure the success of its programme of monetary stabilization. The Decision on “Canadian Import Surcharges” adopted by the CONTRACTING PARTIES on 15 November 1962 states that the import surcharges are “inconsistent with Article II of the General Agreement”.⁶¹ The Report of the Working Party on the “United States Temporary Import Surcharge”,⁶² and the Report of the Working Party on the Danish Temporary Import Surcharge,⁶³ each “noted that the surcharge, to the extent that it raised the incidence of customs charges beyond the maximum rates bound under Article II, was not compatible with the provisions of the General Agreement”.⁶⁴ The Declaration on “Trade Measures taken for Balance-of-Payments Purposes” adopted on 28 November 1979 provides in its paragraph 1 that “The procedures for examination stipulated in Articles XII and XVIII shall apply to all restrictive import measures taken for balance-of-payments purposes ...” but also provides that “The provisions of this paragraph are not intended to modify the substantive provisions of the General Agreement”.⁶⁵

The Understanding on the Balance-of-Payments Provisions of GATT 1994, which is incorporated into GATT 1994, provides in paragraph 2 with respect to “price-based measures” (defined as including “import surcharges, import deposit requirements or other equivalent trade measures with an impact on the price of imported goods”) that

“... It is understood that, notwithstanding the provisions of Article II, price-based measures taken for balance-of-payments purposes may be applied by a Member in excess of the duties inscribed in the Schedule of that Member. Furthermore, that Member shall indicate the amount by which the price-based measure exceeds the bound duty clearly and separately under the notification procedures of this Understanding. ”

In each of the three 1989 Panel Reports on “Republic of Korea - Restrictions on Imports of Beef” - Complaints by Australia, New Zealand and the United States⁶⁶, the Panel examined the “contention that Korea imposed surcharges on imported beef in violation of the provisions of paragraph 1(b) of Article II and noted that Korea claimed that it did not impose any surcharges in violation of Article II:1(b). The Panel was of the view that, in the absence of quantitative restrictions, any charges imposed by an import monopoly would normally be

⁵⁷SR.8/7, p. 10; G/46/Add.4; L/64; SR.9/28.

⁵⁸SR.10/5 p. 52; see also L/410, SR.9/28 p. 4, L/1412.

⁵⁹3S/27, Preamble para. 3.

⁶⁰7S/37.

⁶¹11S/58.

⁶²L/3573, adopted on 16 September 1971, 18S/212.

⁶³L/3648, adopted on 12 January 1972, 19S/120, 129.

⁶⁴18S/223, para. 41; 19S/129, para. 37.

⁶⁵L/4904, adopted on 28 November 1979, 26S/205.

⁶⁶L/6503, L/6504, L/6505, adopted on 7 November 1989, 36S/202, 234, 268.

examined under Article II:4 since it was the more specific provision applicable to the restriction at issue ... It concluded, therefore, that it was not necessary to examine this issue under Article II:1(b).⁶⁷

(b) *Deposit schemes*

See also the discussion of import deposit schemes under Article XII. See also the reference directly above to the Understanding on the Balance-of-Payments Provisions of GATT 1994.

In 1978, an import deposit scheme was examined by the Panel on “EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables”. The EC Commission Regulation in dispute provided that importation of certain products would be conditional on production of a certificate; the issue of the certificate would be conditional on the lodging of a security to guarantee that the imports in question would be made, and an additional security to guarantee that the imports would be made at a minimum price. The United States argued that the minimum import price system operated as a charge on imports, and that charges in excess of bound duties were levied through lost interest, debt servicing, and clerical and administrative costs associated with the provision of security deposits, and through the forfeiture of security deposits if the importation did not occur within the 75-day validity of the licence or if the minimum import price was not respected.⁶⁸ The Report of the Panel notes:

“The Panel ... examined the status of the interest charges and costs in connection with the lodging of the additional security associated with the minimum import price for tomato concentrates in relation to the obligations of the Community under Article II:1(b). The Panel noted the argument by the representative of the United States. ... The Panel further noted that the minimum import price and additional security system for tomato concentrates had not been found to be consistent with Article XI, nor had any justification been claimed by the Community under any other provision of the General Agreement. The Panel considered that these interest charges and costs were ‘other duties or charges of any kind imposed on or in connection with importation’ in excess of the bound rate within the meaning of Article II:1(b). Therefore, the Panel concluded that the interest charges and costs in connection with the lodging of the additional security associated with the minimum import price for tomato concentrates were inconsistent with the obligations of the Community under Article II:1(b).”⁶⁹

With regard to the provision that all or part of the additional security associated with the minimum import price for tomato concentrates would be forfeited if the minimum import price were not respected, the Report notes that “The Panel considered that such a forfeiture should be considered as part of an enforcement mechanism and not as a charge ‘imposed on or in connection with importation’ within the purview of Article II:1(b) ...”.⁷⁰ With regard to the provision that the security associated with the import certificate would be forfeited if the goods covered by a certificate were not imported during the certificate’s period of validity, “The Panel considered that such a forfeiture could not logically be accepted as a charge ‘imposed on or in connection with importation’ within the meaning of Article II:1(b), since no importation had occurred, but only as a penalty to the importer for not fulfilling the obligations which he had undertaken when he applied for the certificate. The Panel further considered that such a penalty should be considered as part of an enforcement mechanism and not as a charge imposed on or in connection with importation within the purview of Article II:1(b) ...”.⁷¹

The 1978 Panel Report on “EEC - Measures on Animal Feed Proteins” examined the complaint by the United States that an EEC regulation requiring domestic producers or importers of certain feed proteins to purchase and denature surplus skimmed milk powder from intervention stocks, and an associated certificate and security deposit requirement, constituted ‘charges of any kind’ in excess of the bound duty rates within the meaning of Article II:1(b). The Panel “concluded that the EEC measures should be examined as internal measures under Article III and not as border measures under Article II” in view of the Panel’s findings “that (a) the EEC measures applied to both imported and domestically-produced vegetable proteins (except in the case of

⁶⁷*Ibid.* at 36S/230, para. 107; 36S/267, para. 123; 36S/305, para. 129.

⁶⁸L/4687, adopted on 18 October 1978, 25S/68, 87-88, para. 3.56.

⁶⁹*Ibid.*, 25S/103, para. 4.15.

⁷⁰*Ibid.*, 25S/104, para. 4.16.

⁷¹*Ibid.*, 25S/98, para. 4.7.

corn gluten); (b) the EEC measures basically instituted an obligation to purchase a certain quantity of skimmed milk powder and, as an internal quantitative regulation fell under Article III:1; (c) the EEC security deposit and protein certificate were enforcement mechanisms for the purchase obligation”.⁷²

(c) *Revenue duties and import taxes*

The Report of the Working Party on the “Accession of the Democratic Republic of the Congo” discusses Zaire’s “Tariff of Import Duties” which was composed of two elements: the customs duty, and the revenue duty. It was pointed out that the rates bound in the schedule as proposed by the Congo would relate to the customs duty only, which would be bound at a higher level than the current applied rate. “After discussion of the nature and effect of the revenue duties, the Working Party considered that the revenue duties in the tariff of the Congo were not internal charges in the sense of Article III but should be considered as other duties or charges, in the sense of Article II:1(b). Following the discussion that ensued on the subject of the potential effect of shifts in the rates of revenue duties on the value of the bound customs duties, and taking into account the particular structure of the customs tariff, the representative of the Democratic Republic of the Congo agreed to make a Declaration of Intent ... concerning the level of the aggregate import duties ... [which] would be referred to by a Note in the Schedule”.⁷³

The Report of the Working Party on “Accession of Morocco” notes the existence of a special import tax, and notes the undertaking of Morocco that “Morocco will apply the special import tax system in full accordance with the relevant GATT provisions”.⁷⁴ In February 1987 the Council agreed that the CONTRACTING PARTIES would carry out a review of this commitment in 1990. In November 1990 Morocco brought to the attention of the Council that this import tax, as well as the stamp tax, had been replaced by a single ad valorem levy on imports as part of a fiscal reform; Morocco had requested authorization under Article XXVIII:4 to renegotiate the four bound tariff headings affected by this levy.⁷⁵

See also the reference to the accession of the United Arab Republic at page 101 below.

See also references to revenue duties in Working Party Reports on regional trade agreements, listed under Article XXIV:8.

(d) *Charges on transfer of payments*

The Report of the Review Session Working Party on “Schedules and Customs Administration” notes that:

“The wording of sub-paragraphs 1(b) and (c) of the existing text is the same as that used in the most-favoured-nation clause in Article I, but it does not go on to include, as does Article I, ‘charges ... imposed on the international transfer of payments for imports.’ Thus sub-paragraphs (b) and (c) could be construed as meaning that the provision does not apply to charges on transfers. But clearly the value of tariff concessions would be impaired if contracting parties were free to introduce additional levies on imports in the form of transfer charges. It is considered that the language of this sentence is all-inclusive for it speaks of ‘... all other duties or charges of any kind imposed on or in connection with importation’ and paragraph 2, which sets out the special charges which do not fall under paragraph 1, does not refer to charges on transfers. The insertion of the words ‘including charges of any kind imposed on the international transfer of payments for imports’ will remove any possibility of misunderstanding. It is the understanding of the Working Party that ‘charges of any kind’ do not include ordinary commercial charges for effecting the international transfer of payments for imports”.⁷⁶

⁷²L/4599, adopted on 14 March 1978, 25S/49, para. 4.17.

⁷³L/3541, adopted on 29 June 1971, 18S/89, discussion at 18S/90-92 paras. 8-10; passages cited at 18S/92-93 paras. 11-12; Declaration of Intent appears at 18S/93-94.

⁷⁴L/5967, adopted on 22 May 1986, 33S/87, 91, para. 13.

⁷⁵C/M/246, p. 26-27; L/6326.

⁷⁶L/329, adopted on 26 February 1955, 3S/205, 209, para. 7.

An amendment to this effect was provided for in the Protocol Amending Part I and Articles XXIX and XXX which did not gain the requisite unanimous approval and was abandoned on 31 December 1967.

See the discussion of the difference between trade and exchange measures under Article XV.

(c) *Charges imposed by import monopolies*

The three parallel Panel Reports in 1989 on the complaints of Australia, New Zealand and the United States regarding “Republic of Korea - Restrictions on Imports of Beef”⁷⁷ each dealt with a claim regarding alleged import charges by the Livestock Products Marketing Organization, an import monopoly in Korea:

“The Panel ... examined [Australia’s/New Zealand’s/the United States’] contention that Korea imposed surcharges on imported beef in violation of the provisions of paragraph 1(b) of Article II and noted that Korea claimed that it did not impose any surcharges in violation of Article II:1(b). The Panel was of the view that, in the absence of quantitative restrictions, any charges imposed by an import monopoly would normally be examined under Article II:4 since it was the more specific provision applicable to the restriction at issue. In this regard, the Panel recalled its findings [see these findings below at page 90] ... It concluded, therefore, that it was not necessary to examine this issue under Article II:1(b).”⁷⁸

(5) *“imposed on or in connection with importation”*

The 1990 Panel Report on “European Economic Community - Regulation on Imports of Parts and Components” examined the legal nature in relation to the GATT of Article 13:10 of the EEC anti-dumping regulations, which provided for levying of anti-dumping duties on products “introduced into the commerce of the Community after having been assembled or produced in the Community” under certain circumstances; the Panel referred to such duties as “anti-circumvention duties”.

“... The Panel noted that Japan argued that the anti-circumvention duties could be considered to be *either* duties imposed on or in connection with importation within the meaning of Article II:1(b) *or* internal taxes within the meaning of Article III:2. The EEC considered that the duties do not fall under Article III:2. The Panel recalled that the distinction between import duties and internal charges is of fundamental importance because the General Agreement regulates ordinary customs duties, other import charges and internal taxes differently: the imposition of ‘ordinary customs duties’ for the purpose of protection is allowed unless they exceed tariff bindings; all other duties or charges of any kind imposed on or in connection with importation are in principle prohibited in respect of bound items (Article II:1(b)). By contrast, internal taxes that discriminate against imported products are prohibited, whether or not the items concerned are bound (Article III:2). The Panel therefore first examined whether the duties constitute customs or other duties imposed on or in connection with importation falling under Article II:1(b) or internal taxes falling under Article III:2.

“The Panel noted that the anti-circumvention duties are levied ... ‘on products that are introduced into the commerce of the Community after having been assembled or produced in the Community’. The duties are thus imposed, as the EEC explained before the Panel, not on imported parts or materials but on the finished products assembled or produced in the EEC. They are not imposed conditional upon the importation of a product or at the time or point of importation. The EEC considers that the anti-circumvention duties should, nevertheless, be regarded as customs duties imposed ‘in connection with importation’ within the meaning of Article II:1(b). The main arguments the EEC advanced in support of this view were: firstly, that the purpose of these duties was to eliminate circumvention of anti-dumping duties on finished products and that their nature was identical to the nature of the anti-dumping duties they were intended to enforce; and secondly, that the duties were collected by the customs authorities under procedures identical to those applied for the collection of customs duties, formed part of the resources of the EEC in the same way as customs duties and related to parts and materials which were not considered to be ‘in free circulation, within the EEC.

⁷⁷L/6503, L/6504, L/6505, adopted on 7 November 1989, 36S/202, 234, 268.

⁷⁸*Ibid.*, 36S/230, para. 107, 36S/267, para. 123, 36S/305, para. 129.

“In the light of the above facts and arguments, the Panel first examined whether the *policy purpose of a charge* is relevant to determining the issue of whether the charge is imposed in ‘connection with importation’ within the meaning of Article II:1(b). The text of Articles I, II, III and the Note to Article III refers to charges ‘imposed on importation’, ‘collected ... at the time or point of importation’ and applied to an imported product and to the like domestic product’. The relevant fact, according to the text of these provisions, is not the policy purpose attributed to the charge but rather whether the charge is due on importation or at the time or point of importation or whether it is collected internally. This reading of Articles II and III is supported by their drafting history and by previous panel reports (e.g. BISD 1S/60; 25S/49, 67). A recent panel report which has examined the provisions of the General Agreement governing tax adjustments applied to goods entering into international trade (among them Articles II and III) stated that

‘the tax adjustment rules of the General Agreement distinguish between taxes on products and taxes not directly levied on products; they do not distinguish between taxes with different policy purposes’. (BISD 34S/161, emphasis added).

The Panel further noted that the policy purpose of charges is frequently difficult to determine objectively. Many charges could be regarded as serving both internal purposes and purposes related to the importation of goods. Only at the expense of creating substantial legal uncertainty could the policy purpose of a charge be considered to be relevant in determining whether the charge falls under Article II:1(b) or Article III:2. The Panel therefore concluded that the policy purpose of the charge is not relevant to determining the issue of whether the charge is imposed in ‘connection with importation’ within the meaning of Article II:1(b).

“The Panel proceeded to examine whether the mere *description or categorization of a charge under the domestic law* of a contracting party is relevant to determining the issue of whether it is subject to requirements of Article II or those of Article III:2. The Panel noted that if the description or categorization of a charge under the domestic law of a contracting party were to provide the required ‘connection with importation’, contracting parties could determine themselves which of these provisions would apply to their charges. They could in particular impose charges on products after their importation simply by assigning the collection of these charges to their customs administration and allocating the revenue generated to their customs revenue. With such an interpretation the basic objective underlying Articles II and III, namely that discrimination against products from other contracting parties should only take the form of ordinary customs duties imposed on or in connection with importation and not the form of internal taxes, could not be achieved. The same reasoning applies to the *description or categorization of the product subject to a charge*. The fact that the EEC treats imported parts and materials subject to anti-circumvention duties as not being ‘in free circulation’ therefore cannot, in the view of the Panel, support the conclusion that the anti-circumvention duties are being levied ‘in connection with importation’ within the meaning of Article II:1(b).

“In the light of the above, the Panel found that the anti-circumvention duties are not levied ‘on or in connection with importation’ within the meaning of Article II:1(b), and consequently do not constitute customs duties within the meaning of that provision”.⁷⁹

(6) “date of this Agreement” (paragraphs 1(b), 1(c) and 6(a))

Article XXVI:1 provides that the “date of this Agreement” shall be 30 October 1947. For the purposes of Article II, the date of 30 October 1947 is still the applicable date for those concessions made in the round of tariff negotiations held in 1947.

When the modalities of accession to the General Agreement were considered for the first time at the Third Session in Annecy in 1949, the Working Party on this subject decided that in the Annecy Protocol of Terms of Accession, the “date of this Agreement” for the purposes of Article II would be changed “with the object of placing acceding governments in a comparable position to that in which the present contracting parties were at

⁷⁹L/6657, adopted on 16 May 1990, 37S/132, 37S/191-3, paras. 5.4-5.8.

Geneva”⁸⁰. The Annecy Protocol of Terms of Accession in October 1949 therefore provided that “In each case in which Article II of the General Agreement refers to the date of that Agreement, the applicable date in respect of the Schedules annexed to this Protocol shall be the date of this Protocol”.⁸¹ This approach has guided subsequent protocols of accession and tariff protocols. Provisions on Schedules in Protocols of Accession contain the following standard formula:

“(a) In each case in which paragraph 1 of Article II of the Agreement refers to the date of the Agreement, the application date in respect of each product which is the subject of a concession provided for in the Schedule annexed to this Protocol shall be the date of this Protocol.

“(b) For the purpose of the reference in paragraph 6(a) of Article II of the General Agreement to the date of that Agreement, the applicable date in respect of the Schedule annexed to this Protocol shall be the date of this Protocol”.⁸²

The 1958 Report of the Working Party on “Rectification and Modification of Schedules and Consolidation of Schedules” discussed the preparation of consolidated Schedules, and noted in this connection:

“A problem arises with respect to the date applicable to each concession for the purposes of Article II:1(b) of the Agreement: the most important purpose being the date as of which ‘other duties and charges’ are bound. Article II:1(b) specifies that this date shall be the date of the Agreement, and protocols of accession and of supplementary concessions have in each case specified that for the schedules annexed to each protocol, the date should be the date of that protocol. The Working Party *recommends* that the date applicable to any concession in a consolidated schedule should be, for the purposes of Article II, the date of the instrument by which the concession was first incorporated into the General Agreement”.⁸³

The Council Decision of 26 March 1980 on the introduction of a loose-leaf system for the schedules of tariff concessions provides that the instrument by which the concession was first incorporated into a GATT schedule (and thus its date) will be indicated in a special column of the loose-leaf schedules.⁸⁴

The various tariff protocols to the General Agreement have provided that “In each case in which paragraph 1(b) and (c) of Article II of the General Agreement refers to the date of that Agreement, the applicable date in respect of each product which is the subject of a concession provided for in a schedule of tariff concessions annexed to this Protocol shall be the date of this Protocol, but without prejudice to any obligations in effect on that date”.⁸⁵ The Geneva Protocols of 1990 and 1992 in connection with the introduction of the Harmonized System provide that the “date of this agreement” in respect of each product that is the subject of a concession “shall be the date of acceptance of that Protocol by the contracting parties concerned, but without prejudice to any obligations in effect on that date”. These Protocols also provide that the applicable date for the purpose of the reference in paragraph 6(a) “shall be the date of acceptance of the Protocol by the contracting parties concerned”.⁸⁶ A Secretariat Note of 1987 on “Harmonized System Negotiations Under Article XXVIII” notes that “The words ... ‘but without prejudice to any obligations in effect on that date’ make it clear that the relevant cut-off date beyond which additional duties or charges may not be imposed remains the date at which the concession was initially granted ... for specific duties

⁸⁰Report of the Working Party on “Accession at Annecy”, GATT/CP.3/37, adopted 9 June 1949, II/148, 153-154, para. 26.

⁸¹Annecy Protocol, dated 10 October 1949, I/79, 81, para. 5(a).

⁸²See, e.g., the Protocols for the Accession of Mexico (L/6036, 33S/3, para. 7(a) and 7(b)), Bolivia (L/6562, 37S/5, 6, para. 4(a) and 4(b)), Costa Rica (L/6626, 37S/7,8, para. 6(a) and 6(b)), El Salvador (L/6795, 37S/27, 28, para. 4(a) and 4(b)), Tunisia (L/6656, 37S/41, 42, para. 4(a) and 4(b)) and Venezuela (L/6717, 37S/72, 73, para. 4(a) and 4(b)).

⁸³L/934, adopted on 22 November 1958, 7S/113, 116, para. 9.

⁸⁴27S/22.

⁸⁵See, e.g., Geneva (1967) Protocol to the General Agreement on Tariffs and Trade, 15S/5, 6, para. 4; Geneva (1979) Protocol to the General Agreement on Tariffs and Trade, L/4812, 26S/3, 4, para. 4; Para. 2 in each of the Geneva (1987), Geneva (1988), and Geneva (1989) Protocols to the General Agreement on Tariffs and Trade in connection with the Harmonized System introduction, L/6112, L/6222 and L/6292), 34S/5; L/6363, 35S/3; L/6466, 36S/3.

⁸⁶L/6728, BISD 37S/3; L/6987.

paragraph 2(b) of the draft Protocol contains the same idea relating to the depreciation of the currency in which the concession is expressed”.⁸⁷

Thus, in the GATT 1947, each concession would have its own “date of this Agreement” for the purpose of the binding on “other duties and charges” under Article II:1(b) or the adjustment of specific duties under Article II:6, and in a Schedule with a number of concessions there could be a number of different and coexisting such “dates of this Agreement”.

The Understanding on the Interpretation of Article II:1(b) of the GATT 1994, which is incorporated into the GATT 1994, provides that each

“ ... the nature and level of any ‘other duties or charges’ levied on bound tariff items shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff item to which they apply. It is understood that such recording does not change the legal character of ‘other duties or charges’.

“The date as of which ‘other duties or charges’ are bound, for the purposes of Article II, shall be 15 April 1994. ‘Other duties or charges’ shall therefore be recorded in the Schedules at the levels applying on this date. At each subsequent renegotiation of a concession or negotiation of a new concession the applicable date for the tariff item in question shall become the date of the incorporation of the new concession in the appropriate Schedule. However, the date of the instrument by which a concession on any particular tariff item was first incorporated into GATT 1947 or GATT 1994 shall also continue to be recorded in column 6 of the Loose-Leaf Schedules.

...

“The decision in paragraph 2 regarding the date applicable to each concession for the purposes of paragraph 1(b) of Article II of GATT 1994 supersedes the decision regarding the applicable date taken on 26 March 1980 (BISD 27S/24).”⁸⁸

(7) “directly and mandatorily required to be imposed ... by legislation”

The words “directly and mandatorily” were inserted during the negotiation of the General Agreement in 1947 “to eliminate the case where the rate may be varied by some kind of administrative order under a law in force and to make it necessary that it shall be a direct requirement of the law that that change shall be made”. However, the addition of the words “at specified fixed rates” after “imposed thereafter” was not accepted. The main argument against this addition was that this sentence “was designed to deal with measures such as anti-dumping duties and countervailing duties and, for example, marking duties or penalty duties with the effect that it would simply require the administration to impose a penalty which may vary ... if certain violations take place”.⁸⁹

The Report of the Sub-Committee on Schedules of the Tariff Agreement Committee during the Geneva session of the Preparatory Committee in 1947, which recommended the inclusion of paragraphs 1(b) and (c) in the text of Article II, noted that this inclusion “would not affect the right of any Delegation to require any other Delegation with which it has entered into negotiations to provide lists or details of legislation referred to in ... each of these paragraphs”.⁹⁰

(8) Paragraph 1(c): “preferential treatment”

Under paragraph 1(c) the preferential commitments in Part II of a Schedule may only relate to products “entitled under Article I to receive preferential treatment”: i.e. products of those territories listed in Annexes A through F, or of territories benefitting from preferences under Article I:3. The historical preference provisions of

⁸⁷TAR/W/65/Rev.1, dated 14 January 1987, para. 4.

⁸⁸Understanding on the Interpretation of Article II:1(b) of the GATT 1994, paras. 1, 2, 8.

⁸⁹EPCT/TAC/PV/23, p. 28.

⁹⁰EPCT/201, p. 2.

paragraphs 2 through 4 of Article I permit certain contracting parties to accord tariff preferences to the products of certain other territories even on unbound items, and set a ceiling on the margin of preference that may be accorded, but do not specify any particular preferential duty rate and do not require that such preferences be accorded. On the other hand, the preferential schedules under Article II:1(c) provide a means for the participants in those historical preference schemes to bargain for commitments enforceable under GATT on the level of the preferential tariff for particular products.

A number of the Schedules negotiated at Geneva in 1947 included a Part II: Australia, Canada, Cuba, India, New Zealand, Pakistan, South Africa, Sri Lanka, the United Kingdom, the United Kingdom for Newfoundland, and the United States. However, none of the contracting parties listed in Annexes B, C, E or F of the General Agreement included a Part II in its Schedule. The United Kingdom Schedule, including its Part II, was withdrawn upon UK accession to the EEC.

See also the discussion under Article I of historical preferences and the effect of m.f.n. duty reductions on the permissible margin of preference; see also under Article XXIV:9. See also the discussion above at page 75 of direct consignment requirements.

3. Paragraph 2

(1) *Paragraph 2(a): “a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III”*

See Interpretative Note ad Article II, paragraph 2(a).

During the Geneva session of the Preparatory Committee the Legal Drafting Committee agreed that the word “equivalent” means that “for example, if a [charge] is imposed on perfume because it contains alcohol, the [charge] to be imposed must take into consideration the value of the alcohol and not the value of the perfume, that is to say the value of the content and not the value of the whole”.⁹¹

See also the discussion of border tax adjustments under Article III:2.

(2) *Paragraph 2(b): “any anti-dumping or countervailing duty applied consistently with the provisions of Article VI”*

In the 1962 Panel Report on “Exports of Potatoes to Canada”, the Panel examined the complaint of the United States concerning the imposition by Canada of a charge in addition to the specific duty on potatoes bound in 1957, as a result of the application under the Canadian Customs Act (as revised in 1958) of “values for duty” on potatoes imported below a certain price.

“The Panel ... did not consider that the provisions of Article VII were relevant in the context of its examination.

“... The Panel concluded that the imposition of an additional charge could not be justified by Article VI of the General Agreement, since the main requirement laid down in paragraph 1(a) of the Article was not satisfied, namely that the price of the product exported from one country to another was less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

“The Panel came to the conclusion that the measure introduced by the Canadian Government amounted to the imposition of an additional charge on potatoes which were imported at a price lower than Can.\$2.67 per 100 lbs. The Panel considered that this charge was in addition to the specific import duty which had been bound at a rate of Can.\$0.375 per 100 lbs. Since no provisions of the General Agreement had been brought forward for the justification of the imposition of an additional charge above the bound

⁹¹EPCT/TAC/PV/26, p. 21; see also reference to this passage in the Panel Report on “United States - Taxes on Petroleum and Certain Imported Substances”, adopted on 17 January 1987, 34S/136, 162, para. 5.2.7.

import duty, the Panel considered that the Canadian Government had failed to carry out its obligations under paragraph 1(a) of Article II”.⁹²

(3) Paragraph 2(c): “fees or other charges commensurate with the cost of services rendered”

The 1978 Panel Report on “EEC - Programme of Minimum Import Prices, Licences and Security Deposits for Certain Processed Fruits and Vegetables” (referred to above at page 80) found that the interest charges and costs connected with the security deposit associated with the import certificate were limited in amount to the approximate costs of administration in accordance with the provisions of Article VIII:1(a). “The Panel considered that the term ‘fees or other charges commensurate with the cost of services rendered’ in Article II:2(c) would include these costs of administration. Therefore, the Panel concluded that the interest charges and costs in connection with the lodging of the security associated with the import certificate were not inconsistent with the obligations of the Community under Article II”.⁹³

The 1988 Panel Report on “United States - Customs User Fee” examined a fee charged for processing of commercial cargo by the U.S. Customs Service, in relation to Articles II:2(c) and VIII:1(a). The Panel noted that:

“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-a-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”.⁹⁴

See also below at page 99 regarding the relationship between Article II:2(c) and Article VIII:1, and see further under Article VIII concerning fees for services.

4. Paragraph 3: impairment of concessions by alteration in valuation or currency conversion

In June 1953, Czechoslovakia gave notice that in conjunction with its May 1953 revaluation of the Czechoslovak crown, the Government of Czechoslovakia had decided to reduce its bound specific duties by an amount equivalent to the revaluation, in order “not [to] impair the value of any of the concessions provided for in the Schedule and thus afford protection in excess of the amount of protection provided for in the Schedule”. The Working Party which examined the case reported that it had “considered the question of the adjustments of the Czechoslovak specific duties from the angle of the provisions of paragraph 3 of Article II” and that it had “noted that no contracting party offered any objection on the basis of those provisions to the alterations made by the Czechoslovak Government. In view of the fact that these changes do not modify the legal position which is defined in the first sentence of Article II:6(a) ... the Working Party felt that it would be sufficient for the CONTRACTING PARTIES to take note of the adjustments made ...”.⁹⁵

⁹²L/1927, adopted on 16 November 1962, 11S/88, 93, paras. 16-18.

⁹³L/4687, adopted on 18 October 1978, 25S/68, 97-98, para. 4.6.

⁹⁴L/6264, adopted on 2 February 1988, 35S/245, 278, para. 84.

⁹⁵G/62, 2S/64, 66, discussed at SR.8/20 p. 4-5; see also request of Czechoslovakia and Secretariat note, L/100, L/136, and Sec/53/126 and Rev.1-2. In the case in question the revaluation had not been approved by the International Monetary Fund.

See also the material under Article XXIV:8(a)(ii) concerning the 1978 EEC change in the unit of account for specific duties in its common customs tariff, which was stated to be consistent with Article II:3.

See also the material from the 1962 Panel Report on “Exports of Potatoes to Canada” on application of a “value for duty” statute, at page 86.

The 1980 Report of the Working Party on “Specific Duties” notes that

“The Working Party examined the question of whether the application of Article II:6(a) should in the present monetary situation be symmetrical, that is whether contracting parties whose currency appreciated should be required to reduce their specific duties. ... The Working Party decided not to pursue this matter noting that ... contracting parties could resort to Article XXII and XXIII of the General Agreement if they considered that an appreciation impaired in a particular case the value of specific duty concessions”.⁹⁶

5. Paragraph 4

The text of this paragraph was drafted by a Sub-Committee of the Tariff Agreement Committee during the Geneva session of the Preparatory Committee. In introducing the text, the chairman of the Sub-Committee stated:

“... the Sub-Committee primarily aimed at covering three points. First ... where there had been tariff negotiations between the two parties and where one of the two parties had an import monopoly and where the parties agreed to a very definite and exact agreement as to any price margin, whether in percentages or in amounts ... That was case number 1. This is provided for in the text ... where it says ‘except as provided in the Schedule or as otherwise agreed between the parties [which initially negotiated] the concession’.

“The second case we had in mind was the one where there is an import monopoly, but where the negotiations for tariff binding or reduction had only resulted in the binding of the tariff but not in any concrete arrangement regarding the margin for the sale of the goods in question in domestic markets. In that case, the Committee considered that the principles of the Charter would apply, especially the rules laid down in Article 31 of the Charter.

“Thirdly, we had in mind the case where an import duty has been fixed in a case where, at present, there is no import monopoly, but where ... an import monopoly might be established in the future. There the Sub-Committee considered that the tariff duty already fixed should ... stand, and that all sales in the domestic markets of products covered by that tariff item should be covered by the principles of the Charter especially, of course, Article 31.

“... in the last sentence ... by the reference to ‘this Agreement’ we had in mind the General Agreement, and also the Protocol, and especially ... we had in mind Article 31 of the Charter”.⁹⁷

(1) *“a monopoly of the importation of any product described in the appropriate Schedule”*

The 1988 Panel Report on “Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies” examined the practices of provincial liquor boards with respect to alcoholic beverages. Noting that “Canada’s Schedule of Concessions includes tariff bindings on all imported alcoholic beverages”, the Panel “recalled that Canada and the European Communities agreed on the fact that Canada had, through the Importation of Intoxicating Liquors Act, authorized a monopoly of the importation of alcoholic beverages. The Panel noted therefore that the amount of protection admissible under Article II:4 was thus either the amount provided for in the Canadian Schedule or ‘as otherwise agreed between the parties which had initially negotiated the concession’”.⁹⁸

⁹⁶L/4858, adopted 29 January 1980, 27S/149, 154, para. 14.

⁹⁷EPCT/TAC/PV/16 p. 35-37, discussing Sub-Committee report at EPCT/191; see further discussion at EPCT/TAC/PV/16 p. 37-49..

⁹⁸L/6304, adopted on 22 March 1988, 35S/37, 85, paras. 4.3-4.4.

Three Panel Reports in 1989 on the complaints of Australia, New Zealand and the United States regarding “Republic of Korea - Restrictions on Imports of Beef”⁹⁹ examined challenges by Australia, New Zealand and the United States of Korean beef import restrictions on the ground, *inter alia*, that these contravened Article II:4. All three applicant contracting parties argued that the application of the price mark-up on imports by the Korean Livestock Products Marketing Organization (LPMO) was in contravention of Article II:4 and in excess of the amount of protection provided for in Korea’s schedule under which a protective import tariff on beef was bound at 20 per cent ad valorem; in Korea’s view, the operation of the LPMO was consistent with the provisions of Article II:4. Each Report provides that “The Panel noted that the LPMO was a beef import monopoly ... with exclusive privileges for the administration of both the beef import quota set by the Korean Government and the resale of the imported beef to wholesalers or in certain cases directly to end users such as hotels”.¹⁰⁰

(2) “except as provided for in that Schedule or as otherwise agreed”: concessions on the operations of import monopolies

The Schedules of Benelux and France negotiated at Geneva in 1947 and at Torquay in 1950 contained certain concessions on monopoly duties, minimum imports by an import monopoly, or domestic selling prices of products subject to a monopoly.¹⁰¹

The 1988 Panel Report on “Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies” examined the application of Article II:4 in relation to a “Provincial Statement of Intentions with Respect to Sales of Alcoholic Beverages by Provincial Marketing Agencies in Canada” (which was negotiated by Canada on behalf of its provinces in the Tokyo Round and set out specific undertakings with respect to mark-ups, listing and distribution practices) and related letters exchanged between Canada and the EC.

“... The Panel examined ... whether the parties had, by a Provincial Statement of Intentions and the related exchange of letters, ‘otherwise agreed’ in the sense of Article II:4, as claimed by Canada, on an amount of protection different from that provided for in the Canadian Schedule.

“The Canadian Government’s letter of 5 April 1979 made it clear that the Provincial Statement of Intentions was put forward on behalf of the provincial authorities. The title and wording of the Provincial Statement of Intentions indicated that it expressed ‘intentions’ and was, as confirmed in the letter, ‘necessarily non-contractual in nature’. The only undertaking expressed by the Government of Canada in the letter of 5 April 1979 was that it ‘will be prepared to use its good offices with the provincial authorities concerned regarding any problem which may arise with respect to the application of provincial policies and practices set forth in the statement’. Canada’s emphasis on the non-binding nature of the undertaking seemed to indicate that it was not meant to affect Canada’s rights and obligations under Article II:4. Nor did the letters of the EC Commission, dated 5 April and 29 June 1979, express an acceptance of an agreement concerning its rights and obligations under Article II:4. The first of these letters restricted itself to acknowledging the receipt of the Canadian letter and the second only expressed ‘some disquiet’ concerning the terms ‘normal commercial considerations’ in the Provincial Statement of Intentions.

“The Panel noted that the Provincial Statement of Intentions and related letters had not been included among the texts listed in the Procès-Verbal embodying the results of the Tokyo Round, that the letters were classified as confidential and had not been notified to the CONTRACTING PARTIES. While the Council has stated in the terms of reference of the Panel that the Provincial Statement had been ‘concluded in the context of the Tokyo Round of Multilateral Trade Negotiations’ it appeared to the Panel that for the Statement to satisfy the conditions of Article II:4, it would have had to be binding to the same extent as the concession in the Schedule which it was intended to supersede.

⁹⁹L/6503, L/6504, L/6505, adopted on 7 November 1989, 36S/202, 234, 268.

¹⁰⁰*Ibid.*, at 36S/228-229, para. 102; 36S/266, para. 118; 36S/304, para. 124.

¹⁰¹Benelux: binding of monopoly duties for various food-related items (59, 70, 75, 84, ex 100, etc.); France: Note Ad item 235A (minimum imports of leaf tobacco and cigarettes by SEITA; selling price of foreign cigarettes).

"The Panel therefore *concluded* that the Provincial Statement of Intentions and the related exchange of letters could not be held to constitute an agreement in terms of Article II:4 and did not, therefore, modify Canada's obligations arising from the inclusion of alcoholic beverages in its GATT Schedule".¹⁰²

(3) "in the light of the provisions of Article 31 of the Havana Charter"

(a) Application of the Interpretative Note

The Panel Report on "Japan - Restrictions on Imports of Certain Agricultural Products" examined, *inter alia*, the import quota maintained by Japan on prepared beef products and administered by the Livestock Industry Promotion Corporation (LIPC), a state corporation holding an import monopoly.

"The Panel noted the view of Japan that Article XI:1 did not apply to import restrictions made effective through an import monopoly. According to Japan, the drafters of the Havana Charter for an International Trade Organization intended to deal with the problem of quantitative trade limitations applied by import monopolies through a provision under which a monopoly of the importation of any product for which a concession had been negotiated would have "to import and offer for sale such quantities of the product as will be sufficient to satisfy the full domestic demand for the imported product" (Article 31:5 of the Havana Charter). Japan contended that that provision had not been inserted into the General Agreement and that quantitative restrictions made effective through import monopolies could therefore not be considered to be covered by Article XI:1 of the General Agreement ...

"The Panel examined this contention and noted the following: Article XI:1 covers restrictions on the importation of any product, 'whether made effective through quotas, import ... licences or other *measures*' (emphasis added). The wording of this provision is comprehensive, thus comprising restrictions made effective through an import monopoly. This is confirmed by the note to Articles XI, XII, XIII, XIV and XVIII, according to which the term 'import restrictions' throughout these Articles covers restrictions made effective through state-trading operations. The basic purpose of this note is to extend to state-trading the rules of the General Agreement governing private trade and to ensure that the contracting parties cannot escape their obligations with respect to private trade by establishing state-trading operations. This purpose would be frustrated if import restrictions were considered to be consistent with Article XI:1 only because they were made effective through import monopolies. The note to Article II:4 of the General Agreement specifies that that provision 'will be applied in the light of the provisions of Article 31 of the Havana Charter.' The obligation of a monopoly importing a product for which a concession had been granted 'to import and offer for sale such quantities of the product as will be sufficient to satisfy the full domestic demand for the imported product' is thus part of the General Agreement. The Panel could therefore not follow the arguments of Japan based on the assumption that Article 31:5 of the Havana Charter was *not* included in the General Agreement. The Panel found for these reasons that the import restrictions applied by Japan fell under Article XI independent of whether they were made effective through quotas or through import monopoly operations."¹⁰³

In the three parallel Panel Reports in 1989 on the complaints of Australia, New Zealand and the United States regarding "Republic of Korea - Restrictions on Imports of Beef":¹⁰⁴

"In examining Article II:4, the Panel noted that, according to the interpretative note to Article II:4, the paragraph was to be applied 'in the light of the provisions of Article 31 of the Havana Charter'. Two provisions of the Havana Charter, Article 31:4 and 31:5, were relevant. Article 31:4 called for an analysis of the import costs and profit margins of the import monopoly. However, Article 31:5 stated that import monopolies would 'import and offer for sale such quantities of the product as will be *sufficient to satisfy the full domestic demand* for the imported product...' (emphasis added). In the view of the panel, Article 31:5 clearly implied that Article 31:4 of the Havana Charter and by implication Article II:4 of the General

¹⁰²L/6304, adopted on 22 March 1988, 35S/37, 85-86, paras. 4.5-4.8.

¹⁰³L/6253, adopted on 2 February 1988, 35S/163, 229, paras. 5.2.2.1-5.2.2.2.

¹⁰⁴L/6503, L/6504, L/6505, adopted on 7 November 1989, 36S/202, 234, 268.

Agreement were intended to cover import monopolies operating in markets not subject to quantitative restrictions.

“Bearing in mind Article 31:5 of the Havana Charter, the Panel considered that in view of the existence of quantitative restrictions, it would be inappropriate to apply Article II:4 of the General Agreement in the present case. The price premium obtained by the LPMO through the setting of a minimum bid price or derived sale price was directly afforded by the situation of market scarcity arising from the quantitative restrictions on beef. The Panel concluded that because of the presence of the quantitative restrictions, the level of the LPMO’s mark-up of the price for imported beef to achieve the minimum bid price or other derived price was not relevant in the present case. Furthermore, once these quantitative restrictions were phased out, as recommended by the Panel ... this price premium would disappear.

“The Panel stressed, however, that in the absence of quantitative restrictions, an import monopoly was not to afford protection, on the average, in excess of the amount of protection provided for in the relevant schedule, as set out in Article II:4 of the General Agreement. Furthermore, in the absence of quantitative restrictions, an import monopoly was not to charge on the average a profit margin which was higher than that ‘which would be obtained under normal conditions of competition (in the absence of the monopoly)’.... The Panel therefore expected that once Korea’s quantitative restrictions on beef were removed, the operation of the LPMO would conform to these requirements”.¹⁰⁵

(b) *Article 31*

The Interpretative Note *ad* Paragraph 4 refers to Article 31 of the Havana Charter, which provides as follows:

“Article 31

Expansion of Trade

“1. If a Member establishes, maintains or authorizes, formally or in effect, a monopoly of the importation or exportation of any product, the Member shall, upon the request of any other Member or Members having a substantial interest in trade with it in the product concerned, negotiate with such other Member or Members in the manner provided for under Article 17 in respect of tariffs, and subject to all the provisions of this Charter with respect to such tariff negotiations, with the object of achieving:

- “(a) in the case of an export monopoly, arrangements designed to limit or reduce any protection that might be afforded through the operation of the monopoly to domestic users of the monopolized product, or designed to assure exports of the monopolized product in adequate quantities at reasonable prices;
- “(b) in the case of an import monopoly, arrangements designed to limit or reduce any protection that might be afforded through the operation of the monopoly to domestic producers of the monopolized product, or designed to relax any limitation on imports which is comparable with a limitation made subject to negotiation under other provisions of this Chapter.

“2. In order to satisfy the requirements of paragraph 1(b), the Member establishing, maintaining or authorizing a monopoly shall negotiate:

- “(a) for the establishment of the maximum import duty that may be applied in respect of the product concerned; or

¹⁰⁵L/6504, 36S/229, paras. 104, 105, 106; L/6505, 36S/266, 267, paras. 120, 121, 122; L/6503, 36S/305, paras. 126, 127, 128.

- “(b) for any other mutually satisfactory arrangement consistent with the provisions of this Charter, if it is evident to the negotiating parties that to negotiate a maximum import duty under sub-paragraph (a) of this paragraph is impracticable or would be ineffective for the achievement of the objectives of paragraph 1; any Member entering into negotiations under this sub-paragraph shall afford to other interested Members an opportunity for consultation.

“3. In any case in which a maximum import duty is not negotiated under paragraph 2(a), the Member establishing, maintaining or authorizing the import monopoly shall make public, or notify the Organization of, the maximum import duty which it will apply in respect of the product concerned.

“4. The import duty negotiated under paragraph 2, or made public or notified to the Organization under paragraph 3, shall represent the maximum margin by which the price charged by the import monopoly for the imported product (exclusive of internal taxes conforming to the provisions of Article 18, transportation, distribution and other expenses incident to the purchase, sale or further processing, and a reasonable margin of profit) may exceed the landed cost; Provided that regard may be had to average landed costs and selling prices over recent periods; and Provided further that, where the product concerned is a primary commodity which is the subject of a domestic price stabilization arrangement, provision may be made for adjustment to take account of wide fluctuations or variations in world prices, subject where a maximum duty has been negotiated to agreement between the countries parties to the negotiations.

“5. With regard to any product to which the provisions of this Article apply, the monopoly shall, wherever this principle can be effectively applied and subject to the other provisions of this Charter, import and offer for sale such quantities of the product as will be sufficient to satisfy the full domestic demand for the imported product, account being taken of any rationing to consumers of the imported and like domestic product which may be in force at that time.

“6. In applying the provisions of this Article, due regard shall be had for the fact that some monopolies are established and operated mainly for social, cultural, humanitarian or revenue purposes.

“7. This Article shall not limit the use by Members of any form of assistance to domestic producers permitted by other provisions of this Charter.

Ad Article 31

“Paragraphs 2 and 4

“The maximum import duty referred to in paragraphs 2 and 4 would cover the margin which has been negotiated or which has been published or notified to the Organization, whether or not collected, wholly or in part, at the custom house as an ordinary customs duty.

“Paragraph 4

“With reference to the second proviso, the method and degree of adjustment to be permitted in the case of a primary commodity which is the subject of a domestic price stabilization arrangement should normally be a matter for agreement at the time of the negotiations under paragraph 2 (a).”

Concerning Article 17 of the Charter, see the material under Article XXVIII*bis* of this Index.

(c) *Interpretative Note Ad Article II:4*

During the Review Session of 1954-55, the Review Working Party on Other Barriers to Trade considered proposals for amending the state trading provisions of the General Agreement either by consolidating them or by adopting Articles 29-31 of the Havana Charter. The Report of the Working Party notes: “The conclusion reached by the majority of the Working Party, however, was in general to retain the present structure of the Agreement with respect to state trading. ... The Working Party undertook to redraft the existing interpretative note to

paragraph 4 of Article II, both so as to eliminate the cross reference to the Havana Charter and so as to clarify the meaning ...".¹⁰⁶ The interpretative note would have been replaced by the following text:

"The provisions of this paragraph will be applied in the light of the following:

"1. The protection afforded through the operation of an import monopoly in respect of products described in the appropriate schedule shall be limited by means of:

"(a) a maximum import duty that may be applied in respect of the product concerned; or

"(b) any other mutually satisfactory arrangement consistent with the provisions of this Agreement; any contracting party entering into negotiations with a view to concluding such arrangement shall afford to other interested contracting parties an opportunity for consultation.

"2. The import duty mentioned in 1(a) above shall represent the margin by which the price charged by the import monopoly for the imported product (exclusive of internal taxes conforming to the provisions of Article III, transportation, distribution, and other expenses incident to the purchase, sale or further processing, and a reasonable margin of profit) exceeds the landed cost; *Provided* that regard may be had to average landed costs and selling prices over recent periods; and *Provided* further that, where the product concerned is a primary commodity which is the subject of a domestic price stabilization arrangement, provisions may be made for adjustment to take account of wide fluctuations or variations in world prices, subject to agreement between the countries parties to the negotiations".

However, this change was effected through the Protocol Amending Part I and Article XXIX and XXX, which failed to gain the requisite unanimous approval, and was abandoned.¹⁰⁷

(4) "protection on the average in excess of the amount of protection provided for in that Schedule"

The 1988 Panel Report on "Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies" examined the application of Article II:4:

"The Panel then proceeded to examine whether the mark-ups imposed on imported alcoholic beverages plus the import duties, which were collected at the bound rate, afforded protection on the average in excess of the amount of protection provided for in Canada's Schedule contrary to Article II:4, as claimed by the European Communities. The Panel noted that according to the interpretative note to Article II:4 the paragraph was to be applied 'in the light of the provisions of Article 31 of the Havana Charter.' ...

"The Panel noted that Article II:4, applied in the light of Article 31:4, prohibited the charging of prices by the provincial liquor boards for imported alcoholic beverages which (regard being had to average landed costs and selling prices over recent periods) exceeded the landed costs; plus customs duties collected at the rates bound under Article II; plus transportation, distribution and other expenses incident to the purchase, sale or further processing; plus a reasonable margin of profit; plus internal taxes conforming to the provisions of Article III. ...¹⁰⁸

"The Panel considered that differential mark-ups could be justified to offset any additional costs of transportation, distribution and other expenses incident to the purchase, sale or further processing, such as storage, necessarily associated with importing products and that such calculations could be made on the basis of average costs over recent periods.

"The Panel noted Canada's statement that, in some instances, the differential mark-ups also reflected a policy of revenue maximization on the part of the provincial liquor boards, which charged higher mark-ups on imported than on domestic alcoholic beverages because they marketed imported products as

¹⁰⁶L/334 and Addendum, adopted on 3 March 1955, 3S/222, 228, para. 26.

¹⁰⁷15S/65.

¹⁰⁸35S/86, paras. 4.9, 4.10.

premium products and exploited less price elastic demand for these products, and that this policy was in accordance with the General Agreement because revenue maximization was justified by normal commercial considerations.

“The Panel considered that a monopoly profit-margin on imports resulting from policies of revenue maximization by provincial liquor boards could not normally be considered as a ‘reasonable margin of profit’ in the sense of Article II:4, especially if it were higher on imported products than on domestic products.

“The Panel considered that the phrase ‘a reasonable margin of profit’ should be interpreted in accordance with the normal meaning of these words in their context of Article II and Article 31 of the Havana Charter and that ‘a reasonable margin of profit’ was a margin of profit that would be obtained under normal conditions of competition (in the absence of the monopoly). The margin of profit would have on the average to be the same on both domestic and the like imported products so as not to undermine the value of tariff concessions under Article II.

“The Panel also noted Canada’s argument that the drafting history implied that a reasonable margin of profit was a margin which ‘should not be so excessive as to restrict the volume of trade in the product concerned’, and that since the volume of imports from the European Communities of the products in question had not declined, the margin of profit was a reasonable one. The Panel noted that the fact that these imports had not declined did not say anything about what they would have been in the absence of a policy of monopolistic profit maximization by the provincial liquor boards.

“The Panel examined Canada’s reference to normal commercial considerations and noted that the term ‘commercial considerations’ was mentioned in Article XVII:1(b). It considered that this reference was not relevant to its examination of Article II:4 as the context in which the term ‘commercial considerations’ had been used was different.

“The Panel therefore *concluded* that the mark-ups which were higher on imported than on like domestic alcoholic beverages (differential mark-ups) could only be justified under Article II:4, to the extent that they represented additional costs necessarily associated with marketing of the imported products, and that calculations could be made on the basis of average costs over recent periods. The Panel also *concluded* that the burden of proof would be on Canada if it wished to claim that additional costs were necessarily associated with marketing of the imported products”.¹⁰⁹

In Council discussions on the adoption of the Panel Report the representative of Canada stated that “with respect to the Panel’s conclusions in paragraph 4.16 of the report, Canada could not agree that the margin of profit would on average have to be the same on both the domestic and the like imported product so as not to undermine the value of tariff concessions under Article II. His authorities considered that the Panel’s interpretation did not accord with normal conditions of competition or reflect the realities of the market place”.¹¹⁰

In the 1992 Panel Report on “Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies”, the same Panel again examined the practices of provincial liquor boards in Canada.

“The Panel noted that the Panel which had examined in 1988 the practices of the Canadian liquor boards had concluded that ‘mark-ups which were higher on imported than on like domestic alcoholic beverages (*differential mark-ups*) could only be justified under Article II:4, to the extent that they represented *additional costs necessarily associated with marketing of the imported products*, and that calculations could be made on the basis of average costs over recent periods’. That Panel had also concluded that ‘the burden of proof would be on Canada if it wished to claim that additional costs were necessarily associated with marketing of the imported products’. The Panel noted that the United States

¹⁰⁹35S/87. paras. 4.13 - 4.19.

¹¹⁰C/M/218, p. 5.

and Canada did not agree on which costs incurred by the liquor boards constituted ‘additional costs necessarily associated with marketing of imported products’ and requested guidance from the Panel on this issue.

“The Panel considered that, in determining which costs were ‘additional costs necessarily associated with the marketing of imported products’, four situations had to be distinguished. The costs could be ‘additional’ because they were incurred as a result of activities of the liquor boards that were specific to imported products; such costs were, for instance, the expenses arising from customs clearance or warehouse handling (e.g. palletization). The costs could also be ‘additional’ because, although they arose both for imported and domestic products, they were higher for imported products; such costs were, for instance, storage or imputed inventory finance costs, where inventory turnover for imported products was slower than for domestic products. On the other hand there were costs, such as general or administrative expenses, which could not be considered ‘additional’, since they were not necessarily associated with the marketing of the imported product, but rather with the overall operation of the liquor monopoly. Nor could costs be considered ‘additional’ which were incurred in respect of services prescribed for imported products but not for domestic products inconsistently with the General Agreement.

“Taking into account the four situations outlined above, the Panel also recalled that, in view of Article 31:4 of the Havana Charter, import monopolies were authorized to charge for transportation, distribution and other expenses incident to the purchase and sale of imported products. The Panel then considered how the liquor boards could and should compute the ‘differential mark-up’ i.e. the difference in the mark-ups on imported and domestic products. It believed that the liquor boards, as commercial enterprises, were entitled to recover both variable and fixed costs arising from their commercial activities incident to the purchase and sale of imported products. Thus, in line with the categorization in the previous paragraph, the Panel considered that the differential mark-up on imported beer should allow the recovery of those costs that were directly associated with the handling of imported beer (variable costs), and of charges for fixed assets employed that were calculated in proportion to the use of these assets by the imported product. All other expenses (e.g. general or administrative expenses) would have to be recovered through mark-ups uniformly applied to both domestic and imported beer.

“The Panel noted in this context that the disagreements between the United States and Canada appeared to arise primarily from the fact that Canada regarded as additional costs all costs arising from services performed by the liquor boards for imported beer that they did not perform for domestic beer, such as the cost of delivering imported beer to the points of sale. The Panel recalled its finding in paragraphs 5.12-5.16 above that, under Article III:4 of the General Agreement, Canada would have to apply the same delivery system to both domestic and imported beer or permit imported beer to be delivered privately if it had done so for domestic beer. In this context the Panel had noted that, in the situation in which the liquor boards authorized the private delivery of domestic beer to the points of sale but prohibited the private delivery of imported beer, a charge on imported beer for delivery to points of sale which corresponded to their actual costs of delivering such beer was not necessarily consistent with Article III:4. The Panel considered that strict observation of the national treatment principle in respect of the services performed by the liquor boards (i.e. identical treatment of imported and domestic beer) would, to a large extent, eliminate the uncertainties as to the proper allocation of the costs of the liquor boards. The Panel considered further that application of the national treatment principle in terms of affording effective equality of opportunities (i.e. permitting imported beer to be treated in the same way as domestic beer) would eliminate any problems with respect to liquor board charges for the services performed; in this situation, the foreign brewers’ choice of distribution system would be made on purely commercial grounds.

“The Panel then examined the mark-up practices of the liquor boards in the light of the principles set out above. The Panel noted that most liquor boards had, subsequent to the adoption of the 1988 Panel report, introduced so-called ‘cost-of-service charges’ and that the cost-of-service differential between imported and domestic products was in fact equivalent to the differential mark-up defined in the 1988 Panel report. It further noted that, in seven of the 10 provinces, the differential mark-ups as computed on the basis of cost-of-service charges did not conform to the principles set out above and included additional costs incurred by the liquor boards not necessarily associated with the marketing of imported beer. Two provinces, New Brunswick and Newfoundland, did not introduce separate cost-of-service charges but

maintained differential mark-ups. In New Brunswick, this differential again included costs that were not necessarily associated with the marketing of imported beer. In the case of Newfoundland, no audit of the mark-ups had been provided. Only in Prince Edward Island, where no beer was brewed, no differential mark-up was maintained. The Panel therefore *concluded* that the differential mark-ups currently levied by the liquor boards (with the exception of Prince Edward Island), including differential mark-ups based on cost-of-service charges, were inconsistent with Article II:4 of the General Agreement.

“The Panel then considered how Canada could best meet its burden of proving that the differential mark-ups consisted only of additional costs necessarily associated with the marketing of imported beer. The Panel considered that one possibility was for Canada to submit audited cost-of-service accounts prepared by independent reputable auditors who were made aware of Canada’s obligations under the General Agreement in respect of mark-ups, in particular the obligation under Article II:4 not to afford protection on the average in excess of the amount of protection provided for in Canada’s Schedule of Concessions. The Panel noted in this context that, in respect of wine and distilled spirits, the United States and Canada had agreed to rely on audited cost-of-service accounts. The Parties might, therefore, wish to agree on the instructions to be given to the auditors or, alternatively, to entrust an independent expert with the task of drawing up such instructions”.¹¹¹

See also the reference to “protection, on the average, in excess of the amount of protection provided for” in the three parallel Panel Reports in 1989 on the complaints of Australia, New Zealand and the United States regarding “Republic of Korea - Restrictions on Imports of Beef”¹¹² excerpted above at pages 96.

Concerning “other charges and fees” charged by import monopolies, see the finding from the same Panel Reports excerpted above at page 82.

See also the definition of the term “import mark-up” in the Interpretative Note ad Article XVII, paragraph 4(b).

6. Paragraph 5

In 1956, Germany complained that the Greek government had imposed a tariff rate of 40 to 60 per cent ad valorem on long-playing gramophone records, despite the fact that “gramophone records” were bound in the Greek Schedule with a per-kilogram specific duty.¹¹³ Greece considered the introduction of the new long-playing records as the creation of a completely new item since they were made of a different material. A Group of Experts that considered the complaint found that when granting the specific duty concession on “gramophone records” the Greek government had not attached any qualification to the description of the product; the experts considered that long-playing records fell within that item and were covered by the concession. “The Group agreed that the practice generally followed ... was to apply the tariff item ... that specified the products by name, or, if no such item existed, to assimilate the new products to existing items in accordance with the principles established by the national tariff legislation ...”.¹¹⁴ The case was ultimately settled bilaterally.¹¹⁵

The only instance in which the Secretariat has been informed of negotiations completed under Article II:5 was in 1969, involved Canada and the European Communities and concerned “compensatory adjustment in connection with the impairment of the concession on flash guns in Schedule V (Canada) resulting from the decision of the Tariff Board of 17 May 1965, on the classification of electronic flash apparatus”.¹¹⁶ A 1980 Note by the Secretariat for the Committee on Tariff Concessions on reclassification issues observes that “It would seem that questions of this kind have come up from time to time in connexion with reclassification questions by the

¹¹¹DS17/R, adopted on 18 February 1992, 39S/27, 80-82, paras. 5.17-5.22.

¹¹²L/6503, L/6504, L/6505, adopted on 7 November 1989, 36S/202, 234, 268.

¹¹³L/575; SR.11/12 p. 115-116.

¹¹⁴L/580, SR.11/16 p. 168-170.

¹¹⁵L/765.

¹¹⁶SECRET/193, TAR/W/14.

Customs Co-operation Council, but up to now they have presumably been settled bilaterally or did not involve changes of substance”.¹¹⁷

See also the discussion above of the difference between maintenance of “treatment” and modification of a concession; see generally the chapter on Article XXVIII; and see paragraphs 4 and 5 of the Understanding on the Interpretation of Article XXVIII of the GATT 1994.

7. Paragraph 6

(1) “currency at the par value accepted or provisionally recognized”

Article IV of the original Articles of Agreement of the International Monetary Fund required each member of the Fund to state a par value for its currency in terms of gold or U.S. dollars of a fixed gold value, as part of a system of fixed exchange rates. A change in the par value of a member’s currency could be made only after consultation with the Fund. The words “or provisionally recognized” were inserted in paragraph 6(a) during the Geneva session of the Preparatory Committee to meet the case of Brazil, which had not established a par value at the time when the paragraph was drafted.¹¹⁸

During the Review Session of 1954-55 the CONTRACTING PARTIES agreed to amend paragraph 6(a) by using the words “... at the par value accepted or at the rate of exchange recognized by the Fund” on the ground that “these words correspond more closely to the Fund’s practices under its Articles of Agreement and cover cases not provided for in the present text”. The Working Party Report on these changes noted that in the case of Canada, for example, the established par value accepted by the Fund was no longer the effective rate, and the Fund recognized the fluctuating rate for its own accounting purposes. The wording was also changed so as to refer to “the” par value instead of “this” par value, in order to permit an adjustment of duties after a second devaluation of a currency. However, this amendment was included in the Protocol Amending Part I and Articles XXIX and XXX, which did not enter into force.¹¹⁹

As revised in 1978, Article IV of the IMF Articles no longer requires the stating of par values and instead provides that “each member undertakes to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates”.¹²⁰

In 1978-80 the Working Party on Specific Duties examined the modalities for the application of Article II:6(a) in the monetary situation of increased flexibility of exchange rates.

“The Working Party noted that the rules for the adjustment of bound specific duties in Article II:6(a) of the General Agreement were drafted on the assumption that the members of the International Monetary Fund maintain par values for their currencies. However, under the present Articles of Agreement of the Fund, as amended on 1 April 1978, Fund members are no longer obliged to maintain par values but have the right to adopt exchange arrangements of their choice. Some Fund members have floating exchange rates, and other maintain the exchange rate against one other currency, a basket of currencies or an international unit of account. The Working Party concluded that the right to adjust specific duties in the present monetary situation could not be called into question but that the modalities for the application of

¹¹⁷TAR/W/14, dated 29 August 1980, para. 5.

¹¹⁸EPCT/TAC/PV/24, p. 43-44.

¹¹⁹L/329, Report of the Review Working Party on “Schedules and Customs Administration”, adopted on 26 February 1955, 3S/205, 209-210, para. 8; *ibid.*, 3S/214, para. 18. The Protocol Amending Part I and Articles XXIX and XXX was abandoned due to lack of the requisite unanimous acceptance; see 15S/65. Concerning the Review Session amendments to Article II:6 see further SR.9/16 and W.9/109+Rev.1, 163, 193, 200 and 212.

¹²⁰Section 4 of Article IV as revised provides that “The Fund may determine, by an 85 per cent majority of the total voting power, that international economic conditions permit the introduction of a widespread system of exchange arrangements based on stable but adjustable par values. ... Upon making such determination, the Fund shall notify members that the provisions of Schedule C [on Par Values] apply”. Articles of Agreement of the International Monetary Fund, 2 UNTS 39 (1947) as amended 1 April 1978.

Article II:6(a) needed to be adjusted to take into account the changes in the international monetary system”.¹²¹

The Working Party on Specific Duties drafted “Guidelines for Decisions under Article II:6(a) of the General Agreement”, which were adopted on 29 January 1980. See also the material under Article XXIV:8(a)(ii) concerning the 1978 EEC change in the unit of account for specific duties in its common customs tariff.

(2) *Adjustment of specific duties in accordance with paragraph 6(a)*

The Decisions of the CONTRACTING PARTIES under Article II:6 before 1980 are listed in the accompanying table.

The “Guidelines for Decisions under Article II:6(a) of the General Agreement”, adopted on 29 January 1980, provide that:

“In the present monetary situation the CONTRACTING PARTIES shall apply the provisions of Article II:6(a) as set out below unless they consider that this would not be appropriate in the circumstances of the particular case, for example because it would lead to an impairment of the value of a specific duty concession ...

“If a contracting party, in accordance with Article II:6(a) of the General Agreement, requests the CONTRACTING PARTIES to concur with the adjustment of bound specific duties to take into account the depreciation of its currency, the CONTRACTING PARTIES shall ask the International Monetary Fund to calculate the size of the depreciation of its currency and to determine the consistency of the depreciation with the Fund’s Articles of Agreement. ...

“The CONTRACTING PARTIES shall be deemed to have authorized the contracting party to adjust its specific duties ... if the International Monetary Fund advises the CONTRACTING PARTIES that the depreciation calculated as set out above ... is in excess of 20 per cent and consistent with the Fund’s Articles of Agreement and if, during the sixty days following the notification of the Fund’s advice to the contracting parties, no contracting party claims that a specific duty adjustment to take into account the depreciation would impair the value of a concession ...”.¹²²

**Decisions of the CONTRACTING PARTIES
under Article II:6(a) to authorize
adjustment of specific duties**

Benelux	Decision of 15 December 1950	II/12
Finland	Decisions of 3 March 1955, 15 November 1957, 20 November 1967	3S/28, 6S/22, 15S/66
Greece	Decision of 24 October 1953	2S/24
Israel	Decision of 3 February 1975	C/M/103, 124, 125, 138
Turkey	Decision of 10 April 1959	8S/24
Uruguay	Decisions of 18 May 1961, 25 March 1965	10S/34, 13S/20

The 1980 Decision provides rules for calculating the size of the depreciation, in the case of one contracting party or in the case of contracting parties members of a customs union which define their common specific duties in terms of a unit of account composed of the currencies of the members.

(3) *“date of this Agreement”*

See the discussion of “date of this Agreement” at page 83 above.

¹²¹L/4858, adopted on 29 January 1980, 27S/149, 150, para. 5.

¹²²L/4938, adopted on 29 January 1980, 27S/28-29.

(4) Article II:6(b)

The Working Party on “Specific Duties” also examined which procedures should apply to requests submitted under Article II:6(a) by contracting parties that are not members of the Fund. It noted that this matter was dealt with in Article II:6(b) and in accession protocols of contracting parties that were not members of the Fund, and considered that no proposals were necessary, it being understood that all contracting parties have access to Article II:6(a).¹²³

8. Paragraph 7: “an integral part of Part I of this Agreement”

The Schedules were included in Part I of the General Agreement as it was intended that Part II would be immediately superseded by the Charter provisions when the Charter entered into force. See Section III below.

In 1949, Cuba challenged the reduction of most-favoured-nation tariff rates by the United States on products with respect to which Cuba benefited from preferential tariff rates under bilateral trade agreements with the US. Cuba argued, *inter alia*, that the inclusion of a rate of duty in Part I of any Schedule legally prevented the reduction of that rate otherwise than by an amendment in accordance with Article XXX requiring acceptance by all the contracting parties as a condition of its becoming effective.¹²⁴ So as to clarify that the wording of Article II meant that the rates of duty contained in the Schedules were only maximum, and not also minimum, rates of duty, the CONTRACTING PARTIES, in a Decision of 9 August 1949, ruled,

“The reduction of the rate of duty on a product, provided for in a schedule to the General Agreement, below the rate set forth therein, does not require unanimous consent of the CONTRACTING PARTIES in accordance with the provisions of Article XXX”.¹²⁵

See also the term “in excess of” in paragraph 1(b); see also the material on modification and rectification of Schedules below and under Article XXX.

B. RELATIONSHIP BETWEEN ARTICLE II AND OTHER GATT ARTICLES**1. Article III**

See under Article III.

2. Article VIII

In the 1988 Panel Report on “United States - Customs User Fee” the Panel examined the general meaning, drafting history and differences in wording in Articles II:2(c) and VIII:1(a).

“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 Article II:2(c) originated as a standard term to be

¹²³L/4858, adopted on 29 January 1980, 27S/149, 156, para. 18.

¹²⁴CP.3/59, CP.3/SR.34-38; Working Party Report on “Accession at Annecy”, GATT/CP.3/37, II/148, 152-153, para. 25.

¹²⁵Vol. II/11.

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)".¹²⁶

A footnote to this paragraph provides:

"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))."¹²⁷

See the material from this Panel Report cited *in extenso* under Article VIII.

3. Articles XI and XIII

In a dispute concerning EEC restrictions on imports of apples from Chile, Chile maintained that the EEC quantitative protective measure against Chile contravened Article II:1(a) and (b), in that the EEC measure involved treatment less favourable than that provided for in tariff concessions granted by the EEC for apples and had the effect of being an absolute or infinite duty completely nullifying the concession granted. In the 1980 Panel Report on "EEC Restrictions on Imports of Apples from Chile",

"the Panel considered that the EEC import suspension did affect the value of the EEC tariff binding to Chile on apples. With reference to II:1(b), however, the Panel considered that the EEC measure was not strictly speaking a duty or charge in excess of the tariff concession provided in the EEC schedule. Therefore, the Panel considered that it was more appropriate to examine the EEC measure in the context of Article XI".¹²⁸

The 1984 Panel Report on "United States - Imports of Sugar from Nicaragua" concluded, *inter alia*, that:

"Having found the reduction of the quota to be inconsistent with the obligations of the United States under Article XIII, the Panel did not deem it necessary to examine whether the action was also inconsistent with any other obligations on quota allocations which the United States might have assumed under Article II in its schedule of concessions".¹²⁹

In the 1984 Report of the "Panel on Newsprint", the Panel did not share the argument advanced by the EC that their opening of a duty-free tariff quota of 500,000 tonnes for newsprint, whereas the commitment of the EC in its GATT Schedule LXXII provided for an annual duty-free tariff quota of 1.5 million tonnes, was merely a change in the administration or management of the tariff quota which was permissible under Article XIII of the GATT.

"The Panel considered the arguments advanced by the EC relating to Article XIII, but concluded that the conditions for its application had not been fulfilled. In examining the EEC Regulation 3684/83, the Panel found that it did not in fact constitute a change in the administration or management of the tariff quota from a global quota system to a system of country shares, as had been asserted by the EC. The Regulation in its Article 1.1 simply opens a quota of 500,000 tonnes and stipulates in Article 1.3 that imports shall not be charged against this quota if they are already free of customs duties under other

¹²⁶L/6264, adopted on 2 February 1988, 35S/245, 275, para. 75.

¹²⁷*Ibid.*, footnote 1 at 35S/275.

¹²⁸L/5047, adopted on 10 November 1980, 27S/98, 112, para. 4.2.

¹²⁹L/5607, adopted on 13 March 1984, 31S/67, 74, para. 4.5.

preferential tariff treatment. It does not provide an allocation of country shares to individual m.f.n. suppliers, nor has a separate quota (global or otherwise) for the EFTA countries been established, as Article XIII requires ... It is in the nature of a duty-free tariff quota to allow specified quantities of imports into a country duty-free which would otherwise be dutiable, which is not the case for EFTA imports by virtue of the free-trade agreements. Imports which are already duty-free, due to a preferential agreement, cannot by their very nature participate in an m.f.n. duty-free quota.”¹³⁰

4. Article XXIII

See under Article XXIII:1(b) on non-violation cases and the relevance of tariff concessions.

5. Article XXVIII

Concerning the relationship between Article XXVIII negotiations and the status of tariff bindings, see the unadopted panel report of 1994 on “EEC - Import Régime for Bananas”.¹³¹

C. EXCEPTIONS AND DEROGATIONS

1. Article II:2

See pages 86-87 above. The 1988 Panel Report on “United States - Customs User Fee” notes that “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’.”¹³²

2. Protocol of Provisional Application

The Note Ad Article I:1 provides that “The obligations incorporated in ... paragraph 2(b) of Article II by reference to Article VI shall be considered as falling within Part II for the purposes of the Protocol of Provisional Application”. An identical provision is included in the standard text of accession Protocols.

3. Other Protocols of accession

The Report of the Working Party on “Accession of the United Arab Republic” notes that “The Working Party discussed the 10 per cent ‘consolidation of economic development tax’ imposed on imports into the United Arab Republic. ... The Working Party noted that this tax was not to be considered as a charge for services rendered. Nor, in the view of the representative of the United Arab Republic, were the provisions of Article III applicable, since there was no question of national treatment. The tax was applied only on imports and as such had an effect equivalent to that of a customs duty”.¹³³ The accession protocol of the United Arab Republic provided that “The temporary ‘consolidation of economic development tax’ may be maintained in effect, at rates not exceeding the rates in force at the date of this Protocol, on bound duties until 31 December 1975, by which time, if the measure is still in effect, the matter shall be reviewed by the CONTRACTING PARTIES”.¹³⁴ This deadline was extended to 31 December 1980,¹³⁵ to 31 December 1985,¹³⁶ and to 31 December 1990¹³⁷ and has expired.

¹³⁰L/5680, adopted on 20 November 1984, 31S/114, 31S/131-2 para. 51, 31S/133 para. 55.

¹³¹DS38/R, dated 11 February 1994, para. 133.

¹³²L/6264, adopted on 2 February 1988, 35S/245, 273, para. 70.

¹³³L/3362, adopted on 27 February 1970, 17S/33, 37, para. 16.

¹³⁴17S/2, 4, para. 6.

¹³⁵L/4264, Decision of 26 November 1975, 22S/8.

¹³⁶L/5083, Decision of 25 November 1980, 27S/16.

¹³⁷L/5923, Decision of 26 November 1985, 32S/15.

4. Waivers under Article XXV:5

For a list of waivers of Article II, see the table of waivers following Article XXV. Recent supplements to the BISD have included a list of waivers related to implementation of the Harmonized System and other schedule-related waivers.¹³⁸

The CONTRACTING PARTIES have decided on a number of occasions to grant waivers suspending the application of Article II of the General Agreement to enable a contracting party to implement a modified Schedule in advance of completion of negotiations under Article XXVIII, subject to specified conditions. In recent years, typical conditions have included:

- “1. The Government of [contracting party] will as soon as possible enter into negotiations or consultations pursuant to paragraphs 1 to 3 of Article XXVIII.
- “2. The negotiations or consultations mentioned above shall be completed not later than [date].
- “3. Pending the entry into force of the results of the negotiations or consultations mentioned above, the other contracting parties will be free to suspend concessions initially negotiated with [contracting party] to the extent that they consider that adequate compensation is not offered by the Government of [contracting party]”.¹³⁹

See also discussion of such waivers under Article XXVIII.

During 1993 the matter of renewal of waivers of Article II associated with the introduction of the Harmonized System was raised in the Council. The 1993 Report of the Committee on Tariff Concessions notes that the Committee at its December 1993 meeting agreed to the following proposal:

“The Committee shall report twice a year on its activities to the Council. Under the item related to ‘Ongoing negotiations and submission of HS documentation by contracting parties under waivers’, the following factual information shall be included:

- “– Date of original waiver.
- “– Date of submission of documents relevant to the HS implementation (if no documents have been circulated, reasons therefor).
- “– Number of extensions and dates when granted.
- “– Number of countries with which Article XXVIII negotiations have been initiated.
- “– Number of countries with which Article XXVIII negotiations have been concluded.
- “– Status of outstanding Article XXVIII negotiations as well as a general outline of relevant problems, if any.
- “– Outlook for concluding the process.”¹⁴⁰

¹³⁸See, e.g., 37S/295, 38S/78.

¹³⁹See, e.g., Waiver decisions on “Indonesia - Establishment of a new Schedule XXI”, L/6331, Decision of 22 April 1988, 35S/347; “Bangladesh - Establishment of a New Schedule LXX”, L/6374, Decision of 18 July 1988, 35S/348; “Mexico - Establishment of a New Schedule LXXVII”, L/6377, Decision of 18 July 1988, 35S/351.

¹⁴⁰TAR/243, adopted on 25-26 January 1994, Annex II. See also Council discussion at C/M/264 and proposal at TAR/W/88.

5. Coexistence of the GATT 1947 and the WTO Agreement

On 8 December 1994, the Preparatory Committee for the WTO, meeting on the occasion of the Implementation Conference, adopted a Decision on “Coexistence of the General Agreement on Tariffs and Trade 1947 and the World Trade Organization”. The CONTRACTING PARTIES meeting in Special Session on the same date also adopted this decision, which provides *inter alia*:

“The CONTRACTING PARTIES to the General Agreement on Tariffs and Trade (hereinafter referred to as ‘GATT 1947’),

“*Noting* that not all contracting parties to the GATT 1947 meeting the conditions for original membership in the World Trade Organization ... will be able to accept the Marrakesh Agreement Establishing the WTO ... as of its date of entry into force, and that the stability of multilateral trade relations would therefore be furthered if the GATT 1947 and the WTO Agreement were to co-exist for a limited period of time;

“*Considering* that, during that period of co-existence, a contracting party which has become a Member of the WTO should not be under a legal obligation to extend the benefits accruing solely under the WTO Agreement to contracting parties that have not yet become WTO Members and should have the right to act in accordance with the WTO Agreement notwithstanding its obligations under the GATT 1947; ...

“*Decide as follows*:

“1. The contracting parties that are Members of the WTO may, notwithstanding the provisions of the GATT 1947,

“(a) accord to products originating in or destined for a Member of the WTO the benefits to be accorded to such products solely as a result of concessions, commitments or other obligations assumed under the WTO Agreement without according such benefits to products originating in or destined for a contracting party that has not yet become a Member of the WTO; and

“(b) maintain or adopt any measure consistent with the provisions of the WTO Agreement.”¹⁴¹

Concerning the transition to the WTO, see further in the chapter on Institutions and Procedure in this book.

D. TARIFF PROTOCOLS, SCHEDULES OF CONCESSIONS, AND NATIONAL TARIFF SCHEDULES

1. Schedules in general

The “Procedures for Giving Effect to Certain Provisions of the Charter of the International Trade Organization by Means of a General Agreement on Tariffs and Trade Among the Members of the Preparatory Committee”, which were drawn up during the London session of the Preparatory Committee, provided:

“It is contemplated that the tariff negotiations among the members of the Preparatory Committee will be multilateral, both in scope and in legal application. Thus, there would result from the negotiations a total of sixteen schedules of tariff concessions, each schedule setting forth a description of the products and of the maximum (concession) rates of duty thereon which would be applicable in respect of the imports into a particular country. In this way each member of the Committee would be contractually entitled, in its own right and independently of the most-favoured-nation clause, to each of the concessions in each of the schedules of the other members.

¹⁴¹PC/12, L/7583, preamble and para. 1.

“The multilateral form of the schedules is designed to provide more stability than has existed in the past under bilateral tariff agreements, to assure certainty of broad action for the reduction of tariffs and to give to countries a right to tariff concessions on particular products which such countries might wish to obtain, but could not obtain under bilateral agreements, because of their relatively less important position as a supplier of the product concerned. The multilateral form also gives expression to the fact that each country stands to gain when another country grants tariff reductions on any product, even though primarily supplied by a third country ...”.¹⁴²

2. Protocols of concessions

A 1985 Secretariat Note for the Committee on Tariff Concessions on “Loose-leaf Schedules Based on Harmonized System Nomenclature” notes as follows:

“*Tariff protocols* which were established at the end of multilateral rounds of trade negotiations have, subsequent to 1959, been signed only by those contracting parties whose schedules were annexed to the protocol. This applied not only to those cases where the new schedules contained exclusively tariff reductions, but also to a case such as the Dillon Round Protocol in which both tariff reductions and tariff increases (resulting from Article XXVIII and Article XXIV:6 negotiations) were embodied.

“Contracting parties have as a general rule submitted the results of their tariff negotiations for inclusion in a protocol at a time when they had concluded all, or at least most, of their bilateral negotiations. The results of negotiations which had not yet been terminated at that time, as well as improvements in the concessions initially granted, were incorporated in supplementary protocols established after the end of a tariff conference. In the context of a Harmonized System exercise ... supplementary protocols would become necessary as not all contracting parties changing over to the Harmonized System will be ready to submit their new schedules at the time the main protocol is opened for signature.

“It should be recalled that annexing schedules to a protocol is only binding on the contracting parties in question which thereby commit themselves to apply in the future the new (normally reduced) rates of duty. This does not, on the other hand, commit other contracting parties which, in the case of increased duty rates and in the absence of an agreement, retain their right to withdraw substantially equivalent concessions (e.g. under Article XXVIII:3 in the case of the Dillon Round or in the Harmonized System negotiations).

“It follows from the above that a protocol (together with the schedules attached) does not require the approval or signature of other contracting parties than those that have schedules annexed to it. The rights of these other contracting parties are, as mentioned above, protected in all cases where agreement could not be reached. However, in order to avoid that technical errors find their way into the new schedules, the practice has been to provide countries which have participated in the negotiations the opportunity to verify that the results of the negotiations have been correctly incorporated into the schedules that are to be annexed to the protocol. In the Tokyo Round, for instance, contracting parties were invited to circulate their draft schedules to the countries with which they had negotiated not later than 1 June 1979, the period of verification having been limited until 22 June, by which date the contracting parties in question had to transmit to the secretariat the necessary number of copies of their final schedules for distribution to all MTN participants; the Geneva (1979) Protocol was opened for signature on 30 June 1979 by the contracting parties having annexed their schedules to it”.¹⁴³

See also a 1990 Secretariat Note on the “Uruguay Round Tariff Protocol”, concerning technical issues such as timetable, opening for signature, schedule format, preparation of revised loose-leaf schedules, and issues to be

¹⁴²London Report, Annexure 10, p. 49-50, “Form of Tariff Schedules”. See also generally the records of the Sub-Committee on Procedures, EPCT/C.II/PRO/PV/5-15 and summary records in the series EPCT/C.II/W/2-31.

¹⁴³TAR/W/55/Add.1, dated 28 November 1985, paras. 1-4.

decided concerning implementation of the tariff concessions¹⁴⁴, as well as a 1993 Note on “Preparation of the Uruguay Round Schedules of Concessions on Market Access”.¹⁴⁵

See also the material below on certifications of rectifications and modifications.

3. Consolidated Schedules

The inclusion of successive concessions in Schedules and in tariff protocols has meant that in order to determine the applicable concession rates for a given tariff line, it was often necessary to examine a number of instruments. However, there have been a number of efforts to reform this system. In the early years of the GATT, the proposal was made that, for each contracting party, its successive Schedules of concessions would be replaced by one consolidated Schedule. A consolidation was carried out in 1951 incorporating the results of the Geneva (1947), Annecy and Torquay Rounds. The question of giving legal status to consolidated Schedules was discussed at the Thirteenth Session in 1958. At that time, the Working Party on Schedules recommended as follows:

“(a) any contracting party, wishing to prepare a consolidated schedule to replace its separate schedules annexed to the various Protocols, may do so, provided a draft consolidated schedule is submitted to the CONTRACTING PARTIES for approval under the normal rectification procedures;

“(b) such a contracting party should give due notice of its intention and should submit copies early enough before the usual protocol of rectifications and modifications is prepared, to allow for adequate checking by all contracting parties;

“(c) the contracting party to which the consolidated schedule relates, should be expected to accept the understanding that earlier schedules and - as has always been the case in the past - negotiating records, would be considered as proper sources in interpreting concessions contained in legal consolidated schedules”.¹⁴⁶

A number of contracting parties submitted Consolidated Schedules under these rules, and updated Schedules were certified in a number of instances. The introduction of the loose-leaf system and the conversion of Schedules to the Harmonized System nomenclature have each entailed a consolidation of past Schedules, and consolidated Schedules are now submitted under the rules and practices pertaining to these two exercises.

4. Loose-leaf Schedules

On 26 March 1980 the Council adopted a proposal by the Director-General on the introduction of a loose-leaf system for the Schedules of Tariff Concessions.¹⁴⁷ The proposal stated:

“... the existing system for the publication of the tariff concessions has become outdated. There are at present more than forty legal instruments (Protocols, Certifications) containing valid tariff concessions. Extensive and time-consuming efforts are necessary under the present system to find out the status of a particular concession.

“In view of this, I suggest that henceforth the schedules of tariff concessions be published in the form of a loose-leaf system which can continuously be kept up to date when rectifications, modifications, withdrawals and new concessions are made ...

“... The basis for the creation of a loose-leaf system for the schedules of tariff concessions must be a general consolidation of tariff schedules. I would consequently propose that the *Council agree that*

¹⁴⁴MTN.GNG/NG1/W/56, dated 24 October 1990..

¹⁴⁵MTN.GNG/MA/W/25, dated 22 December 1993.

¹⁴⁶L/934, Report on “Rectification and Modification of Schedules and Consolidation of Schedules”, adopted on 22 November 1958, 7S/113, 115-116, para. 8.

¹⁴⁷27S/22; see also discussion at C/M/138 p. 10-11, C/M/139 p. 4-6.

contracting parties submit consolidated schedules of tariff concessions as soon as possible and not later than 30 September 1980 ...

“... I would suggest that *the Council agree on a format for the schedules as set out in the Annex to document L/4821/Add.1.*

“The schedules should comprise a complete description of the products covered... the entries in the schedules should, as far as possible, correspond with the entries in the customs tariffs, not only for the descriptions but also in respect of the numeration used. For example, if a heading is only partially bound, then sub-headings should be created and should have their own numbers”.¹⁴⁸

See also the minutes of the Committee on Tariff Concessions concerning discussions of the legal status of loose-leaf schedules and of initial negotiating rights regarding earlier bindings.¹⁴⁹

The Secretariat has issued periodic Notes for the Committee on Tariff Concessions on the status of loose-leaf and other Schedules.¹⁵⁰

5. Implementation of the Harmonized System

(1) *Conversion of schedules to Harmonized System nomenclature*

The International Convention on the Harmonized Commodity Description and Coding System, established under the auspices of the Customs Co-operation Council, entered into force on 1 January 1988. The Convention requires each party thereto to conform its customs tariff and statistical nomenclature to the Harmonized Commodity Description and Coding System (“Harmonized System”) nomenclature and to any future amendments thereto.¹⁵¹ The distinguishing feature of the Harmonized System nomenclature is its multi-functional design, which allows it to serve the needs of tariff classification and trade statistics, while providing a basis for future applications such as freight tariffs and production statistics.

The Ministerial Decision adopted 29 November 1982 on “Tariffs” provides, *inter alia*, that “The CONTRACTING PARTIES decide ...

“That wide acceptance of a common system for classifying products for tariff and statistical purposes would facilitate world trade and therefore recommend prompt action towards the introduction of such a system. They take note of the ongoing work to this end in the Customs Co-operation Council. They further agree that, if such a system is introduced, the general level of benefits provided by GATT concessions must be maintained, that existing concessions should normally remain unchanged and that any negotiations that should prove necessary should be initiated promptly so as to avoid any undue delay in the implementation of a system. They also agree that technical support shall be provided by the GATT secretariat to developing contracting parties in order to fully assist their participation in such a process”.¹⁵²

On 12 July 1983 the Council approved a Decision on “GATT Concessions under the Harmonized Commodity Description and Coding System” which includes, *inter alia*, the following general principles:

“1.2 In addition to the benefits for trade facilitation and analysis of trade statistics, from a GATT point of view adoption of the Harmonized System would ensure greater uniformity among countries in customs

¹⁴⁸C/107/Rev.1, 27S/22, 22-23, paras. 1-5.

¹⁴⁹TAR/M/1 et seq., TAR/W/30, 33, 34.

¹⁵⁰See TAR/W/23/Rev.21, “Status of Pre-HS Loose-leaf Schedules”, dated 4 October 1990 (or later revisions); TAR/W/40/Rev.13, “Tariff Information Available in the Secretariat”, dated 13 November 1994 (or later revisions); TAR/W/85, “Status of Schedules of Contracting Parties to the GATT”, dated 16 October 1992. See also notes referred to below on the Harmonized System schedules.

¹⁵¹Delayed application of these obligations is permitted for developing country parties to the Convention.

¹⁵²L/5424, 29S/18, para. 2.

classification and thus a greater ability for countries to monitor and protect the value of tariff concessions. ...

“2.1 The main principle to be observed in connexion with the introduction of the Harmonized System in national tariffs is that existing bindings should be maintained unchanged. The alteration of existing bindings should only be envisaged where their maintenance would result in undue complexity in the national tariffs and should not involve a significant or arbitrary increase in customs duties collected on a particular product.

“2.2 In order to avoid complicating the introduction of the Harmonized System, contracting parties should endeavour to avoid modifying or renegotiating, in the context of the introduction of the Harmonized System, their bindings for reasons not associated with the System.

“2.3 In light of paragraphs 2.1 and 2.2 contracting parties should be ready to explain and discuss the reason for their proposed changes when requested. Interested contracting parties will be free to raise specific cases, which the party which has notified the change will examine, taking into account all relevant factors with a view to finding a mutually acceptable solution. If such agreement cannot be reached, the contracting party which has notified the change shall proceed under Article XXVIII ...

“2.4 To the extent that the value of existing concessions is not impaired, the conversion of present nomenclatures to the Harmonized System can be done through the rectification procedure.¹⁵³

This Decision also specifies requirements for information to be provided to the GATT Secretariat by each contracting party adopting the Harmonized System; specifies rules to be used for conversion of duty rates if concessions must be modified if headings or parts of headings are combined in the process of implementing the Harmonized System; and provides for the procedures to be used in the event of renegotiation under Article XXVIII. See also material from this Decision in the chapter on Article XXVIII. Prior to the adoption of the Decision, it was stated “that, under this document, any contracting party was entitled to request the maintenance of particular tariff items of interest to it in the new nomenclature, whenever tariff lines with different bound rates were combined or whenever bound rates were combined with unbound rates. This understanding was in keeping with the basic principle stated in paragraph 2.1 [of the Decision,] namely that ‘existing GATT bindings should be maintained unchanged’”.¹⁵⁴ Procedures for the conversion of contracting parties’ schedules of concessions into the Harmonized System nomenclature were also discussed in the Committee on Tariff Concessions.¹⁵⁵

As schedules under the Harmonized System have been finalized, they have been annexed to successive Protocols of tariff concessions: the First, Second, and Third Geneva (1987) Protocols; the Geneva (1988) Protocol; the Geneva (1989) Protocol; the Geneva (1992) Protocol; the Geneva (1993) Protocol; and the Geneva (1994) Protocol.¹⁵⁶ In addition, some HS conversions were completed during the Uruguay Round and the resulting schedules attached to the Marrakesh Protocol to the GATT 1994.

The minutes of the October 1994 meeting of the Committee on Tariff Concessions note that as of that date, all but a very few contracting parties had implemented the Harmonized System in their national tariffs and more than 90 percent of contracting parties’ trade was covered by the HS. However, of 84 GATT 1947 contracting parties with a GATT Schedule, only 25, plus the European Communities, had a certified schedule

¹⁵³L/5470/Rev.1, 30S/17, 17-18.

¹⁵⁴C/M/170, p. 15.

¹⁵⁵TAR/M/4, point 7. For a list of documentation submitted by delegations in the context of Harmonized System negotiations and the certification of schedules, see the latest revision of TAR/W/67.

¹⁵⁶First, Second, and Third Geneva (1987) Protocols, L/6112, L/6222, L/6292, 34S/5; Geneva (1988) Protocol, L/6363, 35S/3; Geneva (1989) Protocol, L/6466, 36S/3; Geneva (1992) Protocol, L/6987, 39S/3; Geneva (1993) Protocol, L/7195, L/7195/Corr.1 and L/7195/Add.1-5. A Geneva (1990) Protocol (L/6728, 37S/3) was done but no schedules were concluded during the relevant period. Concerning status of the Harmonized System Schedules, see the most recent revision of TAR/W/74.

in the nomenclature of the Harmonized System, and only 12 of these were complete, with all 12 columns completed.¹⁵⁷

The Secretariat has issued periodic Notes for the Committee on Tariff Concessions on the status of Harmonized System Schedules and the associated Article XXVIII negotiations.¹⁵⁸ A Secretariat Note of 13 October 1994 on “Transposition of Schedules into the 1996 Harmonized System and Establishment of Loose-Leaf Schedules” assesses the status of schedules as of that date, grouping participants in the Uruguay Round into eight categories as follows. The number of participants is indicated after each category; since October 1994, a number of developing participants have submitted their Uruguay Round schedules which have been annexed to the Marrakesh Protocol.¹⁵⁹

A. Uruguay Round participants which have adopted the Harmonized System, including:

- (1) Participants which have an HS consolidated schedule annexed to the Marrakesh Protocol that is not in loose-leaf format and does not include the HS 1996 changes: (44)
- (2) Participants which have a GATT pre-Uruguay Round schedule in loose-leaf format which has been certified, and also have a Uruguay Round HS schedule annexed to the Marrakesh Protocol: (21)
- (3) Participants maintaining an HS schedule under waiver which have submitted required HS documentation for transposition of pre-UR GATT schedules into the HS, have not yet concluded Article XXVIII negotiations with respect to that schedule, but have a UR HS schedule annexed to the Marrakesh Protocol: (9)
- (4) Participants which are under waiver, have not submitted the required HS documentation for transposition of pre-UR GATT schedules into the HS, but have a UR HS Schedule annexed to the Marrakesh Protocol: (10)
- (5) Participants which have a GATT pre-UR schedule not in HS and a UR schedule in HS, and which have not taken any action concerning the transposition of their pre-UR schedules into HS: (11)
- (6) Participants which have no GATT pre-UR schedule and have not submitted a UR schedule: (7)

B. Participants where it is not certain that they have adopted the HS system

- (1) Participants which have a GATT pre-UR schedule and have not submitted a UR Schedule: (3)
- (2) Participants which have no GATT pre-UR schedule and have not submitted a UR Schedule: (6)

(2) *Implementation in GATT schedules of amendments to Harmonized System nomenclature*

On 8 October 1991 the Council adopted simplified “Procedures to Implement Changes in the Harmonized System”¹⁶⁰ to provide for changes to the Harmonized System planned to enter into force on 1 January 1992 and any changes in the future:

“Contracting parties to the GATT which are also contracting parties to the International Convention on the Harmonized Commodity Description and Coding System (Harmonized System), in order to keep the authentic texts of their GATT schedules up to date and in conformity with their national customs tariffs, adopt the following procedures:

¹⁵⁷TAR/M/38.

¹⁵⁸See TAR/W/67/Rev.13, “Harmonized System and Article XXVIII Negotiations”, dated 28 September 1993 (or later revisions); TAR/W/74/Rev.10, “Status of the Harmonized System Schedules”, dated 27 September 1993 (or later revisions). See also notes concerning status of loose-leaf schedules referred to above.

¹⁵⁹TAR/W/93.

¹⁶⁰L/6905, 39S/300-301.

“1. The implementation of revisions of the nomenclature of the Harmonized System adopted by the Customs Co-operation Council (CCC) shall not involve any alteration in the scope of concessions nor any increase in bound rates of duty unless their maintenance results in undue complexity in the national tariffs. In such cases the contracting parties concerned shall inform the other contracting parties of the technical difficulties in question, e.g. why it has not been possible to create a new subheading to maintain the existing concession on a product or products transferred from within one HS 6-digit heading to another.

“2. No later than 120 days after the circulation by the secretariat of both

- (1) a communication concerning the acceptance by the CCC of a recommendation to revise the Harmonized System nomenclature made in accordance with Article 16 of the Harmonized System Convention, and
- (2) correlation tables prepared by the CCC secretariat,

contracting parties shall submit to the GATT secretariat a notification which includes the pages of their loose-leaf schedules containing proposed changes. The relevant pages of the loose-leaf schedules shall be presented as follows:

- (a) Items in relation to which the proposed changes do not, in the view of the contracting party in question, alter the scope of a concession (e.g. changes or other rectifications of a purely formal character) ...
- (b) Items in relation to which the proposed changes will, in the view of the contracting party in question, alter the scope of a concession (e.g. through an increase in the bound rate of duty or a change in the product description of the item) ...

“4. A proposed change in the authentic text of a GATT schedule described in paragraph 2(a) above shall be certified provided no objection has been raised by a contracting party within ninety days on the ground that the proposed change or rectification is not of a purely formal character. If such objection is raised and in the absence of agreement among the contracting parties concerned, the contracting party in question shall without delay submit to the secretariat, for circulation to all contracting parties, the documentation described in paragraph 2(b) above.

“5. A proposed change in the authentic text of a GATT schedule described in paragraph 2(b) above shall be certified provided no request for negotiation or consultation under Article XXVIII has been made to the contracting party in question within ninety days following the circulation of the documentation described in paragraph 2(b) above.

“6. In cases where an objection under paragraph 4 above is raised or where a request for negotiation or consultation under paragraph 5 has been made, the Procedures for Negotiations Under Article XXVIII (BISD 27S/26) shall apply. Any such objection or request shall at the same time be sent to the secretariat. After the completion of these procedures, a comprehensive list of all changes and the corresponding amended pages of the GATT schedule shall be sent to the secretariat for certification.”

A Secretariat Note of 13 October 1994 on “Transposition of Schedules into the 1996 Harmonized System and Establishment of Loose-Leaf Schedules” (TAR/W/93) notes these procedures and states that “It is expected that the whole of 1995 will be dedicated to the preparation of the new schedules, including the necessary Article XXVIII renegotiations. While it is hoped that this work will be completed during 1995, there is no time-limit set for carrying out Article XXVIII renegotiations. After the completion of the required procedures the new consolidated HS loose-leaf schedules will need to be submitted to the Secretariat for certification; the submission should be in printed form as well as on diskette in spreadsheet format (Lotus 1-2-3 or Excel).”

The Note also discusses the procedures required for participants in each of the eight categories listed at the end of in the preceding section.¹⁶¹

6. Concessions in schedules

(1) *Authentic texts of Schedules*

During discussions on the draft General Agreement at Geneva in 1947 it was agreed that “each Schedule would be authentic in either English or French or in both languages, at the option of the country whose Schedule was concerned. The way it was decided to provide for this was to put in parentheses at the top of the Schedule the words: ‘Authentic in the English text only’ or ‘Authentic in the French text only,’ if it was to be authentic only in one of these two languages. For that reason it was not considered necessary” to refer to the language in which Schedules would be authentic, either in Article II or in the paragraph corresponding to the present Article XXVI:3.¹⁶²

The standard text of accession protocols now provides that the English, French and Spanish texts of the protocol will each be authentic, “except as otherwise specified with respect to the Schedule annexed thereto”.¹⁶³ Tariff protocols such as the Geneva (1992) Protocol or the Marrakesh Protocol provide that “The Schedules annexed hereto are authentic in the English, French or Spanish language as specified in each Schedule”.¹⁶⁴

(2) *Description of concessions*

The Decision of 26 March 1980 on “Introduction of a Loose-leaf System for the Schedules of Tariff Concessions” provides that “The schedules should comprise a complete description of the products covered” and provides for submission of schedules in a specified format.¹⁶⁵ In discussion in the Committee on Tariff Concessions in 1987, the Chairman stated that “in supplying a schedule for annexation to a protocol, the minimum information required would be to complete the first four columns; concerning the fifth and seventh columns referring to current and historical INRs, it was understood that as long as the minimum information was provided in the schedules to be annexed to protocols, the schedules would be considered as authentic for the purpose of the protocols but incomplete as far as the requirements of the loose-leaf system were concerned. When countries would be in a position to provide the missing information, the matter could be dealt with under the certification procedure”.¹⁶⁶ In 1988, the Chairman confirmed that “in order to comply with the Council Decision of 26 March 1980 on the introduction of the loose-leaf system, all the columns of a schedule had to be completed”. The Chairman recalled that “the Harmonized System schedules annexed to the protocols which did not contain entries in all seven columns were considered as legally valid, but incomplete consolidated schedules”.¹⁶⁷

(3) *Legal basis for determining initial negotiating rights (INRs)*

The Director-General’s proposal adopted on 26 March 1980 on “Introduction of a Loose-leaf System for the Schedules of Tariff Concessions” provides:

¹⁶¹TAR/W/93, paras. 8-9; see also TAR/W/81: “Amendment of the Harmonized Commodity Description and Coding System 1992) - Note by the Secretariat”, dated 30 April 1991; TAR/W/81/Add.1 containing the correlation tables between HS 1988 and HS 1992”, dated 2 July 1991; L/6905: “Procedures to Implement Changes in the Harmonized System”, dated 20 September 1991; TAR/W/89: “Changes in the Harmonized System to be introduced on 1 January 1996 - Note by the Secretariat”, dated 4 May 1993; TAR/W/91: “Changes in the Harmonized System to be Introduced on 1 January 1996 - Correlation Tables”, dated 20 June 1994; and CCC document No. 38700: “Amendments to the Nomenclature appended as an Annex to the Convention accepted pursuant to the Recommendation of 6 July 1993 of the Customs Co-operation Council”.

¹⁶²EPCT/TAC/PV/25, p. 13-14.

¹⁶³See, e.g. Protocols for the Accession of Bolivia, L/6562, 37S/5, 6, para. 10, or Costa Rica, L/6626, 37S/7, 9, para. 12.

¹⁶⁴L/6987, para. 5; Marrakesh Protocol, para. 8.

¹⁶⁵C/107/Rev.1, 27S/22, 23, para. 5; format appears in Annex to L/4821/Add.1.

¹⁶⁶TAR/M/25, p. 5-6, para. 7.4.

¹⁶⁷TAR/M/26, p. 3, para. 4.1.

“So far, initial negotiating rights (INRs) have only been indicated in working documents on schedules in connexion with renegotiations or with consolidation of schedules. In the final, published schedules the indication of INRs has so far been deleted. In order to make the loose-leaf system as transparent as possible and to remove the need for contracting parties to consult underlying documents, I propose that *the INRs be indicated in the loose-leaf schedules* as foreseen in the fifth column of the proposed format annexed to L/4821/Add.1 ...

“There is an understanding in the GATT concerning consolidated schedules that earlier schedules and negotiating records should be considered as proper sources in interpreting concessions in consolidated schedules (7S/115-116). This understanding is valid *inter alia* for INRs regarding earlier bindings made at a higher level than the present bound rate on a certain item. ... I propose that *this understanding will cease to be valid as regards the previous INRs when the loose-leaf schedules have been established and that all these previous INRs must, in order to maintain a legal value, be indicated in the loose-leaf schedules*. As the incorporation of previous INRs into the Schedules will necessitate time-consuming research in old negotiating records, I suggest that ... earlier schedules and negotiating records will remain proper sources for interpreting concessions until 1 January 1987.”¹⁶⁸

A Secretariat Note of 1982 on “Submission of Loose-leaf Schedules - Initial Negotiating Rights regarding Earlier Bindings” notes that “the way of presenting previous INRs is a purely bilateral matter” and states as follows:

“In the course of the preparation of loose-leaf schedules, it was found that a complete listing of previous INRs in respect of concessions given in different nomenclatures and at different rates could be very complicated and in some cases could amount to several pages of INRs in respect of one tariff line ...

“It appears ... that the best solution would be to permit a country submitting a schedule to examine bilaterally with countries having INRs in respect of earlier concessions if simplifications could be made in the presentation of the INRs. INRs at different levels and with different item descriptions could thus, for example, be condensed into only one INR at a level to be mutually agreed upon and expressed in the present nomenclature. Such a solution would, however, have to be agreed upon by the two sides. If the INR holder requests, the country submitting the schedule would have to fill in column 7 in full detail.”¹⁶⁹

On 6 November 1986, the Council agreed, in response to a request from the Committee on Tariff Concessions, to change the wording of paragraph 8 of the decision of 26 March 1980 from “until 1 January 1987” to read “until a date to be established by the Council”.¹⁷⁰ The Council has not subsequently established any such date.

The Tariff Division of the Secretariat maintains a complete archive of all bilateral agreements regarding concessions since 1947.

Concerning the definition and application of initial negotiating rights, see Article XXVIII.

7. Application of concessions

(1) National tariff schedules

The Procedures for Rectification and Modification of Schedules agreed on 26 March 1980 provide that:

“... *Considering* the importance of keeping the authentic texts of Schedules annexed to the General Agreement up to date and of ensuring that they tally with the texts of corresponding items in national customs tariffs; ...

¹⁶⁸C/107/Rev.1, 30S/22, 23-24, paras. 7-8.

¹⁶⁹TAR/W/30, dated 23 June 1982, paras. 2, 4-5.

¹⁷⁰Report by Vice-Chairman of the Committee to the Council on 6 November 1986, TAR/132, 33S/133, 135 para. 10.

“The CONTRACTING PARTIES decide that ...

“2. Changes in the authentic texts of Schedules shall be made when amendments or rearrangements which do not alter the scope of a concession are introduced in national customs tariffs in respect of bound items. Such changes and other rectifications of a purely formal character shall be made by means of Certifications. A draft of such changes shall be communicated to the Director-General where possible within three months but not later than six months after the amendment or rearrangement has been introduced in the national customs tariff”¹⁷¹

The Secretariat has issued periodically for the Committee on Tariff Concessions lists of information available in the Secretariat on national tariff schedules.¹⁷²

(2) *Changes in tariff nomenclature*

It was agreed in 1955 that the adoption of the Brussels Tariff Nomenclature as such presented no basic problem so far as schedules to the General Agreement are concerned. Since such a change would not necessarily impair concessions, the contracting party wishing merely to change the nomenclature of its schedule could resort to the normal rectification procedures; see at page 70 above.¹⁷³ See also the material above on introduction of the Harmonized System.

(3) *Provisional accession to the General Agreement*

The Declarations on the provisional accession of certain contracting parties to the General Agreement stated that the contracting party in question “shall not have any direct rights with respect to the concessions contained in the schedules annexed to the General Agreement either under the provisions of Article II or under the provisions of any other Article of the General Agreement”.¹⁷⁴

See also the discussion of provisional accession under Article XXXIII.

8. *Modification of concessions*

See Article XXVIII and the material above on paragraph 1 of Article II.

9. *Modification and rectification of Schedules*

The General Agreement provides for various types of tariff negotiations among contracting parties (Article XXVIII *bis*) or with acceding governments (Article XXXIII) as well as for renegotiations (Article XXVIII:1, 4, 5, Article XVIII:7, XXIV:6), or withholding or withdrawal of concessions (Article XXVII). Each modification of concessions brings a corresponding modification of Schedules.

(1) *Procedures for modification or rectification of Schedules*

In the early years of the GATT, modification and rectification of Schedules was carried out by means of Protocols. See the material on this subject under Article XXX.

¹⁷¹L/4962, 27S/25, para. 2.

¹⁷²See TAR/W/40/Rev.13, “Tariff Information Available in the Secretariat”, dated 13 November 1994 (or later revisions); TAR/W/85, “Status of Schedules of Contracting Parties to the GATT”, dated 16 October 1992.

¹⁷³Report on “Transposition of Schedule XXXVII - Turkey”, L/294, adopted on 20 December 1954, 3S/127, para. 2.

¹⁷⁴See, e.g., 8S/10, 20S/9.

Procedures for modification and rectification of Schedules were agreed in the following decisions: Decision of 17 November 1959;¹⁷⁵ Decision of 19 November 1968;¹⁷⁶ Decision of 26 March 1980.¹⁷⁷ The latter Decision provides, *inter alia*, that:

“1. Changes in the authentic texts of Schedules annexed to the General Agreement which reflect modifications resulting from action under Article II, Article XVIII, Article XXIV, Article XXVII or Article XXVIII shall be certified by means of Certifications. A draft of such change shall be communicated to the Director-General within three months after the action has been completed.

“2. Changes in the authentic texts of Schedules shall be made when amendments or rearrangements which do not alter the scope of a concession are introduced in national customs tariffs in respect of bound items. Such changes and other rectifications of a purely formal character shall be made by means of Certifications. A draft of such changes shall be communicated to the Director-General where possible within three months but not later than six months after the amendment or rearrangement has been introduced in the national customs tariff or in the case of other rectifications, as soon as circumstances permit.

“3. The draft containing the changes described in paragraphs 1 and 2 shall be communicated by the Director-General to all the contracting parties and shall become a Certification provided that no objection has been raised by a contracting party within three months on the ground that, in the case of changes described in paragraph 1, the draft does not correctly reflect the modifications or, in the case of changes described in paragraph 2, the proposed rectification is not within the terms of that paragraph.

“4. Whenever practicable Certifications shall record the date of entry into force of each modification and the effective date of each rectification.

“5. The procedure of Certification under this Decision may be applied for the establishment of consolidated Schedules or of new Schedules under paragraph 5(c) of Article XXVI, wherein all changes are modifications or rectifications referred to in paragraphs 1 or 2.

“6. This Decision supersedes the Decision of 19 November 1968.”

The following certifications of changes to Schedules have been issued:

First Certification of Changes to Schedules	12 July 1969	17S/12
Second Certification of Changes to Schedules	9 January 1974	21S/19
Third Certification of Changes to Schedules	23 October 1974	21S/20
Fourth Certification of Changes to Schedules	20 April 1979	26S/198
Fifth Certification of Changes to Schedules	7 August 1981	28S/10
Sixth Certification of Changes to Schedules	28 November 1987	35S/4

Since the Sixth Certification, changes to schedules have been made and certified on an ad hoc basis: see directly below.

(2) *Certifications of rectifications and modifications*

Certifications are governed by the Decision of 26 March 1980 on “Procedures for Modifications and Rectifications of Schedules of Tariff Concessions”. A 1985 Secretariat Note on “Loose-leaf Schedules Based on Harmonized System Nomenclature” describes practice with regard to certifications.

¹⁷⁵8S/25.

¹⁷⁶16S/16.

¹⁷⁷27S/25.

"The general practice for *certifications* ... has been that notifications received (at irregular intervals) from contracting parties concerning changes in tariff schedules are circulated to all contracting parties in a TAR- document. In this document it is indicated that if no objection is notified to the secretariat within three months, the respective change in the tariff schedule (modification or rectification) will be deemed to be approved and will be included in the next certification of changes to schedules. When a sufficient number of notifications have been approved, a (collective) draft certification is prepared and circulated by the secretariat to all contracting parties. This draft certification contains a proviso to the effect that if no objection is raised by a contracting party within three months from the date of its circulation on the ground that the draft does not correctly reflect modifications which have (already) entered into force, or that the rectifications (included in the draft) are not of a purely formal character, the draft will become a draft certification under paragraph 3 of the 1980 Decision ...

"In the context of the discussions leading to the establishment of a loose-leaf system of tariff schedules ... it was understood ... that in order to simplify and accelerate the certification process, a consolidated loose-leaf schedule - and subsequent amendments to it - would be certified if, upon its initial circulation in a TAR- document, no objections had been raised within the three-month period mentioned above, thus obviating the need for a second circulation of a (collective) draft certification ...

"... *Certifications* ... require the tacit approval of all contracting parties before being approved, by virtue of the (first) three-month period during which objections against proposed changes in tariff schedules can be raised. A contracting party with which agreement concerning the proposed changes has not been reached can thus indefinitely block the entry into force of the certification."¹⁷⁸

The most recent Certification to enter into force is the Sixth Certification of Changes to Schedules to the General Agreement on Tariffs and Trade, of 28 November 1987.¹⁷⁹

Since the Sixth Certification was issued, it was agreed that because of the introduction of the loose-leaf system, changes to schedules would be made on an ad hoc basis. These changes are circulated in documents in the TAR/ series under the Decision of 26 March 1980 on Procedures for Modifications and Rectifications of Schedules of Tariff Concessions, and are certified through documents in the Let/ series.¹⁸⁰

(3) Legal effect of certification

The Sixth Certification provides that "it is hereby certified (i) that the authentic texts of Schedules to the General Agreement are changed to reflect the rectifications of a purely formal character or the modifications resulting from action taken under paragraph 6 of Article II, Article XVIII, Article XXIV, Article XXVII or Article XXVIII of the General Agreement as set out in Annex A; and (ii) that Schedules in Annex B are established in conformity with paragraph 5 of the Decision [of 26 March 1980] and that, in each case in which Article II of the General Agreement refers to the date of the Agreement, the applicable date in respect of any concession contained in these Schedules shall be the date of the instrument by which the concession was first incorporated in the relevant Schedule to the General Agreement ...".¹⁸¹

A 1987 Secretariat Note on "Harmonized System Negotiations under Article XXVIII" states that: "Although the uncertified loose-leaf schedules represent important sources of information and bases for negotiations, they have no legal status. It follows that past protocols and other legal instruments continue to

¹⁷⁸TAR/W/55/Add.1, p. 2-3, paras. 5-7.

¹⁷⁹TAR/138, and Add.1 & 2, 35S/4; for a list of all previous Protocols and Certifications of rectifications and modifications, see the index to the annual Supplements to the BISD under "Schedules".

¹⁸⁰See, for instance, TAR/172, dated 5 January 1989 (notification by Austria of results of Article XXVIII negotiations with Japan and modification of Schedule XXXII - Austria, together with sets of replacement loose-leaf pages), and Let/1631 dated 5 June 1989 (transmission of certified true copy of Certification of Modification and Rectifications relating to Schedule XXXII - Austria, done at Geneva on 31 May 1989).

¹⁸¹TAR/138 and Add.1 & 2, 35S/4-5.

keep their legal status until the time of certification of the respective loose-leaf schedules or their entry into force by means of a Protocol".¹⁸²

(4) *Application of rectification procedures in other agreements*

On 16/17 December 1980, the Committee on Trade in Civil Aircraft decided to apply the Council's Decision of 26 March 1980 on Modification and Rectification of Schedules (27S/25) in respect of the Annex to the Agreement on Trade in Civil Aircraft.¹⁸³ The Agreement on Government Procurement provides simplified procedures for rectifications of a purely formal nature and minor amendments relating to Annexes I-IV, and a more elaborate procedure for modifications to lists of entities.¹⁸⁴ On 27 April 1982, the Government of Switzerland added the "Government of the Principality of Liechtenstein" to its list of covered entities annexed to the Agreement on Government Procurement. A Secretariat legal opinion of 12 June 1992 concluded that since this addition would not appear to add new obligations for other Parties, no re-establishment of the balance of rights and obligations would be necessary; since the purpose of the more elaborate procedures in subparagraph (b) was to permit re-establishment of this balance, the case in question would fit more appropriately under the simplified procedures of subparagraph (a). At its meeting of 26 June 1992 the Committee on Government Procurement noted that the addition in question had been correctly notified under Article IX:5(a).¹⁸⁵

10. Withholding or withdrawal of concessions

Tariff protocols concluding rounds of multilateral trade negotiations in which one or more governments have negotiated accession to the GATT have included provisions regarding the application of Article XXVII. For instance, both the Geneva (1979) Protocol to the General Agreement on Tariffs and Trade and the Protocol Supplementary to the Geneva (1979) Protocol to the General Agreement on Tariffs and Trade included the following provision on withholding or withdrawal of concessions.

"After the schedule of tariff concessions annexed to this Protocol relating to a participant has become a Schedule to the General Agreement pursuant to the provisions of paragraph 1, such participant shall be free at any time to withhold or to withdraw in whole or in part the concession in such schedule with respect to any product for which the principal supplier is any other participant or any government having negotiated for accession during the Multilateral Trade Negotiations, but the schedule of which, as established in the Multilateral Trade Negotiations, has not yet become a Schedule to the General Agreement. Such action can, however, only be taken after written notice of any such withholding or withdrawal of a concession has been given to the CONTRACTING PARTIES and after consultations have been held, upon request, with any participant or any acceding government, the relevant schedule of tariff concessions relating to which has become a Schedule to the General Agreement and which has a substantial interest in the product involved. Any concessions so withheld or withdrawn shall be applied on and after the day on which the schedule of the participant or the acceding government which has the principal supplying interest becomes a Schedule to the General Agreement."¹⁸⁶

11. Notification of national tariff schedules, the Tariff Study and the Integrated Data Base

The "IDB User Reference Manual" issued by the Secretariat on 19 April 1994 notes that:

"The GATT Secretariat has maintained a data base on tariffs and trade since the early seventies. The first GATT data base, known as the Tariff Study, contained information on customs tariffs and imports of eleven OECD markets (including the European Communities counted as one market). The Tariff Study was designed to analyze the tariff situation in the developed markets after the Kennedy Round. Under the guidance of a group of technical experts from governments, the Secretariat prepared several analyses of the

¹⁸²TAR/W/65/Rev.1, dated 14 January 1987, para. 1.

¹⁸³L/5094, L/5225, 28S/43, para. 4; see also AIR/41, AIR/M/3 and AIR/M/9.

¹⁸⁴26S/33, 53, Article IX:5. For examples see, e.g., GPR/46-52, 54-55, 58-59.

¹⁸⁵GPR/68, dated 13 July 1992, referring to Secretariat opinion in GPR/W/114 dated 12 June 1992.

¹⁸⁶26S/4. See also corresponding provisions in the Geneva (1967) Protocol to the General Agreement, 15S/6, para. 3.

tariff situation during the early seventies. A final analysis was published before the Tokyo Round in four volumes known as 'the Basic Documentation for the Tariff Study'.

"During the Tokyo Round, the Tariff Study exercise was continued to assist the participants in the negotiations. Access to the Tariff Study data was restricted to the 11 contracting parties participating in the exercise. However, during and after the Tokyo Round, the participants authorised the Secretariat to provide developing countries with summary information extracted from the Tariff Study files concerning products of export interest to them.

"Between 1980 and 1987, the Tariff Study files continued to be updated on an annual basis to follow the application of the Tokyo Round concessions which were implemented in eight annual stages starting 1 January 1980.

"In 1983, a group of technical experts from governments was convened to analyze the feasibility of establishing a data base containing information to be used in Article XXVIII negotiations which were necessary before the Harmonized System could be implemented. ... The Secretariat established, in parallel with the Tariff Study, the HS common data base in which only the five major developed markets participated.

"From 1986, the Group of experts on the HS data base studied the feasibility of replacing the Tariff Study exercise by a new data base in which all GATT Contracting Parties would be invited to participate and which would cover not only customs tariffs and imports but also non-tariff measures and, if feasible in the future, any additional statistics which could be "integrated" with the above three areas.

"In November 1987, the GATT Council launched the Integrated Data Base (IDB) and the Group of experts on the HS data base became the Informal Advisory Group (IAG) on the IDB in which experts from *all contracting parties* were invited to participate with a view to guiding the Secretariat in the preparation of the IDB and reporting to the Council on the progress of the work. ..."¹⁸⁷

On 10 November 1987 the Council agreed to a Decision on an "Integrated Data Base", providing that the Secretariat would begin work on setting up an integrated data base, and noting that the information would initially be restricted to three categories of data, each at the tariff line level: imports, tariffs and quantitative restrictions. The Decision noted as well that "with respect to the data elements ... contracting parties have already agreed to notification requirements affecting quantitative restrictions ... and bound tariffs. [The Council a]grees that, for the purposes of the integrated data base, contracting parties should also submit annually to the secretariat, by tariff line, tariff data for unbound items and import data for all bound and unbound items."¹⁸⁸ The Council decision also recommends that, when the IDB is operational, all contracting parties will have access to the data base, including the tariff study data base. The IDB User Reference Manual notes that as of April 1994, 45 contracting parties (the EC being counted as one) participated in the IDB, accounting for over 97 percent of total merchandise trade of GATT contracting parties.¹⁸⁹

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

Differences from Havana Charter text: The Havana Charter did not itself provide for the scheduling of tariff concessions. Article 17 of the Charter on "Reduction of Tariffs and Elimination of Preferences" obligated each ITO Member to negotiate on request concerning reduction of tariffs, other charges and preferences; paragraph 3 provided that the Geneva negotiations leading to the GATT would be deemed to be negotiations under Article 17. Concessions made in Article 17 negotiations would be incorporated in the

¹⁸⁷IDB/URM/1, dated 19 April 1994.

¹⁸⁸L/6290, 34S/66, para. 3, referring to: Decision of 30 November 1984, L/5754/Rev.1, 31S/12, adopting *inter alia* recommendations in para. 44 of the Report on "Quantitative Restrictions and Other Non-Tariff Measures", L/5713, 31S/211; and Director-General's proposal adopted 26 March 1980 on "Introduction of a Loose-Leaf System for the Schedules of Tariff Concessions".

¹⁸⁹IDB/URM/1, dated 19 April 1994.

GATT on terms to be agreed with the GATT contracting parties. Hence, the scheduling provisions of the GATT were located in Part I, which under Article XXIX:2 would not be superseded by the Charter when the Charter entered into force.

Preparatory work of Article II: During the London session of the Preparatory Committee, the Procedures Sub-Committee of Committee II drew up a “Resolution Regarding the Negotiation of a Multilateral Trade Agreement Embodying Tariff Concessions”¹⁹⁰, and “Procedures for Giving Effect to Certain Provisions of the Charter of the International Trade Organization by Means of a General Agreement on Tariffs and Trade Among the Members of the Preparatory Committee”.¹⁹¹ The Resolution, noting that the United States government had invited the members of the Preparatory Committee “to meet to negotiate concrete arrangements for the relaxation of tariffs and trade barriers of all kinds and the invitation has been accepted”, recommended “that the meeting envisaged by the invitations ... should be held under the sponsorship of the Preparatory Committee in connection with, and as a part of, the Second Session of the Committee”. The Procedures provided negotiating rules, as well as specific provisions on the use of the principal supplier rule in negotiations, the form of tariff schedules (see page 103 above) and the status of preferential rates of duty; they also provided a draft outline of a General Agreement on Tariffs and Trade, of which Article III provided that “Each signatory government shall accord to the commerce of the customs territories of the other signatory governments the treatment provided for in the appropriate Schedule annexed to this Agreement and made an integral part thereof”.¹⁹²

The General Agreement was then discussed at the Drafting Committee in New York. Article VIII of the draft of the General Agreement in the Drafting Committee Report included paragraphs corresponding to the present paragraphs 1(a), 3 and 4 of Article II; a footnote to Article VIII stated that it was contemplated that at an appropriate place in each schedule of concessions, notes would be included, the text of which corresponded to the present paragraphs 1(b), 2(a) and 5 of Article II. There were no provisions on renegotiation of concessions.

At the Geneva session of the Preparatory Committee, the text of the General Agreement was principally negotiated in the meetings of the Tariff Agreement Committee, which discussed (*inter alia*) scheduling provisions, the contents of schedules, and formalities for putting the General Agreement into effect. The headnote to the first draft model schedule included the provisions now in paragraphs 1(b) and (c) and 2 of Article II, which were later moved into the Article.¹⁹³

Article II has been amended only once, in 1948, when the reference to Article III in paragraph 2(a) was altered as a conforming change associated with the replacement of the original text of Article III by the text of Article 18 of the Havana Charter. This change was effected by the Protocol Modifying Part I and Article XXIX, which entered into force on 24 September 1952.

During the Review Session of 1954-55, it was agreed to amend paragraphs 1(b) and 1(c) to include references to charges on the transfer of payments (see page 81); to amend paragraph 6(a) (see page 97); to delete the interpretative note to paragraph 2(a) as outdated; and to redraft the interpretative note to paragraph 4 (see page 92). However, these amendments were made in the Protocol Amending Part I and Articles XXIX and XXX, which failed to gain the requisite unanimous approval and was abandoned.¹⁹⁴

¹⁹⁰London Report, Annexure 7, p. 47-48.

¹⁹¹London Report, Annexure 10, p. 48-52. See also generally the verbatim records of the Sub-Committee on Procedures, EPCT/C.II/PRO/PV/5-15 and its summary records in the series EPCT/C.II/W/2-31.

¹⁹²*Ibid.* p. 52.

¹⁹³EPCT/153; discussion at EPCT/TAC/PV/21, p. 16ff; EPCT/201; discussion at EPCT/TAC/PV/23 p. 15ff.

¹⁹⁴15S/65.

IV. RELEVANT DOCUMENTS*New York*

Reports: EPCT/C.6/74, 79
Other: EPCT/C.6/W.58

Geneva

Discussion: EPCT/TAC/PV/8, 9, 16, 21, 23, 24, 26, 27, 28
Reports: EPCT/135, 153, 191, 201, 208, 211, 214/Add.1/Rev.1
Other: EPCT/189+Corr.2, 196, 238
EPCT/W/272, 287, 312, 318, 321, 341

Review Session

Discussion: SR.9/16, 18, 20, 36
Reports: W.9/124, 177, 193, 200, 212+Corr.1, 217+Corr.1, 236
Other: L/189, 261/Add.1
W.9/45, 70, 109/Rev.1, 113, 118, 223
Spec/4/55, 85/55, 94/55

V. SCHEDULES OF CONTRACTING PARTIES TO THE GATT 1947

Contracting party	Schedule	Contracting party	Schedule
Argentina	LXIV	Myanmar	IV
Australia	I	Namibia	XC
Austria	XXXII	Netherlands	(EC)
Bangladesh	LXX	New Zealand	XIII
Belgium	(EC)	Nicaragua	XXIX
Benelux (Part D only)	II	Niger	LIII
Part D - Netherlands Antilles		Nigeria	XLIII
Benin	XLVIII	Norway	XIV
Bolivia	LXXXIV	Pakistan	XV
Brazil	III	Paraguay	XCI
Burkina Faso	XLVI	Peru	XXXV
Burundi	LV	Philippines	LXXV
Canada (E/F)	V	Poland	LXV
Chile (E/S)	VII	Portugal	(EC)
Colombia (E/S)	LXXVI	Romania	LXIX
Costa Rica	LXXXV	Rwanda	LVI
Côte d'Ivoire	LII	Senegal	XLIX
Cuba	IX	Singapore	LXXIII
Czech Republic	XCII	Slovak Republic	XCIII
Denmark	(EC)	Slovenia	XCVI
Djibouti	CXXXVII	South Africa	XVIII
Dominican Republic	XXIII	Spain	(EC)
European Communities	LXXX	Sri Lanka	VI
(E/F) (12)		Surinam	LXXIV
Egypt	LXIII	Sweden	XXX
El Salvador	LXXXVII	Switzerland (including Liechtenstein)	LIX
Finland	XXIV	Thailand	LXXIX
France	(EC)	Trinidad & Tobago	LXVII
France (Parts E, H, K, M only)	XI	Tunisia	LXXXIII
Part E - French Establishments		Turkey	XXXVII
in Oceania		United Kingdom	(EC)
Part H - Indo-China		United Kingdom (Part B only)	XIX
Part K - New Caledonia and		Part B - Bahamas	
Dependencies		United States	XX
Part M - St.Pierre and Miquelon		Uruguay	XXXI
Gabon	XLVII	Venezuela	LXXXVI
Germany	(EC)	Yugoslavia	LVII
Greece	(EC)	Zaire	LXVIII
Guatemala	LXXXVIII	Zambia	LXXVIII
Guinea	CXXXVI	Zimbabwe	LIV
Haiti	XXVI		
Honduras	XCV		
Hong Kong	LXXXII		
Hungary	LXXI		
Iceland	LXII		
India	XII		
Indonesia	XXI		
Ireland	(EC)		
Israel	XLII		
Italy	(EC)		
Jamaica	LXVI		
Japan	XXXVIII		
Korea, Republic of	LX		
Luxembourg	(EC)		
Macau	LXXXIX		
Madagascar	LI		
Malawi	LVIII		
Malaysia	XXXIX		
Mali	XCIV		
Mauritania	L		
Mexico	LXXVII		
Morocco	LXXXI		

Notes:

A summary of the status of Schedules of contracting parties appears in TAR/W/85 dated 16 October 1992.

1. Schedule II - Benelux, Part D (Netherlands Antilles) remains in force.
2. The concessions in Schedule XI - France, Parts E, H, K, M (French Establishments in Oceania, Indo-China, New Caledonia and Dependencies, St.Pierre and Miquelon) remain in force. Part H was terminated for Laos and Vietnam upon expiry of their *de facto* application of the General Agreement but is applied *de facto* by Cambodia pending decision on accession to the General Agreement.
3. The status of Schedule XLVII - Gabon is uncertain, Gabon not having recognized the concessions in the former Schedule XI - France, Part B when it acceded under Article XXVI:5(c) in 1963; see L/2169, 12S/75-76.
4. The concessions in Schedule XIX - United Kingdom, Part B (Bahamas) are applied by the Bahamas *de facto* pending decision on accession to the General Agreement.
5. (EC) signifies that the original Schedule was withdrawn and replaced by the Schedule of the European Communities.

PART II

ARTICLE III

NATIONAL TREATMENT ON INTERNAL TAXATION AND REGULATION

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I. TEXT OF ARTICLE III AND INTERPRETATIVE NOTE AD ARTICLE III

Article III*

National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*

3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.*

6. The provisions of paragraph 5 shall not apply to any internal quantitative regulation in force in the territory of any contracting party on July 1, 1939, April 10, 1947, or March 24, 1948, at the option of that contracting party; *Provided* that any such regulation which is contrary to the provisions of paragraph 5 shall not be modified to the detriment of imports and shall be treated as a customs duty for the purpose of negotiation.

7. No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply.

8. (a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

(b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

9. The contracting parties recognize that internal maximum price control measures, even though conforming to the other provisions of this Article, can have effects prejudicial to the interests of contracting parties supplying imported products. Accordingly, contracting parties applying such measures shall take account of the interests of exporting contracting parties with a view to avoiding to the fullest practicable extent such prejudicial effects.

10. The provisions of this Article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematograph films and meeting the requirements of Article IV.

Interpretative Note *Ad* Article III from Annex I

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

Paragraph 1

The application of paragraph 1 to internal taxes imposed by local governments and authorities within the territory of a contracting party is subject to the provisions of the final paragraph of Article XXIV. The term "reasonable measures" in the last-mentioned paragraph would not require, for example, the repeal of existing national legislation authorizing local governments to impose internal taxes which, although technically inconsistent with the letter of Article III, are not in fact inconsistent with its spirit, if such repeal would result in a serious financial hardship for the local governments or authorities concerned. With regard to taxation by local governments or authorities which is inconsistent with both the letter and spirit of Article III, the term "reasonable measures" would permit a contracting party to eliminate the inconsistent taxation gradually over a transition period, if abrupt action would create serious administrative and financial difficulties.

Paragraph 2

A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

Paragraph 5

Regulations consistent with the provisions of the first sentence of paragraph 5 shall not be considered to be contrary to the provisions of the second sentence in any case in which all of the products subject to the regulations are produced domestically in substantial quantities. A regulation cannot be justified as being consistent with the provisions of the second sentence on the ground that the proportion or amount allocated to each of the products which are the subject of the regulation constitutes an equitable relationship between imported and domestic products.

II. INTERPRETATION AND APPLICATION OF ARTICLE III

A. SCOPE AND APPLICATION OF ARTICLE III

1. General

(1) Scope of Article III

The 1958 Panel Report on “Italian Discrimination against Imported Agricultural Machinery,” which examined an Italian law providing special credit terms for the purchase of agricultural machinery produced in Italy, notes that the Panel examined the argument of Italy that “the General Agreement was a trade agreement and its scope was limited to measures governing trade ... the commitment undertaken by the CONTRACTING PARTIES under [Article III:4] was limited to qualitative and quantitative regulations to which goods were subjected, with respect to their sale or purchase on the domestic market.”¹ The Panel found as follows.

“The Panel ... noted that if the Italian contention were correct, and if the scope of Article III were limited in the way the Italian delegation suggested to a specific type of law and regulations, the value of the bindings under Article II of the Agreement and of the general rules of non-discrimination as between imported and domestic products could be easily evaded.

“The Panel recognized ... that it was not the intention of the General Agreement to limit the right of a contracting party to adopt measures which appeared to it necessary to foster its economic development or to protect a domestic industry, provided that such measures were permitted by the General Agreement. The GATT offered a number of possibilities to achieve these purposes through tariff measures or otherwise. The Panel did not appreciate why the extension of the credit facilities in question to the purchasers of imported tractors as well as domestically produced tractors would detract from the attainment of the objectives of the Law, which aimed at stimulating the purchase of tractors mainly by small farmers and co-operatives in the interests of economic development. If, on the other hand, the objective of the Law, although not specifically stated in the text thereof, were to protect the Italian agricultural machinery industry, the Panel considered that such protection should be given in ways permissible under the General Agreement rather than by the extension of credit exclusively for purchases of domestically produced agricultural machinery.”²

The 1984 Panel Report on “Canada - Administration of the Foreign Investment Review Act” examined written purchase and export undertakings under the Foreign Investment Review Act of Canada, submitted by investors regarding the conduct of the business they were proposing to acquire or establish, conditional on approval by the Canadian government of the proposed acquisition or establishment. Written undertakings are legally binding on the investor if the investment is allowed. The Panel noted:

¹L/833, adopted 23 October 1958, 7S/60, 63, para. 6.

²*Ibid.*, 7S/64-65, paras. 15-16.

“... the Panel does not consider it relevant nor does it feel competent to judge how the foreign investors are affected by the purchase requirements, as the national treatment obligations of Article III of the General Agreement do not apply to foreign persons or firms but to imported products and serve to protect the interests of producers and exporters established on the territory of any contracting party”.³

(2) Purpose of Article III

The 1958 Panel Report on “Italian Discrimination against Imported Agricultural Machinery” provides that “It was considered ... that the intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given”.⁴

The Panel Report on “United States - Section 337 of the Tariff Act of 1930” notes that “... the purpose of Article III ... is to ensure that internal measures ‘not be applied to imported or domestic products so as to afford protection to domestic production’ (Article III:1)”.⁵ The same Panel “rejected any notion of balancing more favourable treatment of some imported products against less favourable treatment of other imported products. ... Such an interpretation would lead to great uncertainty about the conditions of competition between imported and domestic products and thus defeat the purposes of Article III”.⁶

The 1987 Panel Report on “United States - Taxes on Petroleum and Certain Imported Substances” notes that “Article III:2, first sentence, obliges contracting parties to establish certain competitive conditions for imported products in relation to domestic products. Unlike some other provisions in the General Agreement, it does not refer to trade effects”.⁷ See further on page 128. Concerning another issue examined by the panel, the same panel report provides:

“... The general prohibition of quantitative restrictions under Article XI ... and the national treatment obligation of Article III ... have essentially the same rationale, namely to protect expectations of the contracting parties as to the competitive relationship between their products and those of the other contracting parties. Both articles are not only to protect current trade but also to create the predictability needed to plan future trade”.⁸

The 1991 Panel Report on “United States - Restrictions on Imports of Tuna,” which has not been adopted, notes with regard to Article III:

“... While restrictions on importation are prohibited by Article XI:1, contracting parties are permitted by Article III:4 and the Note Ad Article III to impose an internal regulation on products imported from other contracting parties provided that it: does not discriminate between products of other countries in violation of the most-favoured-nation principle of Article I:1; is not applied so as to afford protection to domestic production, in violation of the national treatment principle of Article III:1; and accords to imported products treatment no less favourable than that accorded to like products of national origin, consistent with Article III:4....

“The text of Article III:1 refers to the application to imported or domestic products of ‘laws, regulations and requirements affecting the internal sale ... of *products*’ and ‘internal quantitative regulations requiring the mixture, processing or use of *products*’; it sets forth the principle that such regulations on *products* not be applied so as to afford protection to domestic production. Article III:4 refers solely to laws, regulations and requirements affecting the internal sale, etc. of *products*. This suggests that Article III covers only measures affecting products as such. Furthermore, the text of the Note Ad Article III refers to a measure ‘which applies to an imported *product* and the like domestic

³L/5504, adopted 7 February 1984, 30S/140, 167, para. 6.5.

⁴L/833, adopted on 23 October 1958, 7S/60, 63-64, para. 11.

⁵L/6439, adopted on 7 November 1989, 36S/345, 385, para. 5.10.

⁶36S/387, para. 5.14.

⁷L/6175, adopted 17 June 1987, 34S/136, 158, para. 5.1.9.

⁸*Ibid.*, 34S/160, para. 5.2.2.

product and is collected or enforced in the case of the imported *product* at the time or point of importation'. This suggests that this Note covers only measures applied to imported products that are of the same nature as those applied to the domestic products, such as a prohibition on importation of a product which enforces at the border an internal sales prohibition applied to both imported and like domestic products.

"A previous panel had found that Article III:2, first sentence, 'obliges contracting parties to establish certain competitive conditions for imported *products* in relation to domestic *products*'.⁹ Another panel had found that the words 'treatment no less favourable' in Article III:4 call for effective equality of opportunities for imported *products* in respect of the application of laws, regulations or requirements affecting the sale, offering for sale, purchase, transportation, distribution or use of *products*, and that this standard has to be understood as applicable to each individual case of imported *products*.¹⁰ It was apparent to the Panel that the comparison implied was necessarily one between the measures applied to imported products and the measures applied to like domestic products".¹¹

The 1992 Panel Report on United States - Measures Affecting Alcoholic and Malt Beverages" noted with respect to the application of the Article III rules which compare the tax treatment accorded to "like products":

"The basic purpose of Article III is to ensure, as emphasized in Article III:1,

'that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, purchase, transportation, distribution or use of products ... should not be applied to imported or domestic products so as to afford protection to domestic production'.

"The purpose of Article III is thus not to prevent contracting parties from using their fiscal and regulatory powers for purposes other than to afford protection to domestic production. Specifically, the purpose of Article III is not to prevent contracting parties from differentiating between different product categories for policy purposes unrelated to the protection of domestic production. The Panel considered that the limited purpose of Article III has to be taken into account in interpreting the term 'like products' in this Article. Consequently, in determining whether two products subject to different treatment are like products, it is necessary to consider whether such product differentiation is being made 'so as to afford protection to domestic production'. While the analysis of 'like products' in terms of Article III:2 must take into consideration this objective of Article III, the Panel wished to emphasize that such an analysis would be without prejudice to the 'like product' concepts in other provisions of the General Agreement, which might have different objectives and which might therefore also require different interpretations".¹²

In the same Report, referring to regulatory treatment of "like products",

"... The Panel recalled ... its earlier statement on like product determinations and considered that, in the context of Article III, it is essential that such determinations be made not only in the light of such criteria as the products' physical characteristics, but also in the light of the purpose of Article III, which is to ensure that internal taxes and regulations 'not be applied to imported or domestic products so as to afford protection to domestic production'. The purpose of Article III is not to harmonize the internal taxes and regulations of contracting parties, which differ from country to country. In light of these considerations, the Panel was of the view that the particular level at which the distinction between high alcohol and low alcohol beer is made in the various states does not affect its reasonings and findings.

⁹A footnote to this paragraph refers to the Panel Report on "United States - Taxes on Petroleum and Certain Imported Substances", adopted 17 June 1987, BISD 34S/136, 158, para. 5.1.9.

¹⁰A footnote to this paragraph refers to the Panel Report on "United States - Section 337 of the Tariff Act of 1930," adopted 7 November 1989, BISD 36S/345, 386-7, paras. 5.11, 5.14.

¹¹DS21/R, 3 September 1991, 39S/155, 193-194, paras. 5.9, 5.11-5.12.

¹²DS23/R, adopted 19 June 1992, 39S/206, 276, para. 5.25.

“The Panel recognized that the treatment of imported and domestic products as like products under Article III may have significant implications for the scope of obligations under the General Agreement and for the regulatory autonomy of contracting parties with respect to their internal tax laws and regulations: once products are designated as like products, a regulatory product differentiation, e.g. for standardization or environmental purposes, becomes inconsistent with Article III even if the regulation is not ‘applied ... so as afford protection to domestic production’. In the view of the Panel, therefore, it is imperative that the like product determination in the context of Article III be made in such a way that it not unnecessarily infringe upon the regulatory authority and domestic policy options of contracting parties”.¹³

(3) *Relevance of tariff concessions*

The first Report of the Working Party on “Brazilian Internal Taxes” notes that “The working party agreed that a contracting party was bound by the provisions of Article III whether or not the contracting party in question had undertaken tariff commitments in respect of the goods concerned”.¹⁴

In the 1990 Panel Report on “EEC - Regulation on Imports of Parts and Components,” in connection with the Panel’s examination of whether anti-circumvention duties levied by the EEC were import duties under Article II or internal taxes under Article III:

“... The Panel recalled that the distinction between import duties and internal charges is of fundamental importance because the General Agreement regulates ordinary customs duties, other import charges and internal taxes differently: the imposition of ‘ordinary customs duties’ for the purpose of protection is allowed unless they exceed tariff bindings; all other duties or charges of any kind imposed on or in connection with importation are in principle prohibited in respect of bound items (Article II:1(b)). By contrast, internal taxes that discriminate against imported products are prohibited, whether or not the items concerned are bound (Article III:2)”.¹⁵

(4) *Relevance of policy purpose of internal measures*

The 1952 Panel Report on “Special Import Taxes Instituted by Greece” states: “It appeared to the Panel that the principal question arising for determination was whether or not the Greek tax was an internal tax or charge on imported products within the meaning of paragraph 2 of Article III. If the finding on this point were affirmative, the Panel considered that it would be subject to the provisions of Article III whatever might have been the underlying intent of the Greek Government in imposing the tax”.¹⁶

See also the discussion of eligibility for border tax adjustment in the 1987 Panel Report on “United States - Taxes on Petroleum and Certain Imported Substances”.¹⁷ See also the material above from the 1992 Panel Report on “United States - Measures Affecting Alcoholic and Malt Beverages”¹⁸, and the unadopted Panel Report of 1994 on “United States - Taxes on Automobiles.”¹⁹

¹³*Ibid.*, 39S/293-294, paras. 5.71-5.72.

¹⁴GATT/CP.3/42, adopted 30 June 1949, II/181, 182, para. 4.

¹⁵L/6657, adopted on 16 May 1990, 37S/132, 191-192, para. 5.4.

¹⁶G/25, adopted 3 November 1952, 1S/48, 49, para. 5.

¹⁷L/6175, adopted 17 June 1987, 34S/136, para. 5.2.3ff; see below at page 147.

¹⁸DS23/R, adopted 19 June 1992, 39S/206, 276, 293-294, paras. 5.25, 5.71-5.72.

¹⁹DS31/R, dated 11 October 1994, paras. 5.5-5.16, 5.23-5.36.

(5) *Relevance of trade effects*

The 1949 Working Party Report on “Brazilian Internal Taxes” notes that

“... the delegate of Brazil submitted the argument that if an internal tax, even though discriminatory, does not operate in a protective manner the provisions of Article III would not be applicable. He drew attention to the first paragraph of Article III, which prescribes that such taxes should not be applied ‘so as to afford protection to domestic production’.... The delegate of Brazil suggested that where there were no imports of a given commodity or where imports were small in volume, the provisions of Article III did not apply. [The majority of the working party] argued that the absence of imports from contracting parties during any period of time that might be selected for examination would not necessarily be an indication that they had no interest in exports of the product affected by the tax, since their potentialities as exporters, given national treatment, should be taken into account. These members of the working party therefore took the view that the provisions of the first sentence of Article III, paragraph 2, were equally applicable whether imports from other contracting parties were substantial, small or non-existent”.²⁰

The 1987 Panel Report on “United States - Taxes on Petroleum and Certain Imported Substances” found, *inter alia*, that an excise tax on petroleum was imposed at a higher rate on imported products than on the like domestic product, and therefore was inconsistent with Article III:2, first sentence (see page 150 below); the Panel examined the argument of the United States that the tax differential of 3.5 US cents per barrel was so small that it did not nullify or impair benefits accruing to Canada, the EEC and Mexico under the General Agreement. The Panel noted with respect to Article III:2:

“An acceptance of the argument that measures which have only an insignificant effect on the volume of exports do not nullify or impair benefits accruing under Article III:2, first sentence, implies that the basic rationale of this provision - the benefit it generates for the contracting parties - is to protect expectations on export volumes. That, however, is not the case. Article III:2, first sentence, obliges contracting parties to establish certain competitive conditions for imported products in relation to domestic products. Unlike some other provisions in the General Agreement, it does not refer to trade effects. The majority of the members of the Working Party on the ‘Brazilian Internal Taxes’ therefore correctly concluded that the provisions of Article III:2, first sentence, ‘were equally applicable, whether imports from other contracting parties were substantial, small or non-existent’ (BISD Vol. II/185). The Working Party also concluded that ‘a contracting party was bound by the provisions of Article III whether or not the contracting party in question had undertaken tariff commitments in respect of the goods concerned’ (BISD Vol. II/182), in other words, the benefits under Article III accrue independent of whether there is a negotiated expectation of market access or not. Moreover, it is conceivable that a tax consistent with the national treatment principle (for instance, a high but non-discriminatory excise tax) has a more severe impact on the exports of other contracting parties than a tax that violates that principle (for instance a very low but discriminatory tax). The case before the Panel illustrates this point: the United States could bring the tax on petroleum in conformity with Article III:2, first sentence, by raising the tax on domestic products, by lowering the tax on imported products or by fixing a new common tax rate for both imported and domestic products. Each of these solutions would have different trade results, and it is therefore logically not possible to determine the difference in trade impact between the present tax and one consistent with Article III:2, first sentence, and hence to determine the trade impact resulting from the non-observance of that provision. For these reasons, Article III:2, first sentence, cannot be interpreted to protect expectations on export volumes; it protects expectations on the competitive relationship between imported and domestic products. A change in the competitive relationship contrary to that provision must consequently be regarded ipso facto as a nullification or impairment of benefits accruing under the General Agreement. A demonstration that a measure inconsistent with Article III:2, first sentence, has no or insignificant effects would therefore in the view of the Panel not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired even if such a rebuttal were in principle permitted”.²¹

²⁰GATT/CP.3/42, adopted 30 June 1949, II/181, 185, para. 16.

²¹L/6175, adopted 17 June 1987, 34S/136, 158, para. 5.1.9.

The 1992 Panel Report on “United States - Measures Affecting Alcoholic and Malt Beverages” examined an argument that since only 1.5 per cent of domestic beer in the United States was eligible for a reduction in the excise tax on beer and less than one per cent of domestic beer benefited from the tax reduction, “the federal excise tax neither discriminated against imported beer nor provided protection to domestic production”.

“The Panel noted the United States argument that the total number of barrels currently subject to the lower federal excise tax rate represented less than one per cent of total domestic beer production, that over 99 per cent of United States beer was subject to the same federal excise tax as that imposed on imported beer, and that therefore the federal excise tax neither discriminated against imported beer nor provided protection to domestic production. The Panel further noted that although Canada did not accept the United States estimate that the tax exemption applied to only one per cent of United States production, it pointed out that this figure nonetheless equalled total Canadian exports of beer to the United States. In accordance with previous panel reports adopted by the CONTRACTING PARTIES, the Panel considered that Article III:2 protects competitive conditions between imported and domestic products but does not protect expectations on export volume. In the view of the Panel, the fact that only approximately 1.5 per cent of domestic beer in the United States is eligible for the lower tax rate cannot justify the imposition of higher internal taxes on imported Canadian beer than on competing domestic beer. The prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a ‘trade effects test’ nor is it qualified by a *de minimis* standard. ... Thus, in the view of the Panel, the fact that only approximately 1.5 per cent of domestic beer in the United States is eligible for the lower tax rate does not immunize this United States measure from the national treatment obligation of Article III.”²²

The same Panel examined a similar argument with respect to paragraph 4 of Article III.

“With respect to Vermont and Virginia, the Panel noted that certain imported wines cannot be sold in state-operated liquor stores whereas the like domestic wine can. The Panel recalled the United States argument that the number of state-operated sales outlets was relatively small compared to the number of private outlets. The Panel considered that although Canadian wine has access to most of the available sales outlets in these states, it is still denied competitive opportunities accorded to domestic like products with respect to sales in state-operated outlets. Therefore, the Panel considered that the Vermont and Virginia measures are inconsistent with Article III:4.”²³

In 1994, the Panel on “United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco” noted, in relation to an argument regarding a difference in the amount of nonrefundable marketing assessment, termed “budget deficit assessment” (“BDA”) charged on imported tobacco and on domestically produced tobacco:

“The Panel ... recalled the U.S. argument that the discriminatory impact of the BDA differential was so small as to be of no commercial consequence. Here, the Panel noted that previous panels had rejected arguments of *de minimis* trade consequences and had found that the size of the trade impact of a measure was not relevant to its consistency with Article III.”²⁴ The CONTRACTING PARTIES had recognized that Article III protected expectations on the competitive relationship between imported and domestic products, not export volumes.²⁵ In accordance with these past panel rulings, the Panel considered that it was not permissible to impose higher internal taxes on imported products than on like domestic products,

²²DS23/R, adopted 19 June 1992, 39S/206, 270-271, para. 5.6.

²³*Ibid.*, 39S/292, para. 5.65.

²⁴The footnote to this sentence in the panel report provides: “See, e.g., report of the panel on United States - Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/136, 155-159; report of the panel on United States - Section 337 of the Tariff Act of 1930, adopted on 7 November 1989, BISD 36S/345, 386-387”.

²⁵The footnote to this sentence in the panel report refers to the panel report on “United States - Taxes on Petroleum and Certain Imported Substances”, adopted on 17 June 1987, BISD 34S/136, 158 (“Article III:2, first sentence, obliges contracting parties to establish certain competitive conditions for imported products in relation to domestic products. Unlike some other provisions of the General Agreement, it does not refer to trade effects”) and also to the panel report on “United States - Measures Affecting Alcoholic and Malt Beverages”, adopted on 19 June 1992, BISD 39S/206, 271.

even where the difference was minimal or of no commercial consequence.²⁶ The Panel thus rejected this particular U.S. defense of the BDA.

“... the Panel concluded that the BDA subjected imported tobacco to an internal tax or charge in excess of that applied to like domestic tobacco.”²⁷

(6) *Application of Article III to regional and local governments and authorities within the territory of a contracting party*

See the Note *ad* Article III:1, which provides that the application of paragraph 1 to internal taxes imposed by local governments and authorities within the territory of a contracting party is subject to the provisions of the final paragraph of Article XXIV, and adds certain qualifying conditions. This Note was added at the Havana Conference. In response to a request for an explanation of which internal taxes might be considered “technically inconsistent with the letter but not inconsistent with the spirit of Article III” in terms of the Note, the representative of Colombia replied that “the first part of the interpretative note had been drafted to cover certain problems of Colombia connected with domestic products, subject to prices fixed by local public monopolies, which could not be taxed in the same manner as the like imported products, which were subject to a consumption tax, without grave political and administrative consequences”.²⁸

The 1992 Panel Report on “Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies” considered measures of provincial liquor boards which applied both to beer originating outside Canada and beer from other provinces of Canada. A note to the Panel findings provides that “Throughout these findings the reference to domestic beer is a reference to the domestic beer which receives the most favourable treatment by Canada in the province in question, that is in most instances the beer brewed in that province”.²⁹

The 1992 Panel Report on “United States - Measures Affecting Alcoholic and Malt Beverages” observed with respect to differential excise taxes levied by US states:

“The Panel did not consider relevant the fact that many of the state provisions at issue in this dispute provide the same treatment to products of other states of the United States as that provided to foreign products. The national treatment provisions require contracting parties to accord to imported products treatment no less favourable than that accorded to any like domestic product, whatever the domestic origin. Article III consequently requires treatment of imported products no less favourable than that accorded to the most-favoured domestic products”.³⁰

The same Panel also examined the listing requirements of state-operated liquor stores in certain states.

“Having regard to the past panel decisions and the record in the instant case, the present Panel was of the view that the listing and delisting practices here at issue do not affect importation as such into the United States and should be examined under Article III:4. The Panel further noted that the issue is not whether the practices in the various states affect the right of importation as such, in that they clearly apply to both domestic (out-of-state) and imported wines; rather, the issue is whether the listing and delisting practices accord less favourable treatment – in terms of competitive opportunities – to imported wine than that accorded to the like domestic product. Consequently, the Panel decided to analyze the state listing and delisting practices as internal measures under Article III:4.”³¹

See also generally Article XXIV:12.

²⁶The footnote to this sentence in the panel report refers to the panel report on “United States - Taxes on Petroleum and Certain Imported Substances”, adopted on 17 June 1987, BISD 34S/136, 158-159.

²⁷DS44/R, adopted on 4 October 1994, paras. 99-100.

²⁸E/CONF.2/C.3/SR.40, p. 2; see also E/CONF.2/C.3/A/W.30, p. 1.

²⁹DS17/R, adopted 18 February 1992, 39S/27, 75, note to finding in para. 5.4 applying Article III:4.

³⁰DS23/R, adopted 19 June 1992, 39S/206, 274, para. 5.17.

³¹*Ibid.*, 39S/292, para. 5.63.

(7) Application of Article III with regard to State trading monopolies

During discussions in Sub-Committee A of the Third Committee at the Havana Conference, it was agreed that “state monopolies importing products for commercial resale were not excepted from the provisions of Article 18”.³² Also during the Havana Conference, in order to make it clear that an internal tax levied by a State monopoly, if treated as a negotiable monopoly margin, would not fall within the scope of Article 18 [III], the following Interpretative Note was added to Article 31 of the Charter:³³

“The maximum import duty referred to in paragraph 2 and 4 [of Article 31] would cover the margin which has been negotiated or which has been published or notified to the Organization, whether or not collected, wholly or in part, at the custom house as an ordinary customs duty”.³⁴

The 1988 Panel Report on “Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies” examined, *inter alia*, mark-up practices of provincial marketing agencies, or “liquor boards” which have a monopoly of the supply and distribution of alcoholic beverages in Canada.

“The Panel ... noted that the retail prices charged by the provincial liquor boards for imported alcoholic beverages were composed of the invoice price; *plus* federal customs duties collected at the bound rates; *plus* standard freight to a set destination; *plus* additional price increases (‘mark-ups’) which were sometimes higher on imported than on like domestic alcoholic beverages (‘differential mark-ups’); *plus* federal and provincial sales taxes. ...

“... It noted that federal and provincial sales taxes were levied on alcoholic beverages and asked itself whether the fiscal elements of mark-ups, which produced revenue for the provinces, could also be justified as ‘internal taxes conforming to the provisions of Article III’, noting that Article III:2 itself referred, not only to internal taxes, but also to ‘other internal charges’. The Panel was of the view that to be so considered, the fiscal element of mark-ups must of course meet the requirements of Article III, e.g. they must not be applied to imported or domestic products so as to afford protection to domestic production. The Panel also considered it important that, if fiscal elements were to be considered as internal taxes, mark-ups would also have to be administered in conformity with other provisions of the General Agreement, in particular Article X dealing with the Publication and Administration of Trade Regulations.”³⁵

In regard to its examination of the listing practices of provincial liquor boards:

“... the Panel saw great force in the argument that Article III:4 was also applicable to state-trading enterprises at least when the monopoly of the importation and monopoly of the distribution in the domestic markets were combined, as was the case of the provincial liquor boards in Canada. This interpretation was confirmed *e contrario* by the wording of Article III:8(a)”.³⁶

The 1989 Panel Report on “Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes” notes as follows:

“The Panel ... examined how Thailand might restrict the *supply* of cigarettes in a manner consistent with the General Agreement. The Panel noted that contracting parties may maintain governmental monopolies, such as the Thai Tobacco Monopoly, on the importation and domestic sale of products.³⁷ The Thai Government may use this monopoly to regulate the overall supply of cigarettes, their prices and their retail availability provided it thereby does not accord imported cigarettes less favourable treatment

³²E/CONF.2/C.3/A/W.50, p. 1.

³³Havana Reports, p. 67, para. 74.

³⁴Havana Charter, Interpretative Note to Article 31. The General Agreement contains no corresponding interpretative note.

³⁵L/6304, adopted 22 March 1988, 35S/37, 87, para. 4.11 and 88-89, para. 4.20.

³⁶L/6304, adopted on 22 March 1988, 35S/37, 90, para. 4.26.

³⁷Note 1 on page 37S/225 provides: “Cf. Articles III:4, XVII and XX(d)”.

than domestic cigarettes or act inconsistently with any commitments assumed under its Schedule of Concessions.³⁸

The 1992 Panel Report on “Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies” found as follows concerning Article III.

“The Panel ... turned to Canada’s argument that its right to deliver imported beer to the points of sale was an inherent part of Canada’s right to establish an import monopoly in accordance with Article XVII of the General Agreement which was not affected by its obligations under Article III:4. The Panel noted that the issue before it was not whether Canada had the right to create government monopolies for the importation, internal delivery and sale of beer. The Panel fully recognized that there was nothing in the General Agreement which prevented Canada from establishing import and sales monopolies that also had the sole right of internal delivery. The only issue before the Panel was whether Canada, having decided to establish a monopoly for the internal delivery of beer, might exempt domestic beer from that monopoly. The Panel noted that Article III:4 did not differentiate between measures affecting the internal transportation of imported products that were imposed by governmental monopolies and those that were imposed in the form of regulations governing private trade. Moreover, Articles II:4, XVII and the Note Ad Articles XI, XII, XIII, XIV and XVIII clearly indicated the drafters’ intention not to allow contracting parties to frustrate the principles of the General Agreement governing measures affecting private trade by regulating trade through monopolies. Canada had the right to take, in respect of the privately delivered beer, the measures necessary to secure compliance with laws consistent with the General Agreement relating to the enforcement of monopolies. This right was specifically provided for in Article XX(d) of the General Agreement. The Panel recognized that a beer import monopoly that also enjoyed a sales monopoly might, in order properly to carry out its functions, also deliver beer but it did not for that purpose have to prohibit unconditionally the private delivery of imported beer while permitting that of domestic beer. For these reasons the Panel *found* that Canada’s right under the General Agreement to establish an import and sales monopoly for beer did not entail the right to discriminate against imported beer inconsistently with Article III:4 through regulations affecting its internal transportation.”³⁹

With respect to the issue of mark-ups:

“The Panel noted that Canada taxed both imported and domestic beer by assessing mark-ups through the liquor boards and by levying provincial sales taxes and the federal Goods and Services Tax at the retail level. ...

“The Panel noted that, according to Article III:2, first sentence, imported products

‘shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products’.

“The Panel considered that this provision applied not only to the provincial and federal sales taxes but also to the mark-ups levied by the liquor boards because they also constituted internal governmental charges borne by products”.⁴⁰

The Panel also found that the following requirements maintained by Canadian provincial liquor boards fell under Article III:4: the practice of the liquor boards of Ontario to limit listing of imported beer to the six-pack size while according listings in different package sizes to domestic beer; restrictions on private delivery of beer, including levies for delivering imported beer; and application of minimum prices to domestic and imported beer.

³⁸DS10/R, adopted on 7 November 1990, 37S/200, 225, para. 79. Note 2 on page 37S/225, to this sentence, provides: “Cf. Articles III:2 and 4 and II:4”.

³⁹DS17/R, adopted 18 February 1992, 39S/27, 79-80, para. 5.15.

⁴⁰*Ibid.*, 39S/83, paras. 5.23-5.24.

In the 1992 Panel Report on “United States - Measures Affecting Alcoholic and Malt Beverages” the Panel found that listing and delisting requirements maintained by liquor stores operated by certain US states fell under Article III:4.⁴¹

See also the Note *Ad Article XVII:1*.

(8) *Mandatory versus discretionary legislation; non-enforcement*

The 1987 Panel Report on “United States - Taxes on Petroleum and Certain Imported Substances” examined excise taxes on imported petroleum and certain imported chemical substances (“Superfund taxes”), which had been enacted as a revenue source for the US “Superfund” hazardous-waste cleanup program. The tax on certain imported substances, enacted in October 1986, provided that it would not enter into effect until 1 January 1989; regulations implementing it had not been drafted or put into effect.

“The Panel noted that the United States objected to an examination of this tax because it did not go into effect before 1 January 1989, and - having no immediate effect on trade and therefore not causing nullification or impairment - fell outside the framework of Article XXIII. The Panel examined this point and concluded the following.

“... The general prohibition of quantitative restrictions under Article XI ... and the national treatment obligation of Article III ... have essentially the same rationale, namely to protect expectations of the contracting parties as to the competitive relationship between their products and those of the other contracting parties. Both articles are not only to protect current trade but also to create the predictability needed to plan future trade. That objective could not be attained if contracting parties could not challenge existing legislation mandating actions at variance with the General Agreement until the administrative acts implementing it had actually been applied to their trade. Just as the very existence of a regulation providing for a quota, without it restricting particular imports, has been recognized to constitute a violation of Article XI:1, the very existence of mandatory legislation providing for an internal tax, without it being applied to a particular imported product, should be regarded as falling within the scope of Article III:2, first sentence. The Panel noted that the tax on certain imported substances had been enacted, that the legislation was mandatory and that the tax authorities had to apply it after the end of next year and hence within a time frame within which the trade and investment decisions that could be influenced by the tax are taken. The Panel therefore concluded that Canada and the EEC were entitled to an investigation of their claim that this tax did not meet the criteria of Article III:2, first sentence.”⁴²

The 1987 Panel Report on “United States - Taxes on Petroleum and Certain Imported Substances” also examined, with respect to the tax on certain imported substances, the requirement that importers supply sufficient information regarding the chemical inputs of taxable substances to enable the tax authorities to determine the amount of tax to be imposed; otherwise a penalty tax would be imposed in the amount of five per cent ad valorem, or a different rate to be prescribed by the Secretary of the Treasury which would equal the amount that would be imposed if the substance were produced using the predominant method of production. The Panel noted concerning the penalty rate:

“... the Superfund Act permits the Secretary of the Treasury to prescribe by regulation, in lieu of the 5 per cent rate, a rate which would equal the amount that would be imposed if the substance were produced using the predominant method of production.... These regulations have not yet been issued. Thus, whether they will eliminate the need to impose the penalty tax and whether they will establish complete equivalence between domestic and imported products, as required by Article III:2, first sentence, remain open questions. From the perspective of the overall objectives of the General Agreement it is regrettable that the Superfund Act explicitly directs the United States tax authorities to impose a tax inconsistent with the national treatment principle but, since the Superfund Act also gives them the possibility to avoid the need to impose that tax by issuing regulations, the existence of the penalty rate

⁴¹DS23/R, adopted 19 June 1992, 39S/206, 291-293, paras. 5.62-5.69.

⁴²L/6175, adopted 17 June 1987, 34S/136, 160, paras. 5.2.1-5.2.2.

provisions as such does not constitute a violation of the United States obligations under the General Agreement. The Panel noted with satisfaction the statement of the United States that, given the tax authorities' regulatory authority under the Act, 'in all probability the 5 per cent penalty rate would never be applied'.⁴³

In the 1990 Panel Report on "EEC - Regulation on Imports of Parts and Components" the Panel also examined an argument of Japan concerning the anti-circumvention provision in the EEC anti-dumping legislation:

"Japan considers not only the measures taken under the anticircumvention provision but also the provision itself to be violating the EEC's obligations under the General Agreement. Japan therefore asked the Panel to recommend to the CONTRACTING PARTIES that they request the EEC not only to revoke the measures taken under the provision but also to withdraw the provision itself. The Panel therefore examined whether the mere existence of the anti-circumvention provision is inconsistent with the General Agreement. The Panel noted that the anti-circumvention provision does not mandate the imposition of duties or other measures by the EEC Commission and Council; it merely authorizes the Commission and the Council to take certain actions. Under the provisions of the General Agreement which Japan claims to have been violated by the EEC contracting parties are to avoid certain measures; but these provisions do not establish the obligation to avoid legislation under which the executive authorities may possibly impose such measures. ...

"In the light of the above the Panel found that the mere existence of the anti-circumvention provision in the EEC's anti-dumping Regulation is not inconsistent with the EEC's obligations under the General Agreement. Although it would, from the perspective of the overall objectives of the General Agreement, be desirable if the EEC were to withdraw the anti-circumvention provision, the EEC would meet its obligations under the General Agreement if it were to cease to apply the provision in respect of contracting parties".⁴⁴

The 1990 Panel Report on "Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes" examined, *inter alia*, whether excise taxes which could be levied by Thai authorities on foreign cigarettes, as well as the exemption from Thai business and municipal taxes accorded in respect of cigarettes made from domestic leaf, were consistent with Article III. While the ceiling tax rates permitted under law were higher for imported than for domestic cigarettes, and the tax rate applied until 11 July 1990 varied in proportion to foreign tobacco content, the Thai Ministry of Finance had issued a regulation on 11 July 1990 to provide a uniform excise tax rate for all cigarettes. On 18 August 1990 Thailand modified its regulations to exempt all cigarettes from business and municipal taxes.

"... The United States argued that it was not sufficient under Article III for the rates effectively levied to be the same; the maximum rates that could be levied under the legislation also had to be non-discriminatory. The Panel noted that previous panels had found that legislation mandatorily requiring the executive authority to impose internal taxes discriminating against imported products was inconsistent with Article III:2, whether or not an occasion for its actual application had as yet arisen; legislation merely giving the executive the possibility to act inconsistently with Article III:2 could not, by itself, constitute a violation of that provision.⁴⁵ The Panel agreed with the above reasoning and found that the possibility that the Tobacco Act might be applied contrary to Article III:2 was not sufficient to make it inconsistent with the General Agreement.⁴⁶

"... The Panel observed that the new Thai measure, by eliminating business and municipal taxes on cigarettes, removed the internal taxes imposed on imported cigarettes in excess of those applied to

⁴³*Ibid.*, 34S/163-164, para. 5.2.9.

⁴⁴L/6657, adopted 16 May 1990, 37S/132, 198-199, para. 5.25-5.26.

⁴⁵A footnote to this paragraph refers to Report of the Panel on "EEC - Regulation on Imports of Parts and Components" (L/6657 at paragraph 5.25, adopted on 16 May 1990). Report of the panel on "United States - Taxes on Petroleum and Certain Imported Substances" (BISD 34S/160, 164, adopted on 17 June 1987).

⁴⁶DS10/R, adopted on 7 November 1990, 37S/200, 227, para. 84.

domestic cigarettes. The Panel noted that, as in the case of the excise tax, the Tobacco Act continued to enable the executive authorities to levy the discriminatory taxes. However, the Panel, recalling its findings on the issue of excise taxes, found that the possibility that the Tobacco Act might be applied contrary to Article III:2 was, by itself, not sufficient to make it inconsistent with the General Agreement.”⁴⁷

The Panel concluded that “The current regulations relating to the excise, business and municipal taxes on cigarettes are consistent with Thailand’s obligations under Article III of the General Agreement”.⁴⁸

The 1992 Panel Report on “United States - Measures Affecting Alcoholic and Malt Beverages” examined arguments that certain legislation, while it might be mandatory, was not actually being enforced. With respect to legislation exempting local producers from requirements to distribute through wholesalers, which the Panel ruled was inconsistent with Article III:4 (see page 178):

“The Panel then proceeded to consider the United States argument that the provisions in the state of Illinois permitting manufacturers to sell directly to retailers were not given effect. In this regard, the Panel recalled the decisions of the CONTRACTING PARTIES on the relevance of the non-application of laws in dispute. Recent panels addressing the issue of mandatory versus discretionary legislation in the context of both Articles III:2 and III:4⁴⁹ concluded that legislation mandatorily requiring the executive authority to take action inconsistent with the General Agreement would be inconsistent with Article III, whether or not the legislation were being applied, whereas legislation merely giving the executive authority the possibility to act inconsistently with Article III would not, by itself, constitute a violation of that Article. The Panel agreed with the above reasoning and concluded that because the Illinois legislation in issue allows a holder of a manufacturer’s license to sell beer to retailers, without allowing imported beer to be sold directly to retailers, the legislation mandates governmental action inconsistent with Article III:4”.⁵⁰

With respect to the local option law in the state of Mississippi, which the Panel found to be inconsistent with Article III:4 (see page 178):

“The Panel then proceeded to consider the United States argument that the Mississippi law was not being applied. In this regard, the Panel recalled its previous discussion of this issue. ... The Panel noted that the option law in Mississippi provides discretion only for the reinstatement of prohibition, but not for the discriminatory treatment of imported wines. The Panel concluded, therefore, that because the Mississippi legislation in issue, which permits native wines to be sold in areas of the state which otherwise prohibit the sale of alcoholic beverages, including imported wine, mandates governmental action inconsistent with Article III:4, it is inconsistent with that provision whether or not the political subdivisions are currently making use of their power to reinstate prohibition”.⁵¹

With respect to the Massachusetts and Rhode Island “price affirmation” (maximum price) laws:

“In respect of the United States contention that the Massachusetts measure was not being enforced and that the Rhode Island measure was only nominally enforced, the Panel recalled its discussion of mandatory versus discretionary laws in the previous section. The Panel noted that the price affirmation measures in both Massachusetts and Rhode Island are mandatory legislation. Even if Massachusetts may not currently be using its police powers to enforce this mandatory legislation, the measure continues to be mandatory legislation which may influence the decisions of economic operators. Hence, a non-enforcement of a mandatory law in respect of imported products does not ensure that imported beer and wine are not treated less favourably than like domestic products to which the law does not apply. Similarly, the contention that

⁴⁷*Ibid.*, 37S/227 para. 86.

⁴⁸*Ibid.*, 37S/228 para. 88.

⁴⁹Note 11 to this paragraph refers to the Report of the Panel on “Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes”, adopted on 7 November 1990, BISD 37S/200, 227; Report of the Panel on “EEC - Regulation on Imports of Parts and Components”, adopted on 16 May 1990, BISD 37S/132, 198; and Report of the Panel on “United States - Taxes on Petroleum and Certain Imported Substances”, adopted on 17 June 1987, BISD 34S/136, 160.

⁵⁰DS23/R, adopted 19 June 1992, 39S/206, 281-282, para. 5.39.

⁵¹*Ibid.*, 39S/289, para. 5.57.

Rhode Island only ‘nominally’ enforces its mandatory legislation a fortiori does not immunize this measure from Article III:4. The mandatory laws in these two states by their terms treat imported beer and wine less favourably than the like domestic products. Accordingly, the Panel found that the mandatory price affirmation laws in Massachusetts and Rhode Island are inconsistent with Article III:4, irrespective of the extent to which they are being enforced”.⁵²

See also the material on discretionary legislation, measures not yet in effect, and measures no longer in effect, under Article XXIII.

2. Interpretative Note *ad* Article III: measures imposed at the time or point of importation

(1) “collected or enforced ... at the time or point of importation”

The Interpretative Note *ad* Article III was added at Havana. It makes clear that the mere fact that an internal charge or regulation is collected or enforced in the case of the imported product at the time or point of importation does not prevent it from being an “internal tax or other internal charge” and from being subject to the provisions of Article III. During discussions at Havana on the proposal to add the Note, it was stated that “the proposed additional paragraph was intended to cover cases where internal excise taxes were, for administrative reasons, collected at the time of importation, as well as ‘mixing’ regulations also enforced at that stage”.⁵³ The Report of Sub-Committee A of the Third Committee at the Havana Conference, which considered Article 18 of the Charter (on national treatment), states as follows:

“The delegations of Chile, Lebanon, and Syria inquired whether certain charges imposed by their countries on imported products would be considered as internal taxes under Article 18. The Sub-Committee, while not attempting to give a general definition of internal taxes, considered that the particular charges referred to are import duties and not internal taxes because according to the information supplied by the countries concerned (a) they are collected at the time of, and as a condition to, the entry of the goods into the importing country, and (b) they apply exclusively to imported products without being related in any way to similar charges collected internally on like domestic products. The fact that these charges are described as internal taxes in the laws of the importing country would not in itself have the effect of giving them the status of internal taxes under the Charter”.⁵⁴

See also the discussion of border tax adjustments below at page 144.

The 1978 Panel Report on “EEC - Measures on Animal Feed Proteins” examined an EEC scheme requiring importers and producers of vegetable proteins to purchase and denature surplus skimmed milk powder from EEC intervention stocks. The scheme allowed persons subject to this requirement to provide a security deposit or a bank guarantee instead of documents providing proof of the purchase and the denaturing of the skimmed milk powder; the deposit or guarantee was refunded interest-free upon presentation of the required documents but forfeited otherwise. The Panel examined the argument that this security deposit scheme was a charge enforced at the border under Article II:2(a) and the Note *ad* Article III.

“The Panel was of the opinion that the security deposit was not of a fiscal nature because, if it had been, it would have defeated the stated purpose of the EEC Regulation which was to increase utilization of denatured skimmed milk powder. In addition the revenue from the security deposit accrued to EEC budgetary authorities only when the buyer of vegetable proteins had not fulfilled the purchase obligations. The Panel further noted that less than 1 per cent of the security deposits paid, were not released, indicating compliance with the purchase obligation. The Panel therefore considered that the security deposit, including

⁵²*Ibid.*, 39S/290, para. 5.60; see also similar finding with respect to non-enforcement of New Hampshire statute requiring preferential treatment for listing of wine manufactured or bottled in New Hampshire, *ibid.*, 39S/292, para. 5.66.

⁵³E/CONF.2/C.3/SR.11 p. 1; proposal at E/CONF.2/C.3/1/Add.21. See also E/CONF.2/C.3/A/W.33, p. 1.

⁵⁴Havana Reports, p. 62, para. 42; E/CONF.2/C.3/A/W.30, p. 2. The text of Article 18 as amended at Havana was taken into the General Agreement; see the discussion of negotiating history in section III below.

any associated cost, was only an enforcement mechanism for the purchase requirement and, as such, should be examined with the purchase obligation.”⁵⁵

The 1983 Panel Report on “United States - Imports of Certain Automotive Spring Assemblies” notes the view of Canada that “The institution of a bonding requirement, pursuant to Section 337 [of the Tariff Act of 1930] was applied to imports but did not apply to like domestic products and was thus inconsistent with the requirements of Article III:1 and 2. Even if the bonding requirement did not contravene Article III because it was a border measure as contended by the United States delegation, it would still contravene Article II:1(b), the last sentence of which had to be read in conjunction with paragraph 2 of the same Article”⁵⁶ and the view of the United States that “as a matter of GATT interpretation ... Article III:2 would not apply to temporary bonding requirements imposed as a condition of importation”.⁵⁷ The Panel found Article XX(d) to apply and “considered that an examination of the United States action in the light of the other GATT provisions referred to ... above was not required”.⁵⁸ The same statute was again examined in the 1989 panel decision on “United States - Section 337 of the Tariff Act of 1930”.⁵⁹

In the 1990 Panel Report on “EEC - Regulation on Imports of Parts and Components,” the Panel examined the argument of the EEC that the anti-circumvention duties at issue were customs or other duties imposed “on or in connection with importation” under Article II:1(b), or internal taxes or charges falling under Article III:2. See the excerpts from this report below at page 200.⁶⁰

(2) “which applies to an imported product and to the like domestic product”

The 1991 Panel Report on “United States - Restrictions on Imports of Tuna,” which has not been adopted, examined the United States prohibition of imports of tuna and tuna products from Mexico under the provisions of the US Marine Mammal Protection Act (MMPA) relating to fishing of yellowfin tuna in the Eastern Tropical Pacific Ocean (ETP).

“The Panel noted that Mexico had argued that the measures prohibiting imports of certain yellowfin tuna and yellowfin tuna products from Mexico imposed by the United States were quantitative restrictions on importation under Article XI, while the United States had argued that these measures were internal regulations enforced at the time or point of importation under Article III:4 and the Note Ad Article III, namely that the prohibition of imports of tuna and tuna products from Mexico constituted an enforcement of the regulations of the MMPA relating to the harvesting of domestic tuna.

“The Panel examined the distinction between quantitative restrictions on importation and internal measures applied at the time or point of importation, and noted the following. While restrictions on importation are prohibited by Article XI:1, contracting parties are permitted by Article III:4 and the Note Ad Article III to impose an internal regulation on products imported from other contracting parties provided that it: does not discriminate between products of other countries in violation of the most-favoured-nation principle of Article I:1; is not applied so as to afford protection to domestic production, in violation of the national treatment principle of Article III:1; and accords to imported products treatment no less favourable than that accorded to like products of national origin, consistent with Article III:4. ...

“The Panel noted that the United States had claimed that the direct import embargo on certain yellowfin tuna and certain yellowfin tuna products of Mexico constituted an enforcement at the time or point of importation of the requirements of the MMPA that yellowfin tuna in the ETP be harvested with fishing techniques designed to reduce the incidental taking of dolphins. The MMPA did not regulate tuna products as such, and in particular did not regulate the sale of tuna or tuna products. Nor did it prescribe fishing techniques that could have an effect on tuna as a product. This raised in the Panel's view the question of

⁵⁵L/4599, adopted on 14 March 1978, 25S/49, 64, para. 4.4.

⁵⁶L/5333, adopted on 26 May 1983 subject to an understanding (C/M/168), 30S/107, 119, para. 35.

⁵⁷*Ibid.*, 30S/123, para. 46.

⁵⁸*Ibid.*, 30S/126, para. 61.

⁵⁹L/6439, adopted on 7 November 1989, 36S/345.

⁶⁰L/6657, adopted on 16 May 1990, 37S/132, 192-93, paras. 5.5-5.8.

whether the tuna harvesting regulations could be regarded as a measure that ‘applies to’ imported and domestic tuna within the meaning of the Note Ad Article III and consequently as a measure which the United States could enforce consistently with that Note in the case of imported tuna at the time or point of importation. The Panel examined this question in detail and found the following.

“The text of Article III:1 refers to the application to imported or domestic products of laws, regulations and requirements affecting the internal sale ... of products and internal quantitative regulations requiring the mixture, processing or use of products; it sets forth the principle that such regulations on products not be applied so as to afford protection to domestic production. Article III:4 refers solely to laws, regulations and requirements affecting the internal sale, etc. of products. This suggests that Article III covers only measures affecting products as such. ...

“A previous panel had found that Article III:2, first sentence, ‘obliges contracting parties to establish certain competitive conditions for imported *products* in relation to domestic *products*’.⁶¹ Another panel had found that the words ‘treatment no less favourable’ in Article III:4 call for effective equality of opportunities for imported *products* in respect of the application of laws, regulations or requirements affecting the sale, offering for sale, purchase, transportation, distribution or use of *products*, and that this standard has to be understood as applicable to each individual case of imported *products*.⁶² It was apparent to the Panel that the comparison implied was necessarily one between the measures applied to imported products and the measures applied to like domestic products. ...

“The Panel considered that, as Article III applied the national treatment principle to both regulations and internal taxes, the provisions of Article III:4 applicable to regulations should be interpreted taking into account interpretations by the CONTRACTING PARTIES of the provisions of Article III:2 applicable to taxes. The Panel noted in this context that the Working Party Report on Border Tax Adjustments, adopted by the CONTRACTING PARTIES in 1970, had concluded that

‘... there was convergence of views to the effect that taxes directly levied on products were eligible for tax adjustment ... Furthermore, the Working Party concluded that there was convergence of views to the effect that certain taxes that were not directly levied on products were not eligible for adjustment, [such as] social security charges whether on employers or employees and payroll taxes’.

Thus, under the national treatment principle of Article III, contracting parties may apply border tax adjustments with regard to those taxes that are borne by products, but not for domestic taxes not directly levied on products (such as corporate income taxes). Consequently, the Note Ad Article III covers only internal taxes that are borne by products. The Panel considered that it would be inconsistent to limit the application of this Note to taxes that are borne by products while permitting its application to regulations not applied to the product as such.

“The Panel concluded from the above considerations that the Note Ad Article III covers only those measures that are applied to the product as such. The Panel noted that the MMPA regulates the domestic harvesting of yellowfin tuna to reduce the incidental taking of dolphin, but that these regulations could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product. Therefore, the Panel found that the import prohibition on certain yellowfin tuna and certain yellowfin tuna products of Mexico and the provisions of the MMPA under which it is imposed did not constitute internal regulations covered by the Note Ad Article III.”⁶³

⁶¹The footnote to this sentence refers to the Panel Report on “United States - Taxes on Petroleum and Certain Imported Substances”, adopted on 17 June 1987, 34S/136, 158, para. 5.1.9.

⁶²The footnote to this sentence refers to the Panel Report on “United States - Section 337 of the Tariff Act of 1930”, adopted on 7 November 1989, 36S/345, 386-7, paras. 5.11, 5.14.

⁶³DS21/R (unadopted) dated 3 September 1991, 39S/155, 193-195, paras. 5.8-5.14.

See also the references to this report at pages 164 and 175; in this connection see also the unadopted Panel Report of 1994 on “United States - Restrictions on Imports of Tuna”⁶⁴ and the related findings in the unadopted Panel Report of 1994 on “United States - Taxation of Automobiles”.⁶⁵

3. Paragraph 1

(1) “should not be applied to imported or domestic products so as to afford protection to domestic production”

The 1978 Panel Report on “EEC - Measures on Animal Feed Proteins” examined an EEC scheme requiring domestic producers or importers of oilseeds, cakes and meals, dehydrated fodder and compound feeds and importers of corn gluten feed to purchase a certain quantity of surplus skimmed milk powder held by intervention agencies and to have it denatured for use as feed for animals other than calves. The Panel, having concluded that these vegetable proteins and skimmed milk powder were substitutable in terms of their final use (see page 160), noted as follows.

“... The Panel ... considered that the EEC Regulation was an ‘internal quantitative regulation’ in the sense of Article III:5. However, the Panel found that this ‘internal quantitative regulation’ as such was not related to “the mixture, processing or use ... in specified amounts or proportions” within the meaning of Article III:5 because, at the level of its application, the EEC Regulation introduced basically an obligation to purchase a certain quantity of skimmed milk powder and the purchase obligation falls under Article III:1.

“Given the reference in Article III:5, second sentence, to Article III:1, the Panel then examined the consistency of the EEC Regulation as an internal quantitative regulation with provisions of Article III:1, particularly as to whether the Regulation afforded protection to domestic production. The Panel noted that the EEC Regulation considered, in its own terms, that denatured skimmed milk powder was an important source of protein which could be used in feedingstuffs. The Panel also noted that surplus stocks could originate either from domestic production or imports, but that the intervention agencies from which the buyers of vegetable proteins had to purchase a certain quantity of denatured skimmed milk powder only held domestically produced products. The Panel further noted that, although globally about 15 per cent of the EEC apparent consumption of vegetable protein was supplied from domestic sources, not all the individual products subject to the EEC measures were produced domestically in substantial quantities.

“The Panel concluded that the measures provided for by the Regulation with a view to ensuring the sale of a given quantity of skimmed milk powder protected this product in a manner contrary to the principles of Article III:1 and to the provisions of Article III:5, second sentence.”⁶⁶

During the discussion in the Council of the 1981 Panel Report on “Spain - Measures concerning Domestic Sale of Soyabean Oil”⁶⁷ many contracting parties stated that neither the language of Article III nor past interpretations of that provision supported an interpretation that internal regulations which protect domestic production must have restrictive effects on directly competitive or substitutable products in order to be found contrary to Article III:1. Some representatives also noted that adverse effects could not only be measured by direct effects on import volume in the country maintaining the measure but could manifest themselves as well by other trade distorting consequences, including possible suppression of growth of trade. The Council took note of this panel report and of the statements made concerning it, and did not adopt the report.⁶⁸

⁶⁴DS29/R, dated 16 June 1994, paras.5.8-5.10.

⁶⁵DS31/R, dated 11 October 1994, paras. 5.51-5.55.

⁶⁶L/4599, adopted 14 March 1978, 25S/49, 64-65, paras. 4.6-4.8.

⁶⁷L/5142 and Corr.1, dated 17 June 1981, unadopted.

⁶⁸C/M/152 p. 7-19; L/5161, L/5188.

The 1987 Panel Report on “Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages” examined, *inter alia*, the application of Article III:1.

“... The Panel noted that, whereas under the first sentence of Article III:2 the tax on the imported product and the tax on the like domestic product had to be equal in effect, Article III:1 and 2, second sentence, prohibited only the application of internal taxes to imported or domestic products in a manner ‘so as to afford protection to domestic production’. The Panel was of the view that also small tax differences could influence the competitive relationship between directly competing distilled liquors, but the existence of protective taxation could be established only in the light of the particular circumstances of each case and there could be a *de minimis* level below which a tax difference ceased to have the protective effect prohibited by Article III:2, second sentence. ... Since it has been recognized in GATT practice that Article III:2 protects expectations on the competitive relationship between imported and domestic products rather than expectations on trade volumes (see L/6175, paragraph 5.1.9), the Panel did not consider it necessary to examine the quantitative trade effects of this considerably different taxation for its conclusion that the application of considerably lower internal taxes by Japan on shochu than on other directly competitive or substitutable distilled liquors had trade-distorting effects affording protection to domestic production of shochu contrary to Article III:1 and 2, second sentence.”⁶⁹

The 1992 Panel Report on “United States - Measures Affecting Alcoholic and Malt Beverages” notes as follows.

“The Panel began its examination with Canada’s claim that the application of a lower rate of federal excise tax on domestic beer from qualifying (small) United States producers, which lower rate was not available to imported beer, was inconsistent with Articles III:1 and III:2 of the General Agreement. The Panel noted that because Article III:1 is a more general provision than either Article III:2 or III:4, it would not be appropriate for the Panel to consider Canada’s Article III:1 allegations to the extent that the Panel were to find United States measures to be inconsistent with the more specific provisions of Articles III:2 and III:4.”⁷⁰

The same Panel examined the argument that laws in certain states restricting the points of sale, distribution and labelling of beer above a certain per cent of alcohol by weight contravened Articles III:1 and III:4. Having found that low alcohol beer and high alcohol beer need not be considered as ‘like products’ in terms of Article III:4 (see page 171):

“The Panel ... proceeded to examine whether the laws and regulations in the above-mentioned states affecting the alcohol content of beer are applied to imported or domestic beer so as to afford protection to domestic production in terms of Article III:1. In this context, the Panel recalled its finding in paragraph 5.74 regarding the alcohol content of beer and concluded that the evidence submitted to it does not indicate that the distinctions made in the various states with respect to the alcohol content of beer are applied so as to favour domestic producers over foreign producers. Accordingly, the Panel found that the restrictions on points of sale, distribution and labelling based on the alcohol content of beer maintained by the states of Alabama, Colorado, Florida, Kansas, Minnesota, Missouri, Oklahoma, Oregon and Utah are not inconsistent with Article III:1.”⁷¹

With regard to the interpretation of paragraph 1 in the context of the second sentence of paragraph 2, see below under “a directly competitive or substitutable product” (page 159 and following). See also the discussion of this provision in the context of paragraph 5 of Article III.

See also the excerpt from the Working Party Report on “Brazilian Internal Taxes” above at page 128; see also above under “purpose of Article III”.

⁶⁹L/6216, adopted on 10 November 1987, 34S/83, 122-123, para. 5.11.

⁷⁰DS23/R, adopted 19 June 1992, 39S/206, 270, para. 5.2.

⁷¹*Ibid.*, 39S/295, para. 5.76.

(2) *Note Ad paragraph 1: Application of paragraph 1 to internal taxes imposed by local governments and authorities*

See above at page 130.

The Panel Report on “Canada - Measures Affecting the Sale of Gold Coins,” which has not been adopted, examined the application of a retail sales tax on gold coins by the Province of Ontario, and the question of whether the Canadian federal government had, as required by Article XXIV:12, taken “such reasonable measures as may be available to it to ensure observance of the provisions of [the General Agreement]” by Ontario.

“The Panel ... examined what meaning should be given to the term ‘reasonable’. The Panel noted that the only indication in the General Agreement of what was meant by ‘reasonable’ was contained in the interpretative note to Article III:1, which defined the term ‘reasonable measures’ for the case of national legislation authorizing local governments to impose taxes. According to this note the question of whether the repeal of such enabling legislation would be a reasonable measure required by Article XXIV:12 should be answered by taking into account the spirit of the inconsistent local tax laws, on the one hand, and the administrative or financial difficulties to which the repeal of the enabling legislation would give rise, on the other. The basic principle embodied in this note is, in the view of the Panel, that in determining which measures to secure the observance of the provisions of the General Agreement are ‘reasonable’ within the meaning of Article XXIV:12, the consequences of their non-observance by the local government for trade relations with other contracting parties are to be weighed against the domestic difficulties of securing observance. While recognizing that this note refers to the case of national enabling legislation, the Panel considered that the basic principle embodied therein was applicable to the present case.”⁷²

4. Paragraph 2: internal taxes or other internal charges of any kind

(1) *“directly or indirectly”*

In initial discussions at the London session of the Preparatory Committee, it was suggested that while this phrase in the US Draft Charter referred to “taxes and other internal charges imposed on or in connection with like products”, the rapporteurs in the Working Party on Technical Articles had used the phrase ‘directly or indirectly’ instead, owing to the difficulty of obtaining the exact equivalent in the French text.⁷³ In later discussions in Commission A at the London session of the Preparatory Committee, it was stated that the word “indirectly” would cover even a tax not on a product as such but on the processing of the product.⁷⁴

(2) *“internal taxes”*

(a) *Excise taxes, indirect taxes and consumption taxes*

It was stated during discussions in the Third Committee at the Havana Conference that “the provisions relating to internal taxes were not designed to limit the degree of protection, but merely to determine the form which that protection should take. Any country was free to replace internal taxes by import tariffs which were subject to the negotiations referred to in Article 17. There was no general binding or limitations on tariffs as such”.⁷⁵

The 1987 Panel Report on “United States - Taxes on Petroleum and Certain Imported Substances” examined excise taxes on imported petroleum and certain imported chemical substances (“Superfund taxes”), which had been enacted as a revenue source for the US “Superfund” hazardous-waste cleanup program.

⁷²L/5863, para. 69.

⁷³Proposal by UK, EPCT/C.II/11; discussion at EPCT/C.II/W.5, p. 5.

⁷⁴EPCT/A/PV/9 p. 19; EPCT/W/181, p. 3.

⁷⁵E/CONF.2/C.3/SR.11, p. 3; Article 17 was the Charter article on multilateral trade negotiations, some elements of which were incorporated into Article XXVIIIbis.

“The Panel examined the tax on petroleum in the light of the obligations the United States assumed under the General Agreement and found the following: The tax on petroleum is an excise tax levied on imported and domestic goods. Such taxes are subject to the national treatment requirement of Article III:2, first sentence, which reads: ‘The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products’.”⁷⁶

The 1992 Panel Report on “United States - Measures Affecting Alcoholic and Malt Beverages” examined, *inter alia*, excise taxes on beer and wine at the federal and state level in the United States, and the relationship between exemptions granted from such taxes and the exception in Article III:8(b): see below at page 195.

(b) *Fiscal measures versus enforcement measures*

The Panel Report on “United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco” examined a claim that the penalty provisions of the Domestic Marketing Assessment (“DMA”) under Section 1106(a) of the US 1993 Budget Act, and rules of the U.S. Department of Agriculture (“USDA”), were inconsistent with the first sentence of Article III:2. These provisions, consisting of a nonrefundable marketing assessment and a requirement to purchase additional quantities of domestic burley and flue-cured tobacco, were applicable where a domestic manufacturer failed to provide a required certification of the percentage of domestically-produced tobacco used by it to produce cigarettes each year, or to use annually a minimum of 75 per cent domestic tobacco in the manufacture of cigarettes.

“In the Panel's view, the Article III:2 claim raised the question of whether the DMA's penalty provisions were separate fiscal measures or enforcement measures for the domestic content requirement of the DMA. The Panel noted in this regard that previous panels, consistent with the practice of international tribunals, had refrained from engaging in an independent interpretation of domestic laws, and had treated the interpretation of such laws as questions of fact.”⁷⁷ The Panel considered that it should approach its analysis of the complainants' Article III:2 claims in conformity with this practice and, therefore, to treat the interpretation of Section 1106(a) of the 1993 Budget Act as a question of fact. As the basis for such an analysis, the Panel considered that it should seek guidance from the manner in which the United States, as author of the legislation, itself interpreted these provisions.

“The Panel considered as significant that the subsection of the DMA provision which set forth the additional marketing assessment and purchase requirements was entitled ‘Penalties’. Thus, the ordinary meaning of the title of the provision suggested to the Panel that the additional assessment and purchase requirements were treated under U.S. domestic law as penalties, not as separate fiscal measures.

“The Panel recalled once again that the DMA provision, in relevant part, read as follows:

‘*PENALTIES*. In General. Subject to subsection (f), a domestic manufacturer of cigarettes that has failed, as determined by the Secretary after notice and opportunity for a hearing, to use in the manufacture of cigarettes during a calendar year a quantity of tobacco grown in the United States that is at least 75 per cent of the total quantity of tobacco used by the manufacturer or to comply with subsection (a) [certification requirement], shall be subject to the requirements of subsections (c) [*nonrefundable marketing assessment*], (d) [*purchase of additional quantities of domestic burley tobacco*] and (e) [*purchase of additional quantities of domestic flue-cured tobacco*’]. (*emphasis added*)

⁷⁶L/6175, adopted on 17 June 1987, 34S/136, 154, para. 5.1.1.

⁷⁷The footnote to this sentence in the panel report provides: “See, *e.g.*, report of the panel on United States - Measures Affecting Alcoholic and Malt Beverages, adopted on 19 June 1992, BISD 39S/206, 284-287, 296-297”.

“The Panel further recalled that USDA’s Proposed Rules implementing Section 1106(a) of the 1993 Budget Act set out the penalty provisions under Section 723.502(b), entitled “Failure to Comply”. The text of these Proposed Rules provided the following:

‘Each domestic manufacturer of cigarettes who *fails to comply* with the requirements of this section *shall pay* a domestic marketing assessment and *shall purchase* loan stocks of tobacco in accordance with Sections 723.503 and 723.504’.⁷⁸ (*emphasis added*)

“The Panel noted in addition that the text accompanying the Proposed Rules suggested that the additional marketing assessment and purchase requirements were in the nature of penalties. For example, the Panel noted that the following explanation was provided:

‘Section 320C(c) of the Act provides that *if the quantity of imported tobacco* used by a domestic manufacturer for making cigarettes for the year *exceeds 25 per cent*, *such manufacturer must pay a domestic marketing assessment* on each pound of imported tobacco used in excess of 25 per cent. In addition, as provided in section 320C(d) and (e), *such manufacturer must purchase tobacco* from the existing burley and flue-cured tobacco inventories of producer owned cooperative marketing associations in an amount equal to the weight of imported tobacco used in excess of 25 per cent’.⁷⁹ (*emphasis added*)

“The accompanying text further provided:

‘Where a domestic content *violation* has occurred, the *compensatory* purchases of tobacco ... must be from the inventories of producer owned cooperative marketing associations that handle price support loans for tobacco’.⁸⁰ (*emphasis added*)

“It was thus the Panel’s understanding that the U.S. Government treated these DMA provisions as penalty provisions for the enforcement of a domestic content requirement for tobacco, not as separate fiscal measures, and that such interpretation corresponded to the ordinary meaning of the terms used in the relevant statute and proposed rules. Further, it appeared that these penalty provisions had no separate *raison d’être* in the absence of the underlying domestic content requirement. The above factors suggested to the Panel that it would not be appropriate to analyze the penalty provisions separately from the underlying domestic content requirement.

“The Panel further noted that prior panel decisions also supported the view that the additional marketing assessment and purchase requirements should be treated as enforcement measures, and not be analyzed separately as internal charges. The Panel recalled that one such panel, in examining a regulation according to which buyers of vegetable proteins had the possibility of providing a security as an alternative to the required purchase of a certain quantity of skimmed milk powder, had determined that the security deposit was not a fiscal measure because, *inter alia*,

‘the revenue from the security deposit accrued to EEC budgetary authorities only when the buyer of vegetable proteins had not fulfilled the purchase obligation. The Panel therefore considered that the security deposit, including any associated cost, was only an enforcement mechanism for the purchase requirement and, as such, should be examined with the purchase obligation’.⁸¹

“In a similar vein, another more recent panel had first examined the underlying measure at issue (differing systems for the internal distribution of imported and domestic beer), and considered it

⁷⁸The footnote to this sentence in the panel report refers to 59 Federal Register 1493, 1497 (11 January 1994).

⁷⁹The footnote to this sentence in the panel refers to 59 Federal Register 1493, 1495 (11 January 1994).

⁸⁰The footnote to this sentence in the panel report refers to 59 Federal Register 1493, 1495 (11 January 1994).

⁸¹The footnote to this paragraph in the panel report provides: “Report of the panel on EEC - Measures on Animal Feed Proteins, adopted on 14 March 1978, BISD 25S/49, 64. See also report of the panel on EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables, adopted on 18 October 1978, BISD 25S/68, 98”.

unnecessary to examine certain enforcement measures (charges on beer containers).⁸² The Panel did not consider that there were any elements in the case before it which would justify a different approach from that adopted in these earlier cases.

“In view of the Panel’s analysis in paragraphs 75-81 above, the Panel considered that the evidence did not support the complainants’ claim that the DMA’s penalty provisions were separate taxes or charges within the meaning of Article III:2.”⁸³

In this connection see also the unadopted Panel Report of 1994 on “United States - Taxes on Automobiles”.⁸⁴

(c) *Income taxes, exemptions from income taxes and credits against income taxes*

See also the material below at page 152 and under paragraph 8(b).

During discussions in Sub-Committee A of the Third Committee at the Havana Conference, which considered Article 18 of the Charter (on national treatment), it was stated that the sub-committee on Article 25 [XVI] “had implied that exemptions from income taxes would constitute a form of subsidy permissible under Article 25 [XVI] and therefore not precluded by Article 18.” It was agreed that “neither income taxes nor import duties came within the scope of Article 18 [III] since this Article refers specifically to internal taxes on products”.⁸⁵

In October 1952, Austria brought a complaint that the Italian authorities granted a remission of income tax to firms that used domestically-produced ship’s plate.⁸⁶

The 1971 Working Party on the United States Temporary Import Surcharge held an exchange of views on the Job Development Tax Credit, a credit against United States income taxes which was allowed in the year that certain new capital equipment was placed in service, and was not allowed with respect to foreign-produced property ordered by the taxpayer while the import surcharge was in effect. Foreign-produced property was defined as property manufactured outside the US or property manufactured in the US with 50 per cent or more foreign components. Several members of the Working Party stated that the provision under which only goods of United States origin were eligible for the exemption from a direct tax was inconsistent with Article III of the GATT.⁸⁷

In early 1987, the EEC brought a complaint concerning US income tax legislation passed in 1986 which, while eliminating provisions for certain tax credits and special depreciation for capital goods, permitted the temporary use of these provisions for passenger aircraft assembled in certain states of the US if ordered and delivered before a date in late 1986.⁸⁸

(d) *Border tax adjustments; border adjustment of taxes and charges*

See paragraph 2(a) of Article II. See also the discussion of the Note *ad* Article III above.

The 1955 Report of Review Working Party II on Schedules and Customs Administration notes that during the Review Session of 1954-55, Germany (which at the time had a system of border tax adjustment for cascading internal indirect taxes) “proposed insertion of the following interpretative note to Article III:2:

⁸²The footnote to this sentence in the panel report refers to “Report of the panel on Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, adopted on 18 February 1992, BISD 39S/27, 85”.

⁸³DS44/R, adopted on 4 October 1994, paras. 75-82.

⁸⁴DS31/R, dated 11 October 1994, paras. 5.42-5.43.

⁸⁵E/CONF.2/C.3/A/W/32, p. 1-2; statement repeated in Havana Reports, p. 63, para. 44. See also E/CONF.2/C.3/SR.13, p. 1.

⁸⁶L/875; see SR.13/12, SR.15/17, SR.16/9, SR.17/5. The tax remission was extended for all purchases in May 1961: see SR.18/4.

⁸⁷L/3575.

⁸⁸L/6153, C/M/208, C/M/209.

“the words ‘internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products’, as employed in the first sentence of paragraph 2, shall be construed to denote the overall charge, including the charges borne by like domestic products through being subjected to internal taxes or other internal charges at various stages of their production (charges borne by the raw materials, semifinished products, auxiliary materials, etc. incorporated in, and by the power consumed for the production of, the finished products)’.

“The Working Party considered the significance of the phrase ‘internal taxes or other internal charges’ in relation to taxes which are levied at various stages of production, and in particular whether the rule of national treatment would allow a government to tax imported products at a rate calculated to be the equivalent of the taxes levied at the various stages of production of the like domestic product or only at the rate of the tax levied at the last stage. Several representatives supported the former interpretation, while the representative of the United States, on the other hand, thought the reference to internal taxes covered only a tax levied on the final product competitive with the imported article. Against the latter view it was argued that that interpretation would establish a discrimination against countries which chose to levy taxes at various stages and in favour of those which levy a single turnover tax on finished products. Some other representatives were of the opinion that the equivalent of the taxes on the final product and on its components and ingredients would be permitted, but not taxes on power consumed in manufacture, etc. In view of these differences of opinion, the Working Party does not recommend the insertion of an interpretative note, it being understood that the principle of equality of treatment would be upheld in the event of a tax on imported products being challenged under the consultation or complaint procedure of the Agreement.”⁸⁹

The Working Party on “Border Tax Adjustments” in 1968-70 examined the tax adjustment practices of contracting parties, their trade effects and relevant provisions of the General Agreement, and in particular the changeover in certain countries from cascade tax systems to the value-added tax. The Working Party used the definition of border tax adjustments applied in the OECD: “any fiscal measures which put into effect, in whole or in part, the destination principle (i.e. which enable exported products to be relieved of some or all of the tax charged in the exporting country in respect of similar domestic products sold to consumers on the home market and which enable imported products sold to consumers to be charged with some or all of the tax charged in the importing country in respect of similar domestic products)”. The Working Party considered, on the import side, Articles II and III and on the export side, Article XVI; other articles deemed relevant included Articles I, VI and VII. The 1970 Report of the Working Party notes as follows:

“There was general agreement that the main provisions of the GATT represented the codification of practices which existed at the time these provisions were drafted, re-examined and completed. ...

“Most members argued that there seemed to have been a coherent approach when the relevant articles of the GATT were drafted and that there were no inconsistencies of substance between the different provisions even if the question of tax adjustments was dealt with in different articles. They added that the philosophy behind these provisions was the ensuring of a certain trade neutrality. ...

“The Working Party also noted that there were differences in the terms used in these articles, in particular with respect to the provisions regarding importation and exportation: for instance, the terms ‘borne by’ and ‘levied on’. It was established that those differences in wording had not led to any differences in interpretation of the provisions. It was agreed that GATT principles on tax adjustment applied the principle of destination identically to imports and exports.

“It was further agreed that these provisions set maxima limits for adjustment (compensation) which were not to be exceeded, but below which each contracting party was free to differentiate in the degree of compensation applied, provided that such action was in conformity with other provisions of the General Agreement.”⁹⁰

⁸⁹L/329, adopted on 26 February 1955, 3S/205, 210-11, para. 10.

⁹⁰L/3464, adopted on 2 December 1970, 18S/97, 99-100, paras. 8-11. See also documents L/3389 (Consolidated document on the

“On the question of eligibility of taxes for tax adjustment under the present rules, the discussion took into account the term ‘directly or indirectly ...’ (*inter alia* Article III:2). The Working Party concluded that there was convergence of views to the effect that taxes directly levied on products were eligible for tax adjustment. Examples of such taxes comprised specific excise duties, sales taxes and cascade taxes and the tax on value added. It was agreed that the TVA, regardless of its technical construction (fractioned collection), was equivalent in this respect to a tax levied directly - a retail or sales tax. Furthermore, the Working Party concluded that there was convergence of views to the effect that certain taxes that were not directly levied on products were not eligible for tax adjustment. Examples of such taxes comprised social security charges whether on employers or employees and payroll taxes.

“The Working Party noted that there was a divergence of views with regard to the eligibility for adjustment of certain categories of tax and that these could be sub-divided into

- (a) ‘Taxes occultes’ which the OECD defined as consumption taxes on capital equipment, auxiliary materials and services used in the transportation and production of other taxable goods. Taxes on advertising, energy, machinery and transport were among the more important taxes which might be involved. It appeared that adjustment was not normally made for taxes occultes except in countries having a cascade tax;
- (b) Certain other taxes, such as property taxes, stamp duties and registration duties ... which are not generally considered eligible for tax adjustment. Most countries do not make adjustments for such taxes ...

It was generally felt that while this area of taxation was unclear, its importance –as indicated by the scarcity of complaints reported in connexion with adjustment of taxes occultes –was not such as to justify further examination.

“The Working Party noted that there were some taxes which, while generally considered eligible for adjustment, presented a problem because of the difficulty of calculating exactly the amount of compensation. Examples of such difficulties were encountered in cascade taxes. ... Other examples included composite goods which, on export, contained ingredients for which the Working Party agreed in principle it was administratively sensible and sufficiently accurate to rebate by average rates for a given class of goods.

“It was generally agreed that countries adjusting taxes should, at all times, be prepared, if requested, to account for the reasons for adjustment, for the methods used, for the amount of compensation and to furnish proof thereof.”⁹¹

Based on the recommendations of this Working Party the Council introduced a notification procedure on a provisional basis in December 1970, whereby contracting parties would report changes in their tax adjustments. The notifications are to report any major changes in tax adjustment legislation and practices involving international trade, and bring periodically up to date the information contained in the consolidated document on contracting parties’ practices (L/3389) on tax adjustments drawn up in the course of the Working Party’s work. Notifications under this procedure are currently distributed as addenda to document L/3518.⁹²

The 1987 Panel Report on “Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages” examined the argument of Japan that different tax treatment of liqueurs and sparkling wines according to alcohol and extract contents was consistent with Article III:2.

“The Panel noted ... that GATT Article II:2 permitted the non-discriminatory taxation ‘of an article from which the imported product has been manufactured or produced in whole or in part’, and that such a

examination of practices of contracting parties in relation to border tax adjustments); COM.IND/W/98; L/3272; Spec(68)57 and Add.1-2.

⁹¹*Ibid.*, 18S/100-101, paras. 14-17.

⁹²18S/108; see discussion on Notification in the GATT under Article X.

non-discriminatory alcohol tax on like alcoholic beverages with different alcohol contents could result in differential tax rates on like products. ... Having found that

- liqueurs and sparkling wines with high raw material contents, imported into Japan, were subject to internal taxes in excess of those applied to like domestic liqueurs and sparkling wines with lower raw material contents ... and that
- this differential taxation of like products depending on their extract and raw material content had not been, and apparently could not be, justified as resulting from a non-discriminatory internal tax on the raw material content concerned or as justifiable under any of the exception clauses of the General Agreement,

the Panel concluded that this imposition of higher taxes on 'classic' liqueurs and sparkling wines with higher raw material content was inconsistent with Article III:2, first sentence."⁹³

The 1987 Panel Report on "United States - Taxes on Petroleum and Certain Imported Substances" noted that the legislation at issue (the Superfund Amendments and Reauthorization Act) provided for an excise tax per ton on sale of certain chemicals. The legislation also provided for an excise tax on certain downstream imported chemical substances which were derivatives of taxable chemicals. The amount of the tax on any of the downstream imported substances was to equal the amount of the excise taxes which would have been imposed on the upstream chemicals used as materials in the production of the imported substance if those upstream chemicals had been sold in the United States for use in the manufacture of the downstream imported substance.

"The Panel noted that the United States justified the tax on certain imported substances as a border tax adjustment corresponding in its effect to the internal tax on certain chemicals from which these substances were derived ... The Panel further noted that the EEC considered the tax on certain chemicals not to be eligible for border tax adjustment because it was designed to tax polluting activities that occurred in the United States and to finance environmental programmes benefitting only United States producers. Consistent with the Polluter-Pays Principle, the United States should have taxed only products of domestic origin because only their production gave rise to environmental problems in the United States. ... The Panel therefore first examined whether the tax on certain chemicals was eligible for border tax adjustments.

"... As [the conclusions of the Border Tax Adjustments Working Party] clearly indicate, the tax adjustment rules of the General Agreement distinguish between taxes on products and taxes not directly levied on products; they do not distinguish between taxes with different policy purposes. Whether a sales tax is levied on a product for general revenue purposes or to encourage the rational use of environmental resources, is therefore not relevant for the determination of the eligibility of a tax for border tax adjustment. For these reasons the Panel concluded that the tax on certain chemicals, being a tax directly imposed on products, was eligible for border tax adjustment independent of the purpose it served. The Panel therefore did not examine whether the tax on chemicals served environmental purposes and, if so, whether a border tax adjustment would be consistent with these purposes. ...

"The Panel, having concluded that the tax on certain chemicals was in principle eligible for border tax adjustment, then examined whether the tax on certain imported substances meets the national treatment requirement of Article III:2, first sentence. This provision permits the imposition of an internal tax on imported products provided the like domestic products are taxed, directly or indirectly, at the same or a higher rate. Such internal taxes may be levied on imported products at the time or point of importation (Note ad Article III). Paragraph 2(a) of Article II therefore clarifies that a tariff concession does not prevent the levying of

⁹³L/6216, adopted 10 November 1987, 34S/83, 120-121, para. 5.9(d).

‘a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part’.

“The drafters of the General Agreement explained the word ‘equivalent’ used in this provision with the following example:

‘If a charge is imposed on perfume because it contains alcohol, the charge to be imposed must take into consideration the value of the alcohol and not the value of the perfume, that is to say the value of the content and not the value of the whole’ (EPCT/TAC/PV/26, page 21).

“The tax on certain imported substances equals in principle the amount of the tax which would have been imposed under the Superfund Act on the chemicals used as materials in the manufacture or production of the imported substance if these chemicals had been sold in the United States for use in the manufacture or production of the imported substance. In the words which the drafters of the General Agreement used in the above perfume-alcohol example: The tax is imposed on the imported substances because they are produced from chemicals subject to an excise tax in the United States and the tax rate is determined in principle in relation to the amount of these chemicals used and not in relation to the value of the imported substance. The Panel therefore concluded that, to the extent that the tax on certain imported substances was equivalent to the tax borne by like domestic substances as a result of the tax on certain chemicals the tax met the national treatment requirement of Article III:2, first sentence.”⁹⁴

The “Superfund” legislation also provided with respect to the tax on certain imported substances that importers would be required to provide sufficient information regarding the chemical inputs of taxable substances to enable the tax authorities to determine the amount of tax to be imposed; otherwise a penalty tax would be imposed in the amount of five per cent ad valorem, or a different rate to be prescribed by the Secretary of the Treasury which would equal the amount that would be imposed if the substance were produced using the predominant method of production. The Panel, examining this penalty rate, noted as follows.

“According to the Superfund Act, the tax on certain imported substances will however not necessarily be equal to the tax on the chemicals used in their production. If an importer fails to furnish the information necessary to determine the amount of tax to be imposed, a penalty tax of 5 per cent of the appraised value of the imported substance shall be imposed. Since the tax on certain chemicals subjects some of the chemicals only to a tax equivalent to 2 per cent of the 1980 wholesale price of the chemical, the 5 per cent penalty tax could be much higher than the highest possible tax that the importer would have to pay if he provided sufficient information.... The imposition of a penalty tax on the basis of the appraised value of the imported substance would not conform with the national treatment requirement of Article III: 2, first sentence, because the tax rate would in that case no longer be imposed in relation to the amount of taxable chemicals used in their production but the value of the imported substance. Thus it would not meet the requirement of equivalence which the drafters explained in the perfume-alcohol example mentioned in the preceding paragraph. ...”⁹⁵

In the 1990 Panel Report on “EEC - Regulation on Imports of Parts and Components” the Panel examined the application of Article 13:10 of the EEC’s anti-dumping regulation (Council Regulation No. 2176/84), under which anti-circumvention duties were levied on products assembled or produced in the EEC. Having found that the anti-circumvention duties were not customs duties within the meaning of Article II:1(b) (see excerpts starting at page 200), the Panel examined them in the light of the first sentence of Article III:2.

“The Panel noted that, in the cases in which anti-circumvention duties had been applied, the EEC followed sub-paragraph (c) of the anti-circumvention provision, according to which ‘the amount of duty collected shall be proportional to that resulting from the application of the rate of the anti-dumping duty

⁹⁴L/6175, adopted on 17 June 1987, 34S/136, 160-163, paras. 5.2.3, 5.2.4, 5.2.7, 5.2.8.

⁹⁵*Ibid.*, 34S/163, para. 5.2.9.

applicable to the exporter of the complete products on the c.i.f. value of the parts or materials imported'. The Panel further noted that like parts and materials of domestic origin are not subject to any corresponding charge. The Panel therefore found that the anti-circumvention duties on the finished products subject imported parts and materials indirectly to an internal charge in excess of that applied to like domestic products and that they are consequently contrary to Article III:2, first sentence".⁹⁶

In the 1994 Panel Report on "United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco", "The Panel ... turned to the claim of the United States that the internal tax on imported tobacco was a border tax adjustment applied consistently with Article III:2 due to the existence of a similar internal tax applied to domestic tobacco. Addressing this claim, the Panel noted that the BDA could only be subject to border tax adjustment if it were an internal tax or charge consistent with Article III:2".⁹⁷ See also the material from this report at page 153 concerning the claim that the "No Net Cost Assessments" on imported burley and flue-cured tobacco were permissible border tax adjustments consistent with Article III:2.⁹⁸

See also under the Note *ad* Article III and see the discussion below of the phrase "in excess of those applied".

(3) "or other internal charges of any kind": charges on the transfer of payments for imports or exports

The Report of Sub-Committee A of the Third Committee at the Havana Conference, which considered Article 18 of the Charter, states as follows.

"The Sub-Committee [A] considered that charges imposed in connection with the international transfer of payments for imports or exports, particularly the charges imposed by countries employing multiple currency practices, where such charges are imposed not inconsistently with the Articles of Agreement of the International Monetary Fund, would not be covered by Article 18. On the other hand, in the unlikely case of a multiple currency practice which takes the form of an internal tax or charge, such as an excise tax on an imported product not applied on the like domestic product, that practice would be precluded by Article 18. It may be pointed out that the possible existence of charges on the transfer of payments insofar as these are permitted by the International Monetary Fund is clearly recognized by Article 16."⁹⁹

The foregoing passage was referred to in the 1952 Panel Report on "Special Import Taxes Instituted by Greece". In this connection, the Panel observed:

"... the principal question arising for determination was whether or not the Greek tax was an internal tax or charge on imported products within the meaning of paragraph 2 of Article III. If the finding on this point were affirmative, the panel considered that it would be subject to the provisions of Article III whatever might have been the underlying intent of the Greek Government in imposing the tax. ... On the other hand, if the contention of the Greek Government were accepted that the tax was not in nature of a tax or charge on imported goods, but was a tax on foreign exchange allocated for the payment of imports, the question would arise whether this was a multiple currency practice, and, if so, whether it was in conformity with the Articles of Agreement of the International Monetary Fund. These matters would be for the determination of the International Monetary Fund. If the Fund should find that the tax system was a multiple currency practice and in conformity with the Articles of Agreement of the International Monetary Fund, it would fall outside the scope of Article III.

⁹⁶L/6657, adopted on 16 May 1990, 37S/132, 193, para. 5.9.

⁹⁷DS44/R, adopted on 4 October 1994, para. 89; the footnote to this paragraph refers to the panel reports on "United States - Taxes on Petroleum and Certain Imported Substances", adopted on 17 June 1987, BISD 34S/136, 155-159, and "United States - Section 337 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, 386-387.

⁹⁸DS44/R, adopted on 4 October 1994, paras. 102-112.

⁹⁹Havana Reports, p. 62, para. 39, repeating an understanding arrived at during the Geneva session of the Preparatory Committee (see EPCT/174, p. 7). See also Havana discussion of this understanding at E/CONF.2/C.3/A/W.33, p. 3. The text of Article 18 as revised at Havana was taken into the GATT; see the discussion of negotiating history in section III below. Article 16 corresponded to Article I of the General Agreement.

“Even if it were found that the tax did not fall within the ambit of Article III the further question might arise under Article XV:4 whether the action of the Greek Government constituted frustration by exchange action of the intent of the provisions of Article III of the General Agreement”.¹⁰⁰

(4) “in excess of those applied”

The summary records of the Third Committee at the Havana Conference note the statement that “internal taxes on imported products could be increased if the tax on the domestic products was also increased; the requirement was that the tax should be the same on both imported and domestic products”.¹⁰¹

The 1992 Panel Report on “Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies” notes with respect to taxes on beer containers:

“The Panel noted that Canada levied in the provinces of Manitoba and Ontario a charge on all beverage alcohol containers, domestic and imported, which were not part of a deposit/return system; in Nova Scotia, a charge was levied on non-refillable containers, domestic and imported, shipped to the liquor board. The United States considered these charges to be inconsistent with Article III since they were in practice applied only to imported beer because imported beer could not be delivered by the brewers to the points of sale and the establishment of a separate container collection system was, therefore, prohibitively expensive. The Panel noted that it was not the charges on containers as such that the United States considered to be inconsistent with Article III but rather their application in a situation where different systems for the delivery of beer to the points of sale applied to imported and domestic beer. The Panel, therefore, considered that its findings on restrictions on private delivery [see page 181 below] dealt with this matter”.¹⁰²

(a) Discriminatory rates of tax

In October 1955 the United Kingdom complained that the Italian government’s imposition of a general turnover tax on pharmaceuticals at one rate for domestic products and a different and higher rate for imported products was inconsistent with Article III.¹⁰³

The 1987 Panel Report on “United States - Taxes on Petroleum and Certain Imported Substances,” examining an excise tax on petroleum, found that “The rate of tax applied to the imported products is 3.5 cents per barrel higher than the rate applied to the like domestic products. ... The tax on petroleum is ... inconsistent with the United States’ obligations under Article III:2”.¹⁰⁴ See also the discussion of this case above under “Border tax adjustments”.

The 1992 Panel Report on “United States - Measures Affecting Alcoholic and Malt Beverages” “considered that the application of a lower rate of federal excise tax on domestic beer from qualifying United States producers, which lower rate is not available in the case of imported beer, constitutes less favourable treatment to the imported product in respect of internal taxes and is therefore inconsistent with the national treatment provision of Article III:2, first sentence”. The Panel reached the same conclusion with respect to federal excise taxes on wine and cider and floor stocks of wine.¹⁰⁵

(b) Methods of taxation

The 1987 Panel Report on “Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages” examined Japanese excise taxes on alcoholic beverages, which provided different tax rates for different types of beverages, different quality grades of the same beverage, and beverages above and

¹⁰⁰G/25, adopted on 3 November 1952, 1S/48, 49-50, paras. 5, 7, 8.

¹⁰¹E/CONF.2/C.3/SR.42, p. 4.

¹⁰²DS17/R, adopted 18 February 1992, 39S/27, 85, para. 5.33.

¹⁰³L/421, SR.10/5.

¹⁰⁴L/6175, adopted on 17 June 1987, 34S/136, 155, para. 5.1.1.

¹⁰⁵DS23/R, adopted on 19 June 1992, 39S/206, 270, 273, paras. 5.5 (beer), 5.14 (wine, cider and floor stocks of wine).

below a price threshold. The Panel compared the fiscal burden on the various alcoholic beverages that the Panel had determined to be “like products” or “directly competitive or substitutable products” (see below).

“... The Panel further found that the wording ‘directly or indirectly’ and ‘internal taxes ... *of any kind*’ implied that, in assessing whether there is tax discrimination, account is to be taken not only of the rate of the applicable internal tax but also of the taxation methods (e.g. different kinds of internal taxes, direct taxation of the finished product or indirect taxation by taxing the raw materials used in the product during the various stages of its production) and of the rules for the tax collection (e.g. basis of assessment).

“The Panel then examined the European Communities’ contention ... that Japanese internal taxes on whiskies, brandies, still wines, sparkling wines, spirits and liqueurs imported from the EEC were in excess of those applied to like Japanese products, and reached the following conclusions:

“a) *Whiskies and brandies subject to the grading system*: The Panel noted that the Japanese specific tax rates on imported and Japanese whiskies/brandies special grade (2,098,100 yen/kl) were considerably higher than the Japanese specific tax rates on whiskies/brandies first grade (1,011,400 yen/kl) and second grade (296,200 yen/kl). The Panel was unable to find that these tax differentials corresponded to objective differences of the various distilled liquors, for instance that they could be explained as a non-discriminatory taxation of their respective alcohol contents. ... almost all whiskies/brandies imported from the EEC were subject to the higher rates of tax whereas more than half of whiskies/brandies produced in Japan benefited from considerably lower rates of tax. The Panel concluded, therefore, that (special and first grade) whiskies/brandies imported from the EEC were subject to internal Japanese taxes ‘in excess of those applied ... to like domestic products’ (i.e. first and second grade whiskies/brandies) in the sense of Article III:2, first sentence.

“b) *Wines, spirits and liqueurs subject to the ‘mixed’ system of specific tax and ad valorem tax*: The Panel noted that imported and domestic wines, whiskies, brandies, spirits and liqueurs were subject to *ad valorem* taxes in lieu of the specific tax when the manufacturer’s selling price (CIF and customs duty for imported products) exceeded a specified threshold. ... The Panel was of the view that a ‘mixed’ system of specific and *ad valorem* liquor taxes was as such not inconsistent with Article III:2, which prohibits only discriminatory or protective taxation of imported products but not the use of differentiated taxation methods as such, provided the differentiated taxation methods do not result in discriminatory or protective taxation. ... since liquors above the non-taxable thresholds were subjected to *ad valorem* taxes in excess of the specific taxes on ‘like’ liquors below the threshold ... the imposition of *ad valorem* taxes on wines, spirits and liqueurs imported from the EEC, which are considerably higher than the specific taxes on ‘like’ domestic wines, spirits and liqueurs, was inconsistent with Article III:2, first sentence.

“c) *The different methods of calculating ad valorem taxes on imported and domestic liquors*: The Panel shared the view expressed by both parties that Article III:2 does not prescribe the use of any specific method or system of taxation. The Panel was further of the view that there could be objective reasons proper to the tax in question which could justify or necessitate differences in the system of taxation for imported and for domestic products. The Panel found that it could be also compatible with Article III:2 to allow two different methods of calculation of price for tax purposes. Since Article III:2 prohibited only discriminatory or protective tax burdens on imported products, what mattered was, in the view of the Panel, whether the application of the different taxation methods actually had a discriminatory or protective effect against imported products. The Panel could therefore not agree with the European Community’s view that the mere fact that the so-called ‘fixed subtraction system’ was available only for domestic liquors constituted in itself a discrimination contrary to Article III:2 or 4”.¹⁰⁶

¹⁰⁶L/6216, adopted 10 November 1987, 34S/83, 118-120, paras. 5.8-5.9.

The 1992 Panel Report on “Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies” noted with respect to the mark-ups charged by provincial liquor boards:

“... The Panel ... considered that Article III:2 required that the computations of the base value for the purposes of assessing these charges be no less favourable for imported beer than for domestic beer. This requirement was met if this value was computed for both imported and domestic beer on the basis of the full cost of the beer, which in the case of the imported beer included charges for cost of services levied by the liquor boards consistently with the General Agreement.

“The Panel further noted that Article III:2 applied to internal taxes levied on imported products, that is products on which duties levied in connection with importation had already been assessed. The Panel therefore *found* that Canada could, consistently with Article III:2, levy the provincial and federal sales taxes on the basis of the duty-paid value of imported beer.

“In the light of these considerations the Panel *found* that Canada’s methods of assessing mark-ups and taxes on imported beer were not inconsistent with Article III:2”.¹⁰⁷

See also the material on border tax adjustments at page 144 *et seq.*

(c) *Exemption or remission of taxes*

In 1950 the Netherlands brought a complaint concerning the “utility” system in the United Kingdom, under which goods satisfying certain quality and price criteria were exempted from the UK purchase tax, but imported articles of comparable quality and price were not so exempted. Other representatives stated that the utility system applied only to goods produced in the UK, and that the purchase tax was collected on many imported goods where the identical UK product was exempted. The UK representative agreed that this discrimination had a protective effect. In 1952 the UK authorities notified that the system had been changed so as to exempt from purchase tax all listed textiles, clothing and footwear below specified price levels.¹⁰⁸

The 1985 Panel Report on “Canada - Measures Affecting the Sale of Gold Coins,” which has not been adopted, examined taxes imposed by the Province of Ontario on the Maple Leaf (Canadian) and Krugerrand (South African) gold coins. Having found that the Maple Leaf and Krugerrand were “like products” (see below), the Panel found that “Ontario had exempted the Maple Leaf gold coin from its retail sales tax but not the Krugerrand gold coin. The internal taxes to which Krugerrand gold coins imported into Canadian territory were subject in Ontario were thus in excess of those applied to a like domestic product”.¹⁰⁹

In the 1994 dispute on “United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco”, the Panel examined the “No Net Cost Assessment” (“NNCA”), a tax applied to both domestic and imported burley and flue-cured tobacco, the proceeds of which were deposited in an account used to reimburse the U.S. Government for any losses resulting from the operation of the domestic tobacco price-support programme.

“The Panel recalled the claim of the complainants that the NNCA was inconsistent with Article III:2, first sentence, because the net charge of the NNCA on imported tobacco was greater than that on like domestic tobacco. The Panel further recalled the complainants’ claim that the NNCA was inconsistent with Article III:2, second sentence, because the NNCA charged on imported tobacco reduced the cost of the price support programme to the domestic tobacco producer, without providing any benefit to imported tobacco. The Panel also recalled the defense of the United States that the NNCA was a border tax adjustment consistent with Article III.

...

¹⁰⁷DS17/R, adopted 18 February 1992, 39S/27, 83, paras. 5.24-5.26.

¹⁰⁸GATT/CP.5/12 (Netherlands complaint), GATT/CP.5/SR.20, p. 1-5 (discussion at Fifth Session), GATT/CP.6/SR.7 (interim report by UK), G/18 (UK notification of elimination of discrimination).

¹⁰⁹L/5863, para. 51.

“In examining the parties’ claims as to the NNCA in the light of Article III:2, first sentence, the Panel first noted that the record indicated, and all parties to the dispute agreed, that the tax applied to imported burley and flue-cured tobacco was not in excess of –indeed was identical to –the tax applied to domestic burley and flue-cured tobacco, respectively.

“The Panel then examined the complainants’ claim that the net rate of the NNCA on imported tobacco was higher than that of the NNCA on domestic tobacco because the latter in effect benefitted from a tax remission through the operation of the tobacco price support programme.

“On this point, the Panel first noted that Article III is concerned with ensuring national treatment of products, not of producers.¹¹⁰ The Panel then noted that the same rate of tax was imposed via the NNCA on both imported and domestic tobacco. Both in the case of imported and domestic burley and in the case of imported and domestic flue-cured, respectively, the identical rate of tax was paid to the CCC on each pound of such tobacco sold in the United States. What was different in the case of domestic tobacco subject to NNCA was that its producers benefitted from the U.S. Government’s tobacco price support programme. In the view of the Panel, this distinction did not transform the NNCA paid on domestic tobacco into a remission of a tax on a product. The Panel here agreed with the United States that whether or not the use of the revenue derived from the NNCA might ultimately benefit domestic rather than imported tobacco was not relevant to the Panel’s analysis under Article III:2.

“The Panel noted, moreover, that Article III:8(b) explicitly recognizes that

‘[t]he provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including *payments to domestic producers derived from the proceeds of internal taxes or charges* applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.’ (*emphasis added*)

“It appeared to the Panel that the complainants were in essence arguing that Article III:2 was violated because U.S. producers benefitted from a payment of a subsidy derived from the proceeds of the internal tax, but that importers did not benefit in a like manner.

“The Panel was cognizant of the fact that a remission of a tax on a product and the payment of a producer subsidy out of the proceeds of such a tax could have the same economic effects. However, the Panel noted that the distinction in Article III:8(b) is a formal one, not one related to the economic impact of a measure. Thus, in view of the explicit language of Article III:8(b), which recognizes that the product-related rules of Article III ‘shall not prevent the payment of subsidies exclusively to domestic producers’, the Panel did not consider, as argued by the complainants, that the payment of a subsidy to tobacco producers out of the proceeds of the NNCA resulted in a form of tax remission inconsistent with Article III:2.¹¹¹

...

“... the Panel rejected the complainants’ claims of inconsistency of the NNCA with Article III:2, first and second sentence. In addition, the Panel concurred with the United States that the NNCA on imported burley and flue-cured tobacco were permissible border tax adjustments consistent with Article III:2.”¹¹²

¹¹⁰The footnote to this paragraph in the panel report notes: “See report of the panel on United States - Section 337 of the Tariff Act of 1930, adopted on 7 November 1989, BISD 36S/345, 387, citing report of the panel on United States - Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/136, 158.”

¹¹¹The footnote to this paragraph notes: “See report of the panel on United States - Measures Affecting Alcoholic and Malt Beverages, adopted on 19 June 1992, BISD 39S/206, 271-273 for a discussion of the reasons for the distinction in GATT between tax exemptions and remissions on the one hand and producer subsidies on the other.”

¹¹²DS44/R, adopted on 4 October 1994, paras. 103, 105-109, 112.

(d) *Exposure of imported products to a risk of discrimination*

The 1994 Panel Report on “United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco” notes, in relation to the budget deficit assessment (“BDA”) charge assessed on domestic and imported tobacco:

“The Panel recalled that the BDA, applicable to all domestic tobacco for which price support was available, was calculated at the rate of one per cent of the average price support level for each such tobacco type in the previous crop year. The Panel then recalled that the BDA on all types of imported tobacco was calculated as the average of the BDA on domestic burley and domestic flue-cured tobacco.

“The Panel further noted that the application of these two different statutorily prescribed formulas to tobacco in the current year, at least in the case of flue-cured tobacco, resulted in an internal tax on imported tobacco that was higher than that on like domestic tobacco. ...

...

“The Panel thus considered that this imposition of an internal tax on imported flue-cured tobacco at a higher rate than on domestic flue-cured tobacco, as well as the fact that some domestic tobacco was entirely exempt from such tax, each presented cases of less favourable tax treatment inconsistent with Article III:2, first sentence.¹¹³

“The Panel recognized that a change in the price support levels for domestic burley and flue-cured tobacco could result in a given year in the elimination of the discriminatory tax treatment against imported flue-cured tobacco. However, beyond the immediate circumstance of a higher assessment on imported flue-cured tobacco than on like domestic tobacco, the Panel considered that the U.S. statutorily prescribed averaging method for calculation of the BDA on imported tobacco contained an inherent risk of a higher assessment on some types of imported tobacco than on like domestic tobacco. The Panel agreed with the argument of the complainants that, mathematically, given the statutorily mandated averaging formula, the BDA would always be higher on imported tobacco than on one type of domestic tobacco so long as there was any price differential between the average support price of burley and flue-cured tobacco.

“The Panel noted that an internal regulation which merely exposed imported products to a risk of discrimination had previously been recognized by a GATT panel to constitute, by itself, a form of discrimination, and therefore less favourable treatment within the meaning of Article III.¹¹⁴ The Panel agreed with this analysis of risk of discrimination as enunciated by this earlier panel.

“The Panel thus considered that the system for calculation of the BDA on imported tobacco itself, not just the manner in which it was currently applied, was inconsistent with Article III:2 because it carried with it the risk of discriminatory treatment of imports in respect of internal taxes.

“The Panel recalled the U.S. defense that even if the BDA was higher on imported flue-cured tobacco than on like domestic tobacco, the method of calculation of the BDA for imports –averaging the BDA on domestic burley and flue-cured tobacco –was a reasonable method and should not be subject to challenge before this Panel. However, the Panel could not see how such a method of calculation could be termed ‘reasonable’ in the context of the General Agreement if it mandated and inevitably resulted in discriminatory treatment of imported tobacco in respect of internal taxes. The Panel recalled in this regard that a prior GATT panel had ruled that in assessing whether there was tax discrimination, account was to be taken not only of the rate of the applicable internal tax but also of the taxation methods,

¹¹³The footnote to this sentence notes: “See, e.g., report of the panel on United States - Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/136, 155; report of the panel on United States - Measures Affecting Alcoholic and Malt Beverages, adopted on 19 June 1992, BISD 39S/206, 270”.

¹¹⁴The footnote to this sentence notes: “See, e.g., report of the panel on EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal Feed Protein, adopted on 25 January 1990, BISD 37S/86, 125”.

including the basis of assessment.¹¹⁵ Another Article III panel had ruled that more favourable treatment as to some products could not be balanced against less favourable treatment as to others.¹¹⁶ It had noted that '[s]uch an interpretation would lead to great uncertainty about the conditions of competition between imported and domestic products and thus defeat the purposes of Article III'.¹¹⁷ The Panel agreed with these earlier rulings and rejected the U.S. defense of 'reasonableness' of the BDA's method of calculation. In accordance with the national treatment provisions of Article III:2, each pound of tobacco imported into the United States had to be accorded treatment no less favourable in respect of internal taxes than that accorded to like domestic tobacco."¹¹⁸

In this connection see also the unadopted Panel Report of 1994 on "United States - Taxes on Automobiles".¹¹⁹

(5) "like domestic products"

See also the material on "like product" under Article I and paragraph 4 of Article III.

The 1970 Working Party Report on "Border Tax Adjustments" observed that "With regard to the interpretation of the term 'like or similar products', which occurs some sixteen times throughout the General Agreement, it was recalled that considerable discussion had taken place ... but that no further improvement of the term had been achieved. The Working Party concluded that problems arising from the interpretation of the terms should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a 'similar' product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is 'similar': the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality. ..." ¹²⁰

The 1985 Panel Report on "Canada - Measures Affecting the Sale of Gold Coins," which has not been adopted, examined taxes imposed by the Province of Ontario on the Maple Leaf (Canadian) and Krugerrand (South African) gold coins.

"The Panel ... examined the Ontario measure in the light of the provisions of Article III and reached the following conclusions: (a) Both the Maple Leaf and the Krugerrand are legal tender in their respective countries of origin. However, they are normally purchased as investment goods. The Panel therefore considered that the Maple Leaf and Krugerrand gold coins were not only means of payment but also 'products' within the meaning of Article III:2. (b) The Maple Leaf and Krugerrand gold coins are produced to very similar standards, have the same weight in gold, and therefore compete directly with one another in international markets. The Panel therefore considered that the Maple Leaf and Krugerrand gold coins were 'like' products within the meaning of Article III:2, first sentence."¹²¹

The 1987 Panel Report on "United States - Taxes on Petroleum and Certain Imported Substances" examined, *inter alia*, a tax on petroleum, applied at US\$0.082 per barrel for "crude oil received at a United States refinery" and US\$0.117 per barrel for "petroleum products entered into the United States for consumption, use or warehousing". The panel findings note as follows.

"... The CONTRACTING PARTIES have not developed a definition of the term 'like products' in [Article III:2, first sentence]. In the report of the Working Party on Border Tax Adjustments, adopted by the CONTRACTING PARTIES in 1970, it was suggested that the problems arising from the interpretation of

¹¹⁵The footnote to this sentence refers to the panel report on "Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages", adopted on 10 November 1987, BISD 34S/83, 118-120.

¹¹⁶The footnote to this sentence refers to the panel report on "United States - Section 337 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, 387.

¹¹⁷The footnote to this sentence refers to the panel report on "United States - Section 337 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, 387.

¹¹⁸DS44/R, adopted on 4 October 1994, paras. 92-93, 95-98.

¹¹⁹DS31/R, dated 11 October 1994, paras. 5.10, 5.14, 5.27-5.32.

¹²⁰L/3464, adopted on 2 December 1970, 18S/97, 102, para. 18.

¹²¹L/5863, para. 51.

this term should be examined on a case-by-case basis and that one of the possible methods for determining whether two products were like products was to compare their end-uses in a given market (BISD 18S/102). The domestic products subject to the tax are: crude oil, crude oil condensates, and natural gasoline. The imported products subject to the tax are: crude oil, crude oil condensates, natural gasoline, refined and residual oil, and certain other liquid hydrocarbon products. The imported and domestic products are thus either identical or, in the case of imported liquid hydrocarbon products, serve substantially identical end-uses. The imported and domestic products subject to the tax on petroleum are therefore in the view of the Panel 'like products' within the meaning of Article III:2. ..."¹²²

In the 1987 Panel Report on "Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages" the Panel examined the arguments of the parties regarding the application of Article III:2 to the liquor tax system applied to various types of domestic and imported alcoholic beverages in Japan.

"The *text of the first sentence of Article III:2* clearly indicates that the comparison to be made is between internal taxes on imported products and 'those applied ... to like domestic products'. The wording 'like' products (in the French text: 'produits similaires') has been used also in other GATT Articles on non-discrimination (e.g. Article I:1) in the sense not only of 'identical' or 'equal' products but covering also products with similar qualities (see, for instance, the 1981 Panel Report on Tariff Treatment by Spain of Imports of Unroasted Coffee, BISD 28S/102, 112).

"The *context of Article III:2* shows that Article III:2 supplements, within the system of the General Agreement, the provisions on the liberalization of customs duties and of other charges by prohibiting discriminatory or protective taxation against certain products from other GATT contracting parties. The Panel found that this context had to be taken into account in the interpretation of Article III:2. For instance, the prohibition under GATT Article I:1 of different tariff treatment for various types of 'like' products (such as unroasted coffee, see BISD 28S/102, 112) could not remain effective unless supplemented by the prohibition of different internal tax treatment for various types of 'like' products. Just as Article I:1 was generally construed, in order to protect the competitive benefits accruing from reciprocal tariff bindings, as prohibiting 'tariff specialization' discriminating against 'like' products, only the literal interpretation of Article III:2 as prohibiting 'internal tax specialization' discriminating against 'like' products could ensure that the reasonable expectation, protected under GATT Article XXIII, of competitive benefits accruing under tariff concessions would not be nullified or impaired by internal tax discrimination against like products. It had therefore been correctly stated in another Panel Report recently adopted by the CONTRACTING PARTIES that 'Article III:2, first sentence, obliges contracting parties to establish certain competitive conditions for imported products in relation to domestic products' (L/6175, paragraph 5.1.9). And it had been for similar reasons that, during the discussion in the GATT Council of the panel report on Spain's restrictions on the domestic sale of soyabean oil which had not been adopted by the Council, several contracting parties, including Japan, had emphasized 'with regard to Article III:4 that the interpretation of the term "like products" in the Panel Report as meaning 'more or less the same product' was too strict an interpretation' (C/M/152 at page 16).

"The *drafting history* confirms that Article III:2 was designed with 'the intention that internal taxes on goods should not be used as a means of protection' ... This accords with the broader objective of Article III 'to provide equal conditions of competition once goods had been cleared through customs' (BISD 7S/64), and to protect thereby the benefits accruing from tariff concessions. This object and purpose of Article III:2 of promoting non-discriminatory competition among imported and like domestic products could not be achieved if Article III:2 were construed in a manner allowing discriminatory and protective internal taxation of imported products in excess of like domestic products.

"*Subsequent GATT practice* in the application of Article III further shows that past GATT panel reports adopted by the CONTRACTING PARTIES have examined Article III:2 and 4 by determining, firstly, whether the imported and domestic products concerned were 'like' and, secondly, whether the internal taxation or other regulation discriminated against the imported products ... Past GATT practice has

¹²²L/6175, adopted on 17 June 1987, 34S/136, 154-155, para. 5.1.1.

clearly established that ‘like’ products in terms of Article III:2 are not confined to identical products but cover also other products, for instance if they serve substantially identical end-uses. ...

“The Panel concluded that the ordinary meaning of Article III:2 in its context and in the light of its object and purpose supported the past GATT practice of examining the conformity of internal taxes with Article III:2 by determining, firstly, whether the taxed imported and domestic products are ‘like’ or ‘directly competitive or substitutable’ and, secondly, whether the taxation is discriminatory (first sentence) or protective (second sentence of Article III:2). The Panel decided to proceed accordingly also in this case.”¹²³

“The CONTRACTING PARTIES have never developed a general definition of the term ‘like products’ in Article III:2. Past decisions on this question have been made on a case-by-case basis after examining a number of relevant factors. ... The Panel was aware of the more specific definition of the term ‘like product’ in Article 2:2 of the 1979 Antidumping Agreement ... but did not consider this very narrow definition for the purpose of antidumping proceedings to be suitable for the different purpose of GATT Article III:2. The Panel decided, therefore, to examine the table of ‘like products’ submitted by the EEC [in the dispute] on a product-by-product basis using the above-mentioned criteria as well as others recognized in previous GATT practice (see BISD 25S/49, 63), such as the Customs Cooperation Council Nomenclature (CCCN) for the classification of goods in customs tariffs which has been accepted by Japan. The Panel found that the following alcoholic beverages should be considered as ‘like products’ in terms of Article III:2 in view of their similar properties, end-uses and usually uniform classification in tariff nomenclatures:

- imported and Japanese-made *gin*;
- imported and Japanese-made *vodka*;
- imported and Japanese-made *whisky* (including all grades classified as ‘whisky’ in the Japanese Liquor Tax Law) and ‘spirits similar to whisky in colour, flavour and other properties’ as described in the Japanese Liquor Tax Law;
- imported and Japanese-made *grape brandy* (including all grades classified as ‘brandy’ in the Japanese Liquor Tax Law);
- imported and Japanese-made *fruit brandy* (including all grades classified as ‘brandy’ in the Japanese Liquor Tax Law);
- imported and Japanese-made ‘*classic*’ *liqueurs* (not including, for instance, medicinal liqueurs);
- imported and Japanese-made unsweetened *still wine*;
- imported and Japanese-made *sparkling wines*.”¹²⁴

The 1992 Panel Report on “United States - Measures Affecting Alcoholic and Malt Beverages” examined the excise tax exemption accorded by the state of Mississippi to wine made from scuppernong grapes (*vitis rotundifolia*).

“The Panel ... examined the claim by Canada that the state of Mississippi applied a lower tax rate to wines in which a certain variety of grape was used, contrary to Articles III:1 and III:2. The Panel recalled the United States argument that the tax provision in Mississippi was applicable to all qualifying wine produced from the specified variety of grape, regardless of the point of origin.

“The Panel considered that Canada’s claim depends upon whether wine imported from Canada is ‘like’ the domestic wine in Mississippi made from the specified variety of grape, within the meaning of Article III:2. In this regard, the Panel noted that the CONTRACTING PARTIES have not developed a general definition of the term ‘like products’, either within the context of Article III or in respect of other Articles of the General Agreement. Past decisions on this question have been made on a case-by-case basis after examining a number of relevant criteria, such as the product’s end-uses in a given

¹²³L/6216, adopted on 10 November 1987, 34S/83, 113-115, para. 5.5.

¹²⁴*Ibid.*, 34S/115-116, para. 5.6.

market, consumers tastes and habits, and the product's properties, nature and quality. The Panel considered that the like product determination under Article III:2 also should have regard to the purpose of the Article."

"The basic purpose of Article III is to ensure, as emphasized in Article III:1,

'that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, purchase, transportation, distribution or use of products ... should not be applied to imported or domestic products so as to afford protection to domestic production'.

"The purpose of Article III is thus not to prevent contracting parties from using their fiscal and regulatory powers for purposes other than to afford protection to domestic production. Specifically, the purpose of Article III is not to prevent contracting parties from differentiating between different product categories for policy purposes unrelated to the protection of domestic production. The Panel considered that the limited purpose of Article III has to be taken into account in interpreting the term 'like products' in this Article. Consequently, in determining whether two products subject to different treatment are like products, it is necessary to consider whether such product differentiation is being made 'so as to afford protection to domestic production'. While the analysis of 'like products' in terms of Article III:2 must take into consideration this objective of Article III, the Panel wished to emphasize that such an analysis would be without prejudice to the 'like product' concepts in other provisions of the General Agreement, which might have different objectives and which might therefore also require different interpretations.

"Applying the above considerations to the Mississippi wine tax, the Panel noted that the special tax treatment accorded in the Mississippi law to wine produced from a particular type of grape, which grows only in the southeastern United States and the Mediterranean region, is a rather exceptional basis for a tax distinction. Given the limited growing range of the specific variety of grape, at least in North America, the Panel was of the view that this particular tax treatment implies a geographical distinction which affords protection to local production of wine to the disadvantage of wine produced where this type of grape cannot be grown. The Panel noted that a previous panel concerning Article III treatment of wines and alcoholic beverages found imported and Japanese unsweetened still wines to be like products. The Panel agreed with the reasoning of this previous panel and was of the view that tariff nomenclatures and tax laws, including those at the United States federal and state level, do not generally make such a distinction between still wines on the basis of the variety of grape used in their production. The Panel noted that the United States did not claim any public policy purpose for this Mississippi tax provision other than to subsidize small local producers. The Panel concluded that unsweetened still wines are like products and that the particular distinction in the Mississippi law in favour of still wine of a local variety must be presumed, on the basis of the evidence submitted to the Panel, to afford protection to Mississippi vintners. Accordingly, the Panel found that the lower rate of excise tax applied by Mississippi to wine produced from the specified variety of grape, which lower rate is not available to the imported like product from Canada, is inconsistent with Article III:2, first sentence."¹²⁵

See also the similar treatment of "like product" in the same Panel Report with respect to an Article III:4 claim regarding regulation of beer according to alcohol content (cited below at page 171).

In the 1994 Panel Report on "United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco", the panel examined

"The Panel recalled the complainants' subsidiary argument under Article III:2, second sentence, as to the protective effect of the differing tax liability mandated by the BDA. On this point, the Panel noted that the second sentence of Article III:2 is subsidiary to the first sentence thereof: the second sentence only becomes relevant where a contracting party is 'otherwise apply[ing] internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1', *i.e.* 'so as to afford protection to domestic production'. However, in the present case,

¹²⁵DS23/R, adopted 19 June 1992, 39S/206, 276-277, paras. 5.23-5.26.

because the Panel had already determined that the BDA was inconsistent with Article III:2, first sentence, the Panel considered that it would not be necessary to examine the consistency of the BDA with Article III:2, second sentence.”¹²⁶

In this connection see also the unadopted Panel Report of 1994 on “United States - Taxes on Automobiles”.¹²⁷

(6) “a directly competitive or substitutable product” (Ad Article III paragraph 2)

During discussions in Commission A in the Geneva session of the Preparatory Committee, the following explanation was offered of this provision.

“... Let us suppose that ... Country A gets a ... binding of oranges from Country B. Now Country B after that can proceed to put on an internal duty of any height at all on oranges, seeing that it grows no oranges itself. But by putting on that very high duty on oranges, it protects the apples which it grows itself. The consequence is that the binding duty which Country A has secured from Country B on its oranges is made of no effect, because in fact the price of oranges is pushed up so high by this internal [tax] that no one can buy them. The consequence is that the object of that binding is defeated”.¹²⁸

An ad-hoc Sub-committee which then examined the national treatment provisions of the draft Charter, and redrafted that article, included the following in its report.

“The Sub-committee considered a suggestion by the Sub-committee on Articles 25 [XI] and 27 [XIII] that the expression ‘directly competitive or substitutable’ used in [Article III] should conform with the wording adopted for Article 25(2)(c) [XI:2(c)]. In view of the difference in significance between the somewhat comparable expressions used in Articles 15 [III] and Article 25 [XI], it was the opinion of the Sub-committee that there was no necessity for the language of the two articles to be identical in this respect.”¹²⁹

The Report of Sub-Committee A of the Third Committee at the Havana Conference, which considered Article 18 of the Charter (on national treatment), states that

“The Sub-Committee (A) agreed that a general tax, imposed for revenue purposes, uniformly applicable to a considerable number of products, which conformed to the requirements of the first sentence of paragraph 2 would not be considered to be inconsistent with the second sentence. ... It was agreed further that a tax applying at a uniform rate to a considerable number of products was to be regarded as a tax of the kind referred to in the preceding paragraph ... notwithstanding the fact that the legislation under which the tax was imposed also provided for other rates of tax applying to other products”.¹³⁰

The summary records of discussions in the Third Committee at the Havana Conference include the following statements.

– It was stated by one of the drafters that

“... the second sentence of [the Article], far from being a departure from the principle of national treatment, was intended to strengthen that principle and prevent its abuse. Illustrating the case of tung oil and linseed oil, which could be considered as competitive and substitutable, he stated that the United States, under the first sentence of paragraph 1 of the Article, would be required to apply the same taxation policy to a domestic product as to a like imported product. The first sentence was, however,

¹²⁶DS44/R, adopted on 4 October 1994, para. 101.

¹²⁷DS31/R, dated 11 October 1994, paras. 5.4-5.16, 5.23-5.32, 5.33-5.37.

¹²⁸EPCT/A/PV/9, p. 7.

¹²⁹EPCT/174, p. 6.

¹³⁰Havana Reports, p. 62, para. 40-41.

qualified by the second because if no substantial domestic production existed, a tax could not be placed on tung oil in order to protect linseed oil which was not similarly taxed”.¹³¹

- It was stated that it would not be permissible to impose a tax on imported natural rubber in order to assist the production of synthetic rubber.¹³²

The 1978 Panel Report on “EEC - Measures on Animal Feed Proteins” examined an EEC Regulation requiring domestic producers or importers of oilseeds, cakes and meals, dehydrated fodder and compound feeds and importers of corn gluten feed to purchase a certain quantity of surplus skimmed milk powder held by intervention agencies and to have it denatured for use as feed for animals other than calves. The Panel concluded that skimmed milk powder and vegetable proteins for animal feedingstuffs could not be considered as “like products” (see page 171):

“The Panel noted that the General Agreement made a distinction between ‘like products’ and ‘directly competitive and substitutable’ products. The Panel therefore also examined whether these products should be considered as directly competitive and substitutable within the meaning of Article III. In this regard the Panel noted that both the United States and the EEC considered most of these products to be substitutable under certain conditions. The Panel also noted that the objective of the EEC Regulation during the period of its application, in its own terms, was to allow for increased utilization of denatured skimmed milk powder as a protein source for use in feedingstuffs for animals other than calves. Furthermore, the Panel noted that the security deposit had been fixed at such a level as to make it economically advantageous to buy denatured skimmed milk powder rather than to provide the security, thus making denatured skimmed milk powder competitive with these products. The Panel concluded that vegetable proteins and skimmed milk powder were technically substitutable in terms of their final use and that the effects of the EEC measures were to make skimmed milk powder competitive with these vegetable proteins”.¹³³

In the 1987 Panel Report on “Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages,” as noted above the Panel concluded that “the ordinary meaning of Article III:2 in its context and in the light of its object and purpose supported the past GATT practice of examining the conformity of internal taxes with Article III:2 by determining, firstly, whether the taxed imported and domestic products are ‘like’ or ‘directly competitive or substitutable’ and, secondly, whether the taxation is discriminatory (first sentence) or protective (second sentence of Article III:2).”¹³⁴

“... In the view of the Panel there existed - even if not necessarily in respect of all the economic uses to which the product may be put - direct competition or substitutability among the various distilled liquors, among various liqueurs, among unsweetened and sweetened wines, and among sparkling wines. The increasing imports of ‘Western-style’ alcoholic beverages into Japan bore witness to this lasting competitive relationship and to the potential products substitution through trade among various alcoholic beverages. Since consumer habits vis-a-vis these products varied in response to their respective prices, their availability through trade and their other competitive inter-relationships, the Panel concluded that the following alcoholic beverages could be considered to be ‘*directly competitive or substitutable products*’ in terms of Article III:2, second sentence:

imported and Japanese-made distilled liquors, including all grades of whiskies/brandies, vodka and shochu Groups A and B, among each other; imported and Japanese-made liqueurs among each other; imported and Japanese-made unsweetened and sweetened wines among each other; and imported and Japanese-made sparkling wines among each other.”¹³⁵

¹³¹E/CONF.2/C.3/SR.II p. 1 and Corr.2.

¹³²E/CONF.2/C.3/SR.II p. 3.

¹³³L/4599, adopted on 14 March 1978, 25S/49, 63-64, para. 4.3.

¹³⁴L/6216, adopted 10 November 1987, 34S/83, 115, para. 5.5.

¹³⁵*Ibid.*, 34S/117, para. 5.7.

“... The Panel noted that shochu was not subject to ad valorem taxes and that the specific tax rates on shochu were many times lower than the specific tax rates on whiskies, brandies and other spirits. The Panel noted that, whereas under the first sentence of Article III:2 the tax on the imported product and the tax on the like domestic product had to be equal in effect, Article III:1 and 2, second sentence, prohibited only the application of internal taxes to imported or domestic products in a manner ‘so as to afford protection to domestic production’. The Panel was of the view that also small tax differences could influence the competitive relationship between directly competing distilled liquors, but the existence of protective taxation could be established only in the light of the particular circumstances of each case and there could be a *de minimis* level below which a tax difference ceased to have the protective effect prohibited by Article III:2, second sentence. ... Since it has been recognized in GATT practice that Article III:2 protects expectations on the competitive relationship between imported and domestic products rather than expectations on trade volumes (see L/6175, paragraph 5.1.9), the Panel did not consider it necessary to examine the quantitative trade effects of this considerably different taxation for its conclusion that the application of considerably lower internal taxes by Japan on shochu than on other directly competitive or substitutable distilled liquors had trade-distorting effects affording protection to domestic production of shochu contrary to Article III:1 and 2, second sentence.”¹³⁶

A request for consultations in 1989 by the EEC concerning “Chile - Internal Taxes on Spirits” states that “The Government of Chile levies an additional sales tax of 70% on imported whisky, compared with the rate of 25% for pisco. In the view of the European Communities this situation constitutes a breach of Chile’s obligations under Article III:2 ... Whisky and pisco, while they may not be ‘like products’, are directly competitive or substitutable products, and in this connection the panel on Japanese customs duties, taxes etc. on alcoholic drinks (L/6216) has made very clear findings and constitutes a precedent applicable in the present instance to Chilean taxation of spirits”.¹³⁷

The 1992 Panel Report on “United States - Measures Affecting Alcoholic and Malt Beverages,” in examining an excise tax exemption accorded by the state of Mississippi to wine made from scuppernong grapes (*vitis rotundifolia*), found that the lower excise tax rate applying to such wine was inconsistent with Article III:2, first sentence, and further noted as follows:

“... The Panel wished to point out that even if the wine produced from the special variety of grape were considered unlike other wine, the two kinds of wine would nevertheless have to be regarded as ‘directly competitive’ products in terms of the Interpretative Note to Article III:2, second sentence, and the imposition of a higher tax on directly competing imported wine so as to afford protection to domestic production would be inconsistent with that provision”.¹³⁸

See also the material above at page 139-140 on paragraph 1 of Article III.

(7) *Taxes collected or enforced at the point of importation*

See the discussion above at page 136 *et seq.* of the Interpretative Note ad Article III.

5. Paragraph 3

Paragraph 3 of Article III was inserted into the General Agreement in 1948 when the original text of Article III was replaced by the text of Article 18 of the Havana Charter. The corresponding provision in the Charter had been inserted at the Havana Conference in response to a proposal by Venezuela.¹³⁹ It was stated during discussions at the Havana Conference that “if the import duty on the product in question was not bound, the margin of protection afforded by internal taxation could be transferred to the customs duty; even if

¹³⁶ *Ibid.*, 34S/122-123, para. 5.11; the reference is to the “Superfund” case.

¹³⁷ DS9/1, communication dated 31 October 1989.

¹³⁸ DS23/R, adopted 19 June 1992, 39S/206, 277, para. 5.26.

¹³⁹ Venezuelan proposal: E/CONF.2/C.3/6/Corr.2; see discussion at E/CONF.2/C.3/A/W.22, W.30.

it were bound, under paragraph 3 of Article 18 [III] it was possible to postpone the transfer until such time as it was possible for the member to obtain a release from its trade agreement obligations".¹⁴⁰

Paragraph 3 of Article III applies only to the situation in which a contracting party may maintain discriminatory internal taxes on a particular item, but cannot simply transfer the discriminatory element into an import tariff because the tariff on the item in question is bound in a bilateral trade agreement that was in existence on 10 April 1947 (the opening date for the Second Session (at Geneva) of the Preparatory Committee for the Havana Conference). Paragraph 3 permits maintenance of the internal tax discrimination until the contracting party in question can obtain a release from its *bilateral* obligations with respect to the tariff.

6. Paragraph 4

(1) "treatment no less favourable"

Australia complained in 1955 that a Hawaiian regulation requiring firms which sold imported eggs to display a placard stating: "We sell foreign eggs" violated paragraph 4 of Article III.¹⁴¹ The complaint was withdrawn when a domestic court decision declared the law unconstitutional and contrary to paragraph 4 of Article III.¹⁴²

The 1958 Panel Report on "Italian Discrimination against Imported Agricultural Machinery", which examined the consistency with Article III:4 of an Italian law providing special credit facilities to farmers for the purchase of agricultural machinery produced in Italy:

"The Panel ... had the impression that the contention of the Italian Government might have been influenced in part by the slight difference of wording which existed between the French and the English texts of paragraph 4 of Article III. The French text which had been submitted to the Italian Parliament for approval provided that the imported products '*ne seront pas soumis à un traitement moins favorable*' whereas the English text reads 'the imported product shall be accorded treatment no less favourable'. It was clear from the English text that any favourable treatment granted to domestic products would have to be granted to like imported products and the fact that the particular law in question did not specifically prescribe conditions of sale or purchase appeared irrelevant in the light of the English text. It was considered, moreover, that the intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given".¹⁴³

The 1978 Panel Report on "EEC - Measures on Animal Feed Proteins" examined an EEC Regulation requiring domestic producers or importers of oilseeds, cakes and meals, dehydrated fodder and compound feeds and importers of corn gluten feed to purchase a certain quantity of surplus skimmed milk powder held by intervention agencies and to have it denatured for use as feed for animals other than calves. The Regulation was not applied to domestic producers of corn gluten, and was not applicable to animal, fish and synthetic proteins. The Panel examined the consistency with Article III:4 of these aspects of the Regulation and of the requirement to produce either a protein certificate (certifying the purchase and denaturing of a certain quantity of milk powder) or a security deposit.

"The Panel ... examined whether the EEC measures accorded imported products less favourable treatment than that accorded to like products of EEC origin within the meaning of Article III:4. In this regard the Panel noted the economic considerations, including the level of domestic production and of the applicable security deposit, put forward by the EEC to justify the application of the measures to corn gluten of foreign origin only. The Panel was not convinced that these considerations justified the non-application of these measures to domestic corn gluten and therefore concluded that the measures accorded

¹⁴⁰E/CONF.2/C.3/SR.40, p. 3.

¹⁴¹L/411.

¹⁴²SR.10/13.

¹⁴³L/833, adopted on 23 October 1958, 7S/60, 63-64, para. 11.

imported corn gluten less favourable treatment than that accorded corn gluten of national origin in violation of Article III:4.

“The Panel also examined whether the fact that the EEC measures were not applicable to animal, fish and synthetic proteins was consistent with the provisions of Article III:4. Having regard to its own conclusion with regard to ‘like products’, the Panel was satisfied that animal, fish and synthetic proteins could not be considered as ‘like products’ for the sake of Article III:4. Since the obligations under Article III:4 relate to ‘like products’, the Panel concluded that the non-application of the EEC measures to these products was not inconsistent with the EEC obligations under the Article.

“The Panel examined whether the protein certificate requirement and other specific administrative requirements accorded to imported products treatment less favourable than that accorded to ‘like products’ of EEC origin in respect of the purchase, sale and distribution of the products in the EEC within the meaning of Article III:4. The Panel was of the opinion that these requirements should be considered as enforcement mechanisms to ensure that the obligation, of either purchasing a certain quantity of denatured skimmed milk powder or of providing a security, had been complied with. The Panel noted that the protein certificate applied only to imports but that there was an equivalent document required for products of national origin except for a relatively short period at the beginning of the application of the EEC measures. The Panel concluded that the various administrative requirements, including the protein certificate, were not inconsistent with the EEC obligations under Article III:4.”¹⁴⁴

The 1981 Panel Report on “EEC - United Kingdom Application of EEC Directives to Imports of Poultry from the United States” notes that this panel was established in 1980 to examine the US complaint that the UK had prevented the importation of US poultry not in compliance with legislation implementing an EEC Directive, which required that slaughtered poultry be cooled by the “spin-chill” method. As poultry produced in the United Kingdom was by derogation exempted from the requirements of the legislation (permitting it to be chilled by other methods) the US considered the UK action to be a violation of Article III. After formation of the panel, the complaint was withdrawn.¹⁴⁵

In a 1982 request for consultations under Article XXII:1, the United States cited the differential postal rates applicable to second class printed matter in Canada:

“We consider that such differentiated rates which distinguish between Canadian newspapers and periodicals, non-Canadian printed-in-Canada publications, and non-Canadian mailed-in-Canada publications constitute regulations which accord treatment to imported products less favourable than that accorded to like products of national origin, and that these regulations are therefore contrary to Canada’s obligations under Article III of the GATT”.¹⁴⁶

The 1983 Panel Report on “United States - Imports of Certain Automotive Spring Assemblies” examined the consistency with Articles III and XX of Section 337 of the Tariff Act of 1930, a US statutory provision providing (*inter alia*) for enforcement of patent infringement claims when imported goods are alleged to infringe a US patent. The Panel Report notes the Canadian view that the use of Section 337 “in cases of alleged patent infringement granted to holders of United States patents a remedy in addition to that provided by the United States patent laws, which was available only in the context of import trade. This constituted a denial of national treatment under Article III:1 and 4 of the General Agreement. Foreign producers were treated less favourably because, instead of being subject only to the procedures under United States patent law, they had to face separate proceedings in separate bodies. This was not the case for domestic producers unless they engaged in import trade. In the Canadian view this dual system was of a discriminatory nature”.¹⁴⁷ The Panel found that “Since Article XX(d) had been found to apply, the Panel considered that an examination of the United States action in the light of the other GATT provisions ... was not required”.¹⁴⁸ This Panel Report was adopted

¹⁴⁴L/4599, adopted 14 March 1978, 25S/49, 65-66, paras. 4.10-4.12.

¹⁴⁵L/5155, adopted 11 June 1981, 28S/90.

¹⁴⁶L/5359.

¹⁴⁷L/5333, adopted on 26 May 1983 subject to an understanding (C/M/168), 30S/107, 119, para. 34.

¹⁴⁸*Ibid.*, 30S/126-127, para. 61.

subject to an understanding that its adoption “shall not foreclose future examination of the use of Section 337 to deal with patent infringement cases from the point of view of consistency with Articles III and XX of the General Agreement”.¹⁴⁹ The same statute was again examined in the 1989 panel decision on “United States - Section 337 of the Tariff Act of 1930”.¹⁵⁰

The 1991 Panel Report on “United States - Restrictions on Imports of Tuna,” which has not been adopted, examined a prohibition on imports of tuna and tuna products from Mexico imposed under the US Marine Mammal Protection Act (MMPA), and found that

“... even if the provisions of the MMPA enforcing the tuna harvesting regulations (in particular those providing for the seizure of cargo as a penalty for violation of the Act) were regarded as regulating the sale of tuna as a product, the United States import prohibition would not meet the requirements of Article III. As pointed out in paragraph 5.12 above, Article III:4 calls for a comparison of the treatment of imported tuna *as a product* with that of domestic tuna *as a product*. Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product. Article III:4 therefore obliges the United States to accord treatment to Mexican tuna no less favourable than that accorded to United States tuna, whether or not the incidental taking of dolphins by Mexican vessels corresponds to that of United States vessels.

“The Panel noted that Mexico had argued that the MMPA requirements with respect to production of yellowfin tuna in the ETP, and the method of calculating compliance with these requirements, provided treatment to tuna and tuna products from Mexico that was less favourable than the treatment accorded to like United States tuna and tuna products. It appeared to the Panel that certain aspects of the requirements could give rise to legitimate concern, in particular the MMPA provisions which set a prospective absolute yearly ceiling for the number of dolphins taken by domestic tuna producers in the ETP, but required that foreign tuna producers meet a retroactive and varying ceiling for each period based on actual dolphin taking by the domestic tuna fleet in the same time period. However, in view of its finding in the previous paragraph, the Panel considered that a finding on this point was not required.”¹⁵¹

See also the material from this report at pages 137 and 175. See also the unadopted Panel Reports of 1994 on “United States - Restrictions on Imports of Tuna”¹⁵² and “United States - Taxation of Automobiles”.¹⁵³

(a) *Equality of competitive opportunities*

The Panel Report on “Italian Discrimination against Imported Agricultural Machinery” examined an Italian law providing special credit terms to farmers for the purchase of agricultural machinery, conditional on the purchase of machinery produced in Italy. The Panel Report found, *inter alia*, that

“... the intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given.

“In addition, the text of paragraph 4 referred ... to laws and regulations and requirements *affecting* internal sale, purchase, etc., and not to laws, regulations and requirements governing the conditions of sale or purchase. The selection of the word ‘affecting’ would imply, in the opinion of the Panel, that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market.

¹⁴⁹C/M/168.

¹⁵⁰L/6439, adopted on 7 November 1989, 36S/345.

¹⁵¹DS21/R (unadopted), 39S/155, 195-196, paras. 5.15-5.16.

¹⁵²DS29/R, dated 16 June 1994, paras. 5.8-5.9.

¹⁵³DS31/R, dated 11 October 1994, paras. 5.51-5.55.

“... The fact that the drafters of Article III thought it necessary to include [the Article III:8(b)] exemption for production subsidies would indicate that the intent of the drafters was to provide equal conditions of competition once goods had been cleared through the customs”.¹⁵⁴

The 1984 Panel Report on “Canada - Administration of the Foreign Investment Review Act” examined written purchase and export undertakings under the Foreign Investment Review Act of Canada, submitted by investors regarding the conduct of the business they were proposing to acquire or establish, conditional on approval by the Canadian government of the proposed acquisition or establishment. Written undertakings are legally binding on the investor if the investment is allowed. The Panel first determined that the undertakings were to be considered “laws, regulations or requirements” within the meaning of Article III:4 (see page 173 below).

“The Panel then examined the question whether less favourable treatment was accorded to imported products than that accorded to like products of Canadian origin in respect of requirements affecting their purchase. For this purpose the Panel distinguished between undertakings to purchase goods of Canadian origin and undertakings to use Canadian sources or suppliers (irrespective of the origin of the goods), and for both types of undertakings took into account the qualifications ‘available’, ‘reasonably available’, or ‘competitively available’.

“The Panel found that undertakings to purchase *goods of Canadian origin* without any qualification exclude the possibility of purchasing available imported products so that the latter are clearly treated less favourably than domestic products and that such requirements are therefore not consistent with Article III:4. This finding is not modified in cases where undertakings to purchase goods of Canadian origin are subject to the qualification that such goods be ‘available’. It is obvious that if Canadian goods are not available, the question of less favourable treatment of imported goods does not arise.

“When these undertakings are conditional on goods being ‘competitively available’ (as in the majority of cases) the choice between Canadian or imported products may frequently coincide with normal commercial considerations and the latter will not be adversely affected whenever one or the other offer is more competitive. However, it is the Panel’s understanding that the qualification ‘competitively available’ is intended to deal with situations where there are Canadian goods available on competitive terms. The Panel considered that in those cases where the imported and domestic product are offered on equivalent terms, adherence to the undertaking would entail giving preference to the domestic product. Whether or not the foreign investor chooses to buy Canadian goods in given practical situations, is not at issue. The purpose of Article III:4 is not to protect the interests of the foreign investor but to ensure that goods originating in any other contracting party benefit from treatment no less favourable than domestic (Canadian) goods, in respect of the requirements that affect their purchase (in Canada). On the basis of these considerations, the Panel found that a requirement to purchase goods of Canadian origin, also when subject to ‘competitive availability’, is contrary to Article III:4. The Panel considered that the alternative qualification ‘reasonably available’ which is used in some cases, is *a fortiori* inconsistent with Article III:4, since the undertaking in these cases implies that preference has to be given to Canadian goods also when these are not available on entirely competitive terms.

“The Panel then turned to the undertakings to buy from *Canadian suppliers*. The Panel did not consider the situation where domestic products are not available, since such a situation is not covered by Article III:4. The Panel understood the choice under this type of requirement to apply on the one hand to imported goods if bought through a Canadian agent or importer and on the other hand to Canadian goods which can be purchased either from a Canadian ‘middleman’ or directly from the Canadian producer. The Panel recognized that these requirements might in a number of cases have little or no effect on the choice between imported or domestic products. However, the possibility of purchasing imported products *directly* from the foreign producer would be excluded and as the conditions of purchasing imported products through a Canadian agent or importer would normally be less advantageous, the imported product would therefore have more difficulty in competing with Canadian products (which are not subject

¹⁵⁴L/833, adopted 23 October 1958, 7S/60, 64, paras. 11-13.

to similar requirements affecting their sale) and be treated less favourably. For this reason, the Panel found that the requirements to buy from Canadian suppliers are inconsistent with Article III:4.

“In case undertakings to purchase from Canadian suppliers are subject to a ‘competitive availability’ qualification, as is frequent, the handicap for the imported product is alleviated as it can be obtained directly from the foreign producer if offered under more competitive conditions than via Canadian sources. In those cases in which Canadian sources and a foreign manufacturer offer a product on equivalent terms, adherence to the undertaking would entail giving preference to Canadian sources, which in practice would tend to result in the purchase being made directly from the Canadian producer, thereby excluding the foreign product. The Panel therefore found that requirements to purchase from Canadian suppliers, also when subject to competitive availability, are contrary to Article III:4. As before (paragraph 5.9), the Panel considered that the qualification ‘reasonably available’ is *a fortiori* inconsistent with Article III:4.”¹⁵⁵

The Panel noted in its conclusions that

“The Panel sympathizes with the desire of the Canadian authorities to ensure that Canadian goods and suppliers would be given a fair chance to compete with imported products. However, the Panel holds the view that the purchase requirements under examination do not stop short of this objective but tend to tip the balance in favour of Canadian products, thus coming into conflict with Article III:4. ...

“As to the extent to which the purchase undertakings reflect plans of the investors, the Panel does not consider it relevant nor does it feel competent to judge how the foreign investors are affected by the purchase requirements, as the national treatment obligations of Article III of the General Agreement do not apply to foreign persons or firms but to imported products and serve to protect the interests of producers and exporters established on the territory of any contracting party. Purchase requirements applied to foreign investors in Canada which are inconsistent with Article III:4 can affect the trade interests of all contracting parties, and impinge upon their rights”.¹⁵⁶

The 1989 Panel Report on “United States - Section 337 of the Tariff Act of 1930” again examined the consistency with Articles III and XX of Section 337, a US statute providing procedures for enforcing patent infringement claims which only applies to imported goods alleged to infringe a US patent. The Panel examined in particular the application of Article III:4. Having found that the procedures of Section 337 fell within the scope of “laws, regulations and requirements” (see page 175), the Panel turned to the “no less favourable treatment” standard, examining the United States argument that in certain instances Section 337 proceedings were more favourable to imported products than the alternative of enforcement of a patent in federal district court.

“The Panel noted that, as far as the issues before it are concerned, the ‘no less favourable’ treatment requirement set out in Article III:4, is unqualified. These words are to be found throughout the General Agreement and later agreements negotiated in the GATT framework as an expression of the underlying principle of equality of treatment of imported products as compared to the treatment given either to other foreign products, under the most favoured nation standard, or to domestic products, under the national treatment standard of Article III. The words ‘treatment no less favourable’ in paragraph 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products. This clearly sets a minimum permissible standard as a basis. ...

“The Panel noted the differing views of the parties on how an assessment should be made as to whether the differences between Section 337 and federal district court procedures do or do not accord imported products less favourable treatment than that accorded to products of United States origin. ... In brief, the United States believed that this determination could only be made on the basis of an examination of the *actual results* of past Section 337 cases. It would follow from this reasoning that any unfavourable elements of treatment of imported products could be offset by more favourable elements of treatment,

¹⁵⁵L/5504, adopted 7 February 1984, 30S/140, 159-161, paras. 5.7-5.11.

¹⁵⁶*Ibid.*, 30S/166-167, paras. 6.3, 6.5.

provided that the results, as shown in past cases, have not been less favourable. The Community's interpretation of Article III:4 would require that Section 337 not be *capable* of according imported products less favourable treatment; elements of less and more favourable treatment could thus only be offset against each other to the extent that they always would arise in the same cases and necessarily would have an offsetting influence on each other.

"The Panel examined these arguments carefully. It noted that a previous Panel had found that the purpose of the first sentence of Article III:2, dealing with internal taxes and other internal charges, is to protect 'expectations on the competitive relationship between imported and domestic products'.¹⁵⁷ Article III:4, which is the parallel provision of Article III dealing with the 'non-charge' elements of internal legislation, has to be construed as serving the same purpose. Article III:4 would not serve this purpose if the United States interpretation were adopted, since a law, regulation or requirement could then only be challenged in GATT after the event as a means of rectifying less favourable treatment of imported products rather than as a means of forestalling it. In any event, the Panel doubted the feasibility of an approach that would require it to be demonstrated that differences between procedures under Section 337 and those in federal district courts had actually caused, in a given case or cases, less favourable treatment. The Panel therefore considered that, in order to establish whether the 'no less favourable' treatment standard of Article III:4 is met, it had to assess whether or not Section 337 in itself may lead to the application to imported products of treatment less favourable than that accorded to products of United States origin. It noted that this approach is in accordance with previous practice of the CONTRACTING PARTIES in applying Article III, which has been to base their decisions on the distinctions made by the laws, regulations or requirements themselves and on their potential impact, rather than on the actual consequences for specific imported products."¹⁵⁸

In the 1992 Panel Report on "Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies," the Panel examined restrictions imposed by provincial liquor authorities on access for imported beer to points of sale (with respect to which Canada invoked the Protocol of Provisional Application):

"... The Panel recalled that the CONTRACTING PARTIES had decided in a number of previous cases that the requirement of Article III:4 to accord imported products treatment no less favourable than that accorded to domestic products was a requirement to accord imported products competitive opportunities no less favourable than those accorded to domestic products. The Panel found that, by allowing the access of domestic beer to points of sale not available to imported beer, Canada accorded domestic beer competitive opportunities denied to imported beer. For these reasons the present Panel saw great force in the argument that the restrictions on access to points of sale were covered by Article III:4. However, the Panel considered that it was not necessary to decide whether the restrictions fell under Article XI:1 or Article III:4 because Canada was not invoking an exception to the General Agreement applicable only to measures taken under Article XI:1 (such as the exceptions in Articles XI:2 and XII) and the question of whether the restrictions violated Article III:4 or Article XI:1 of the General Agreement was therefore of no practical consequence in the present case".¹⁵⁹

The 1992 Panel Report on "United States - Measures Affecting Alcoholic and Malt Beverages" examined the requirement, imposed by certain states in the US, that imported beer and wine be sold only through in-state wholesalers or other middlemen, while some in-state like products were permitted to be sold directly to retailers, and in some cases at retail on producers' premises.

¹⁵⁷Note 1 to this paragraph refers to the Panel Report on "United States - Taxes on Petroleum and Certain Imported Substances", L/6175, paragraph 5.1.9), adopted on 17 June 1987, 34S/136.

¹⁵⁸36S/386-387, paras. 5.11-5.13. Note 2 to this paragraph provides: "For example: Working Party on Brazilian Internal Taxes (BISD II/184-5, paragraph 13-16); Panel on Italian Discrimination against Imported Agricultural Machinery (BISD 7S/63-64, paragraphs 11-12); Panel on EEC - Measures on Animal Feed Proteins (BISD 25S/65, paragraph 4.10); Panel on Canada - Administration of the Foreign Investment Review Act (BISD 30S/167, paragraph 6.6); Panel on United States - Taxes on Petroleum and Certain Imported Substances (L/6175, paragraphs 5.1.1-5.1.9)".

¹⁵⁹DS21/R, adopted on 18 February 1992, 39S/27, 75-76, para. 5.5.

“... The Panel recalled that the CONTRACTING PARTIES have consistently interpreted the requirement of Article III:4 to accord imported products treatment no less favourable than that accorded to domestic products as a requirement to accord imported products competitive opportunities no less favourable than those accorded to domestic products.”¹⁶⁰

“The Panel considered as irrelevant to the examination under Article III:4 the fact that many – or even most – in-state beer and wine producers ‘preferred’ to use wholesalers rather than to market their products directly to retailers. The Article III:4 requirement is one addressed to relative competitive opportunities created by the government in the market, not to the actual choices made by enterprises in that market. Producers located in the states in question have the opportunity to choose their preferred method of marketing. The Panel considered that it is the very denial of this opportunity in the case of imported products which constitutes less favourable treatment. The Panel then recalled the finding of a previous panel¹⁶¹ that a requirement to buy from domestic suppliers rather than from the foreign producer was inconsistent with Article III:4:

“Similarly, in the present case the Panel considered that the choice available to some United States producers to ship their beer and wine directly to in-state retailers may provide such domestic beer and wine with competitive opportunities denied to the like imported products. Even if in some cases the in-state exemption from the wholesaler requirement is available only to small wineries and small breweries, this fact does not in any way negate the denial of competitive opportunities to the like imported products. In so finding, the Panel recalled its earlier finding, in paragraph 5.19, that beer from large breweries is not unlike beer from small breweries.

“In the view of the Panel, therefore, the requirement that imported beer and wine be distributed through in-state wholesalers or other middlemen, when no such obligation to distribute through wholesalers exists with respect to in-state like domestic products, results in ‘treatment ... less favourable than that accorded to like products’ from domestic producers, inconsistent with Article III:4. The Panel considered that even where Canadian producers have the right to establish in-state wholesalers, as is the case in some states, subject to varying conditions, the fact remains that the wholesale level represents another level of distribution which in-state product is not required to use.

“The Panel ... recalled the argument of the United States that the wholesaling requirement was consistent with Article III:4 because in-state breweries and wineries not subject to the wholesaling requirement bore the same costs as did wholesalers in respect of record keeping, audit, inspection and tax collection. The Panel noted that this factual contention – that imported products are not in fact disadvantaged vis-à-vis domestic like products in spite of different requirements – was disputed by Canada and was similar to the position taken by the United States with respect to imported products being subject to the ‘preferred’ wholesaling method of distribution. As previously noted, the Panel considered that the inconsistency with Article III:4 stems from the denial to the imported products of competitive opportunities accorded to the domestic like products. Whereas domestic beer and wine may be shipped directly from the in-state producer to the retailer, or sold directly at retail, this competitive advantage is denied to imported beer and wine.”¹⁶²

(b) *Formally identical legal requirements versus formally different legal requirements*

The 1989 Panel Report on “United States - Section 337 of the Tariff Act of 1930” further provided:

“... The words ‘treatment no less favourable’ in paragraph 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the

¹⁶⁰Note 8 to the Panel Report provides: “See, for example, the Report of the Panel on ‘United States - Section 337 of the Tariff Act of 1930’, adopted on 7 November 1989, BISD 36S/345, 386; and the Report of the Panel on ‘Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies’, [not yet considered by the Council,] DS17/R, page 55”.

¹⁶¹Note 9 to the Panel Report provides: “Report of the Panel on ‘Canada - Administration of the Foreign Investment Review Act’, adopted on 7 February 1984, BISD 30S/140, 160-61”.

¹⁶²DS23/R, adopted 19 June 1992, 39S/206, 279-280, paras. 5.30-5.33.

internal sale, offering for sale, purchase, transportation, distribution or use of products. This clearly sets a minimum permissible standard as a basis. On the one hand, contracting parties may apply to imported products different formal legal requirements if doing so would accord imported products more favourable treatment. On the other hand, it also has to be recognised that there may be cases where application of formally identical legal provisions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded them is in fact no less favourable. For these reasons, the mere fact that imported products are subject under Section 337 to legal provisions that are different from those applying to products of national origin is in itself not conclusive in establishing inconsistency with Article III:4. In such cases, it has to be assessed whether or not such differences in the legal provisions applicable do or do not accord to imported products less favourable treatment. Given that the underlying objective is to guarantee equality of treatment, it is incumbent on the contracting party applying differential treatment to show that, in spite of such differences, the no less favourable treatment standard of Article III is met”.¹⁶³

The 1992 Panel Report on “Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies” also examined the application of Article III:4 with respect to formally identical requirements (in the case of minimum prices applied to all beer: see page 177) and formally different requirements (in the case of internal transportation of beer: see page 181).

(c) *Application of legal requirements to individual cases and “balancing”*

The 1989 Panel Report on “United States - Section 337 of the Tariff Act of 1930” further provides:

“The Panel further found that the ‘no less favourable’ treatment requirement of Article III:4 has to be understood as applicable to each individual case of imported products. The Panel rejected any notion of balancing more favourable treatment of some imported products against less favourable treatment of other imported products. If this notion were accepted, it would entitle a contracting party to derogate from the no less favourable treatment obligation in one case, or indeed in respect of one contracting party, on the ground that it accords more favourable treatment in some other case, or to another contracting party. Such an interpretation would lead to great uncertainty about the conditions of competition between imported and domestic products and thus defeat the purposes of Article III”.¹⁶⁴

After a detailed comparison between Section 337 procedures and those in federal district court,

“The Panel *found* that Section 337, inconsistently with Article III:4 of the General Agreement, accords to imported products alleged to infringe United States patents treatment less favourable than that accorded under federal district court procedures to like products of United States origin as a result of the following factors:

- (i) the availability to complainants of a choice of forum in which to challenge imported products, whereas no corresponding choice is available to challenge products of United States origin;
- (ii) the potential disadvantage to producers or importers of challenged products of foreign origin resulting from the tight and fixed time-limits in proceedings under Section 337, when no comparable time-limits apply to producers of challenged products of United States origin;
- (iii) the non-availability of opportunities in Section 337 proceedings to raise counterclaims, as is possible in proceedings in federal district court;

¹⁶³L/6439, adopted 7 November 1989, 36S/345, 386, para. 5.11.

¹⁶⁴L/6439, adopted on 7 November 1989, 36S/345, 387, para. 5.14. See also similar finding with respect to Article I in the Panel Report on “United States - Denial of Most-favoured-nation Treatment as to Non-Rubber Footwear from Brazil”, DS18/R, adopted on 19 June 1992, 39S/128, 151, para. 6.10.

- (iv) the possibility that general exclusion orders may result from proceedings brought before the USITC under Section 337, given that no comparable remedy is available against infringing products of United States origin;
- (v) the automatic enforcement of exclusion orders by the United States Customs Service, when injunctive relief obtainable in federal court in respect of infringing products of United States origin requires for its enforcement individual proceedings brought by the successful plaintiff;
- (vi) the possibility that producers or importers of challenged products of foreign origin may have to defend their products both before the USITC and in Federal district court, whereas no corresponding exposure exists with respect to products of United States origin".¹⁶⁵

In the 1990 Panel Report on "EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins" the Panel examined EEC legislation providing for payment of subsidies to processors of oilseeds whenever they established by documentary evidence that they had transformed oilseeds of Community origin. Discussing as well the relationship between paragraphs 4 and 8(b) of Article III (see page 194 below),

"... The Panel noted that ... if the economic benefits generated by the payments granted by the Community can at least partly be retained by the processors of Community oilseeds, the payments generate a benefit conditional upon the purchase of oilseeds of domestic origin inconsistently with Article III:4. ...

"... The Panel concluded that the Community Regulations do not ensure that the payments to processors are based on prices processors actually have to pay when purchasing Community oilseeds ... [nor that] the subsidy payments are based on prices that the subsidy recipients would actually have paid had they chosen to buy imported rather than domestic products.

"For the reasons indicated in the preceding paragraphs, the Panel found that subsidy payments made to processors can be greater than the difference between the price processors actually pay to producers and the price that processors would have to pay for imported oilseeds. Whether such over-compensation creating an incentive to purchase domestic rather than imported products takes place depends on the circumstances of the individual purchase. The Community Regulations are thus capable of giving rise to discrimination against imported products though they may not necessarily do so in the case of each individual purchase.

"Having made this finding the Panel examined whether a purchase regulation which does not necessarily discriminate against imported products but is capable of doing so is consistent with Article III:4. The Panel noted that the exposure of a particular imported product to a risk of discrimination constitutes, by itself, a form of discrimination. The Panel therefore concluded that purchase regulations creating such a risk must be considered to be according less favourable treatment within the meaning of Article III:4. The Panel found for these reasons that the payments to processors of Community oilseeds are inconsistent with Article III:4".¹⁶⁶

In the 1992 Follow-up on this Panel Report, the members of the Reconvened Oilseeds Panel noted that "The facts before the Panel, which were not challenged by the United States, indicated that ... the payments to processors conditional on the purchase of domestic oilseeds that had given rise to the inconsistency found by the original Panel had been superseded, there being no provision for such payments under the new support system other than in the transitional arrangements"¹⁶⁷ and concluded that "... the Panel suggests that the CONTRACTING PARTIES take note of the Community's statement that the new support system for oilseeds under

¹⁶⁵*Ibid.*, 36S/391, para. 5.20.

¹⁶⁶L/6627, adopted on 25 January 1990, 37S/86, 124-125, paras. 137-141.

¹⁶⁷DS28/R, dated 31 March 1992, 39S/91, 113, para. 74.

Regulation N° 3766/91 was intended to eliminate any inconsistency with Article III:4 by the discontinuation of payments to processors conditional on the purchase of domestic oilseeds”.¹⁶⁸

In this connection, see also the unadopted Panel Report of 1994 on “United States - Taxes on Automobiles”.¹⁶⁹

(2) “than that accorded to like products of national origin”

See also the discussion of “like product” above in this chapter and under Article I.

The 1978 Panel Report on “EEC - Measures on Animal Feed Proteins” examined an EEC Regulation requiring domestic producers or importers of oilseeds, cakes and meals, dehydrated fodder and compound feeds and importers of corn gluten feed to purchase a certain quantity of surplus skimmed milk powder held by intervention agencies and to have it denatured for use as feed for animals other than calves. The Panel examined the consistency of the EEC measures with, *inter alia*, Article III:1, III:4 and III:5.

“The Panel began by examining whether all products used for the same purpose of adding protein to animal feeds should be considered as ‘like products’ within the meaning of Articles I and III. Having noted that the General Agreement gave no definition of the concept of ‘like product’ the Panel reviewed how it had been applied by the CONTRACTING PARTIES in previous cases.”¹⁷⁰

“The Panel noted, in this case, such factors as the number of products and tariff items carrying different duty rates and tariff bindings, the varying protein contents and the different vegetable, animal and synthetic origins of the protein products before the Panel –not all of which were subject to the EEC measures. Therefore, the Panel concluded that these various protein products could not be considered as ‘like products’ within the meaning of Articles I and III.”¹⁷¹

During the discussion in the Council of the Panel Report on “Spain - Measures concerning Domestic Sale of Soyabean Oil”¹⁷² which was noted by the Council and not adopted, representatives of several contracting parties criticized the Panel’s conclusion in respect of Article III:4, that the term “like products” meant “more or less the same product”, on the basis that this general definition in the Panel Report was too narrow and that past decisions on this term had been made on a case-by-case basis after examining a number of relevant factors.¹⁷³

In the 1992 Panel Report on “United States - Measures Affecting Alcoholic and Malt Beverages”

“The Panel began its examination of these beer alcohol content distinctions in the named states by considering whether, in the context of Article III:4, low alcohol beer and high alcohol beer should be considered ‘like products’. The Panel recalled in this regard its earlier statement on like product determinations and considered that, in the context of Article III, it is essential that such determinations be made not only in the light of such criteria as the products’ physical characteristics, but also in the light of the purpose of Article III, which is to ensure that internal taxes and regulations ‘not be applied to imported or domestic products so as to afford protection to domestic production’. The purpose of Article III is not to harmonize the internal taxes and regulations of contracting parties, which differ from country to country. In light of these considerations, the Panel was of the view that the particular level at which the distinction between high alcohol and low alcohol beer is made in the various states does not affect its reasonings and findings.

¹⁶⁸*Ibid.*, 39S/118, para. 89.

¹⁶⁹DS31/R, dated 11 October 1994, paras. 5.47-5.49.

¹⁷⁰Note 1 at 25S/63 provides: “See for instance BISD II/188, BISD 1S/53, BISD II/181, 183.”

¹⁷¹L/4599, adopted on 14 March 1978, 25S/49, 63, paras. 4.1-4.2. See also material on this report at pages 162, 199 and 160 in this chapter.

¹⁷²L/5142.

¹⁷³C/M/152.

“The Panel recognized that the treatment of imported and domestic products as like products under Article III may have significant implications for the scope of obligations under the General Agreement and for the regulatory autonomy of contracting parties with respect to their internal tax laws and regulations: once products are designated as like products, a regulatory product differentiation, e.g. for standardization or environmental purposes, becomes inconsistent with Article III even if the regulation is not ‘applied ... so as afford protection to domestic production’. In the view of the Panel, therefore, it is imperative that the like product determination in the context of Article III be made in such a way that it not unnecessarily infringe upon the regulatory authority and domestic policy options of contracting parties. The Panel recalled its earlier statement that a like product determination under Article III does not prejudice like product determinations made under other Articles of the General Agreement or in other legislative contexts.

“The Panel recognized that on the basis of their physical characteristics, low alcohol beer and high alcohol beer are similar. It then proceeded to examine whether, in the context of Article III, this differentiation in treatment of low alcohol beer and high alcohol beer is such ‘as to afford protection to domestic production’. The Panel first noted that both Canadian and United States beer manufacturers produce both high and low alcohol content beer. It then noted that the laws and regulations in question in the various states do not differentiate between imported and domestic beer as such, so that where a state law limits the points of sale of high alcohol content beer or maintains different labelling requirements for such beer, that law applies to all high alcohol content beer, regardless of its origin. The burdens resulting from these regulations thus do not fall more heavily on Canadian than on United States producers. The Panel also noted that although the market for the two types of beer overlaps, there is at the same time evidence of a certain degree of market differentiation and specialization: consumers who purchase low alcohol content beer may be unlikely to purchase beer with a higher alcohol content and vice-versa, and manufacturers target these different market segments in their advertising and marketing.

“The Panel then turned to a consideration of the policy goals and legislative background of the laws regulating the alcohol content of beer. In this regard, the Panel recalled the United States argument that states encouraged the consumption of low alcohol beer over beer with a higher alcohol content specifically for the purposes of protecting human life and health and upholding public morals. The Panel also recalled the Canadian position that the legislative background of laws regulating the alcohol content of beer showed that the federal and state legislatures were more concerned with raising tax revenue than with protecting human health and public morals. On the basis of the evidence submitted, the Panel noted that the relevant laws were passed against the background of the Temperance movement in the United States. It noted further that prior to the repeal of the Eighteenth Amendment of the United States Constitution authorizing Prohibition, amendments to the federal Volstead Act – the Act which implemented the Eighteenth Amendment – authorized the sale of low alcohol beer, and that the primary focus of the drafters of these amendments may have been the establishment of a brewing industry which could serve as a new source of tax revenue. However, irrespective of whether the policy background to the laws distinguishing alcohol content of beer was the protection of human health and public morals or the promotion of a new source of government revenue, both the statements of the parties and the legislative history suggest that the alcohol content of beer has not been singled out as a means of favouring domestic producers over foreign producers. The Panel recognized that the level at which the state measures distinguished between low and high alcohol content could arguably have been other than 3.2 per cent by weight. Indeed, as the Panel previously noted, Alabama and Oregon make the distinction at slightly different levels. However, there was no evidence submitted to the Panel that the choice of the particular level has the purpose or effect of affording protection to domestic production”.¹⁷⁴

See also the similar treatment of “like product” in the same Report with regard to an Article III:2 claim concerning the Mississippi excise tax exemption for wine made from scuppernong grapes (page 157).

¹⁷⁴DS23/R, adopted 19 June 1992, 39S/206, 293-294, para. 5.71-5.74.

(3) “in respect of all laws, regulations and requirements”

(a) Requirements applied in individual cases

The 1984 Panel Report on “Canada - Administration of the Foreign Investment Review Act” notes as follows.

“The Panel could not subscribe to the Canadian view that the word ‘requirements’ in Article III:4 should be interpreted as ‘mandatory rules applying across-the-board’ because this latter concept was already more aptly covered by the term ‘regulations’ and the authors of this provision must have had something different in mind when adding the word ‘requirements’. The mere fact that the few disputes that have so far been brought before the CONTRACTING PARTIES regarding the application of Article III:4 have only concerned laws and regulations does not in the view of the Panel justify an assimilation of ‘requirements’ with ‘regulations’. The Panel also considered that, in judging whether a measure is contrary to obligations under Article III:4, it is not relevant whether it applies across-the-board or only in isolated cases. Any interpretation which would exclude case-by-case action would, in the view of the Panel, defeat the purposes of Article III:4.

“The Panel carefully examined the Canadian view that the purchase undertakings should be considered as private contractual obligations of particular foreign investors vis-à-vis the Canadian government ... The Panel felt ... that ... private contractual obligations entered into by investors should not adversely affect the rights which contracting parties, including contracting parties not involved in the dispute, possess under Article III:4 of the General Agreement and which they can exercise on behalf of their exporters. This applies in particular to the rights deriving from the national treatment principle, which –as stated in Article III:1 –is aimed at preventing the use of internal measures ‘so as to afford protection to domestic production’.”¹⁷⁵

(b) Subsidies and other benefits as “requirements”

The 1958 Panel Report on “Italian Discrimination against Imported Agricultural Machinery” examined an Italian law providing special credit terms to farmers for the purchase of agricultural machinery, conditional on the purchase of machinery produced in Italy.¹⁷⁶ The United Kingdom also complained in October 1957 concerning a subsidy granted by the French government to purchasers of agricultural machinery, conditional on the purchase of domestically-produced machinery.¹⁷⁷

The Panel Report on “Canada - Administration of the Foreign Investment Review Act” provides as follows.

“... As both parties had agreed that the Foreign Investment Review Act and the Foreign Investment Review Regulations –whilst providing for the possibility of written undertakings –did not make their submission obligatory, the question remained whether the undertakings given in individual cases are to be considered ‘requirements’ within the meaning of Article III:4. In this respect the Panel noted that Section 9(c) of the Act refers to ‘any written undertakings relating to the proposed or actual investment given by any party thereto conditional upon the allowance of the investment’ and that Section 21 of the Act states that ‘where a person who has given a written undertaking... fails or refuses to comply with such undertaking’ a court order may be made ‘directing that person to comply with the undertaking’. The Panel noted that written purchase undertakings –leaving aside the manner in which they may have been arrived at (voluntary submission, encouragement, negotiation, etc.) –once they were accepted, became part of the conditions under which the investment proposals were approved, in which case compliance could be legally enforced. The Panel therefore found that the word ‘requirements’ as used in Article III:4 could be considered a proper description of existing undertakings.”¹⁷⁸

¹⁷⁵L/5504, adopted on 7 February 1984, 30S/140, 159, paras. 5.5-5.6.

¹⁷⁶L/833, adopted on 23 October 1958, 7S/60.

¹⁷⁷L/695, SR.12/5.

¹⁷⁸L/5504, adopted on 7 February 1984, 30S/140, 158, para. 5.4.

In the Panel Report on “EEC - Regulation on Imports of Parts and Components” the Panel examined, *inter alia*, the EEC’s acceptance of undertakings under anti-circumvention rules in its anti-dumping legislation, examining whether acceptance of such undertakings to limit the use of imported parts and materials constituted a “requirement” according treatment to imported products less favourable than that accorded to domestic products contrary to Article III:4.

“The Panel recalled that, during the period June 1987 to October 1988, eleven undertakings by parties related to or associated with Japanese manufactures had been accepted by the EEC in investigations under the anti-circumvention provision and that, according to the relevant Commission decisions published in the Official Journal of the European Communities, these undertakings related, *inter alia*, to changes in the sourcing of parts and materials used in assembly or production operations in the Community. The Panel noted that there is no obligation under the EEC’s anti-dumping Regulation to offer parts undertakings, to accept suggestions by the EEC Commission to offer such undertakings and to maintain the parts undertakings given. However, the consequence of not offering an undertaking, or of withdrawing an existing undertaking, can be the continuation of procedures that may lead to the imposition of the anti-circumvention duties. Article 10 of Regulation N° 2324/88 states that ‘where an undertaking has been withdrawn or where the Commission has reason to believe that it has been violated ... it may ... apply ... antidumping ... duties forthwith on the basis of the facts established before the acceptance of the undertaking’.

“The Panel noted that Article III:4 refers to ‘all laws, regulations or requirements affecting (the) internal sale, offering for sale, purchase, transportation, distribution or use’. The Panel considered that the comprehensive coverage of ‘*all* laws, regulations or requirements *affecting*’ (emphasis added) the internal sale, etc. of imported products suggests that not only requirements which an enterprise is legally bound to carry out, such as those examined by the ‘FIRA Panel’ (BISD 30S/140, 158), but also those which an enterprise voluntarily accepts in order to obtain an advantage from the government constitute ‘requirements’ within the meaning of that provision. The Panel noted that the EEC made the grant of an advantage, namely the suspension of proceedings under the anti-circumvention provision, dependent on undertakings to limit the use of parts or materials of Japanese origin without imposing similar limitations on the use of like products of EEC or other origin, hence dependent on undertakings to accord treatment to imported products less favourable than that accorded to like products of national origin in respect of their internal use. The Panel therefore concluded that the decisions of the EEC to suspend proceedings under Article 13:10 conditional on undertakings by enterprises in the EEC to limit the use of parts or materials originating in Japan in their assembly or production operations are inconsistent with Article III:4.”¹⁷⁹

In this connection see also the unadopted 1994 Panel Report on “EEC - Import Régime for Bananas”.¹⁸⁰

(c) *Requirements associated with the regulation of international investment*

The 1984 Panel Report on “Canada - Administration of the Foreign Investment Review Act” examined, *inter alia*, the argument of Canada that in accordance with Article XXIX:1 of the General Agreement, the word “requirements” in Article III:4 of the General Agreement should be interpreted in the light of Article 12 of the Havana Charter concerning the right to regulate foreign investment.

“... the Panel could not subscribe to the assumption that the drafters of Article III had intended the term ‘requirements’ to exclude requirements connected with the regulation of international investments and did not find anything in the negotiating history, the wording, the objectives and the subsequent application of Article III which would support such an interpretation.”¹⁸¹

¹⁷⁹L/6657, adopted on 16 May 1990, 37S/132, 197, para. 5.20-5.21.

¹⁸⁰DS38/R, dated 11 February 1994, paras. 143-148.

¹⁸¹L/5504, adopted on 7 February 1984, 30S/140, 162, para. 5.12.

(4) “affecting”

The 1958 Panel Report on “Italian Discrimination Against Imported Agricultural Machinery,” which examined the consistency with Article III:4 of an Italian law providing special credit facilities to farmers for the purchase of agricultural machinery produced in Italy, noted that

“... the text of paragraph 4 referred both in English and French to laws and regulations and requirements *affecting* internal sale, purchase, etc., and not to laws, regulations and requirements governing the conditions of sale or purchase. The selection of the word ‘affecting’ would imply, in the opinion of the Panel, that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market”.¹⁸²

The 1989 Panel Report on “United States - Section 337 of the Tariff Act of 1930” also addressed the meaning of “affecting” in Article III:4.

“... The Panel first addressed the issue of whether only substantive laws, regulations and requirements or also procedural laws, regulations and requirements can be regarded as ‘affecting’ the internal sale of imported products. The positions of the United States and the Community on this were different. The Panel noted that the text of Article III:4 makes no distinction between substantive and procedural laws, regulations or requirements and it was not aware of anything in the drafting history that suggests that such a distinction should be made. A previous Panel had found that ‘the selection of the word ‘affecting’ would imply ... that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market.’¹⁸³ In the Panel’s view, enforcement procedures cannot be separated from the substantive provisions they serve to enforce. If the procedural provisions of internal law were not covered by Article III:4, contracting parties could escape the national treatment standard by enforcing substantive law, itself meeting the national treatment standard, through procedures less favourable to imported products than to like products of national origin. The interpretation suggested by the United States would therefore defeat the purpose of Article III, which is to ensure that internal measures ‘not be applied to imported or domestic products so as to afford protection to domestic production’ (Article III:1). The fact that Section 337 is used as a means for the enforcement of United States patent law at the border does not provide an escape from the applicability of Article III:4; the interpretative note to Article III states that any law, regulation or requirement affecting the internal sale of products that is enforced in the case of the imported product at the time or point of importation is nevertheless subject to the provisions of Article III. Nor could the applicability of Article III:4 be denied on the ground that most of the procedures in the case before the Panel are applied to persons rather than products, since the factor determining whether persons might be susceptible to Section 337 proceedings or federal district court procedures is the source of the challenged products, that is whether they are of United States origin or imported. For these reasons, the Panel found that the procedures under Section 337 come within the concept of ‘laws, regulations and requirements’ affecting the internal sale of imported products, as set out in Article III of the General Agreement.”¹⁸⁴

In this connection see also the unadopted Panel Report of 1994 on “United States - Taxes on Automobiles”.¹⁸⁵

The 1991 Panel Report on “United States - Restrictions on Imports of Tuna,” which has not been adopted, examined a US prohibition on the imports of tuna and tuna products from Mexico imposed under the

¹⁸²L/833, adopted on 23 October 1958, 7S/60, 64, para. 12.

¹⁸³The note to this sentence refers to the Panel Report on “Italian Discrimination Against Imported Agricultural Machinery,” adopted on 23 October 1958, 7S/60, para. 12.

¹⁸⁴L/6439, adopted on 7 November 1989, 36S/345, 385-386, para. 5.10.

¹⁸⁵DS31/R, dated 11 October 1994, paras. 5.45-5.46.

US Marine Mammal Protection Act because of the incidental taking of dolphins during tuna fishing by the Mexican tuna fleet. The Panel found that

“... The text of Article III:1 refers to the application to imported or domestic *products* of ‘laws, regulations and requirements affecting the internal sale ... of *products*’ and ‘internal quantitative regulations requiring the mixture, processing or use of *products*’; it sets forth the principle that such regulations on *products* not be applied so as to afford protection to domestic production. Article III:4 refers solely to laws, regulations and requirements affecting the internal sale, etc. of *products*. This suggests that Article III covers only measures affecting products as such. ...

“A previous panel had found that Article III:2, first sentence, ‘obliges contracting parties to establish certain competitive conditions for imported *products* in relation to domestic *products*’.¹⁸⁶ Another panel had found that the words ‘treatment no less favourable’ in Article III:4 call for effective equality of opportunities for imported *products* in respect of the application of laws, regulations or requirements affecting the sale, offering for sale, purchase, transportation, distribution or use of *products*, and that this standard has to be understood as applicable to each individual case of imported *products*.¹⁸⁷ It was apparent to the Panel that the comparison implied was necessarily one between the measures applied to imported products and the measures applied to like domestic products.

“The Panel considered that, as Article III applied the national treatment principle to both regulations and internal taxes, the provisions of Article III:4 applicable to regulations should be interpreted taking into account interpretations by the CONTRACTING PARTIES of the provisions of Article III:2 applicable to taxes. The Panel noted in this context that the Working Party Report on Border Tax Adjustments, adopted by the CONTRACTING PARTIES in 1970, had concluded that

‘... there was convergence of views to the effect that *taxes directly levied on products were eligible for tax adjustment* ... Furthermore, the Working Party concluded that there was convergence of views to the effect that certain taxes that were not directly levied on products were not eligible for adjustment, [such as] social security charges whether on employers or employees and payroll taxes.’¹⁸⁸

“Thus, under the national treatment principle of Article III, contracting parties may apply border tax adjustments with regard to those taxes that are borne by products, but not for domestic taxes not directly levied on products (such as corporate income taxes). Consequently, the Note Ad Article III covers only internal taxes that are borne by products. The Panel considered that it would be inconsistent to limit the application of this Note to taxes that are borne by products while permitting its application to regulations not applied to the product as such.

“The Panel further concluded that, even if the provisions of the MMPA enforcing the tuna harvesting regulations (in particular those providing for the seizure of cargo as a penalty for violation of the Act) were regarded as regulating the sale of tuna as a product, the United States import prohibition would not meet the requirements of Article III. As pointed out ... above, Article III:4 calls for a comparison of the treatment of imported tuna *as a product* with that of domestic tuna *as a product*. Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product. Article III:4 therefore obliges the United States to accord treatment to Mexican tuna no less favourable than that accorded to United States tuna, whether or not the incidental taking of dolphins by Mexican vessels corresponds to that of United States vessels.”¹⁸⁹

¹⁸⁶ A note to this paragraph refers to the Panel report on “United States - Taxes on Petroleum and Certain Imported Substances”, adopted 17 June 1987, BISD 34S/136, 158, para. 5.1.9.

¹⁸⁷ A note to this paragraph refers to the Panel Report on “United States - Section 337 of the Tariff Act of 1930”, adopted 7 November 1989, BISD 36S/345, 386-7, paras. 5.11, 5.14.

¹⁸⁸ A note to this paragraph refers to 18S/97, 100-101, para. 14.

¹⁸⁹ DS21/R (unadopted), dated 3 September 1991, 39S/155, 194-195, paras. 5.11-5.13, 5.15.

In this connection see also the unadopted Panel Report of 1994 on “United States - Taxes on Automobiles”.¹⁹⁰

(5) “internal sale, offering for sale, purchase, transportation, distribution or use”

(a) Standardization of products

The Report of Sub-Committee A of the Third Committee at the Havana Conference, which considered Article 18 of the Charter (on national treatment), notes as follows:

“The Norwegian delegation had proposed to insert a new paragraph in Article 18 to make sure that the provisions of this Article would not apply to laws, regulations and requirements which have the purpose of standardizing domestic products in order to improve the quality or to reduce costs of production, or have the purpose of facilitating an improved organization of internal industry, provided they have no harmful effect on the expansion of international trade. The Sub-Committee was of the opinion that this amendment would not be necessary because the Article as drafted would permit the use of internal regulations required to enforce standards”.¹⁹¹

(b) Minimum and maximum price regulations

The 1992 Panel Report on “Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies” examined minimum prices maintained in certain provinces of Canada. The Panel found that the minimum price requirement fell under Article III, not Article XI (see page 203 below).

“The Panel noted that minimum prices applied equally to imported and domestic beer did not necessarily accord equal conditions of competition to imported and domestic beer. Whenever they prevented imported beer from being supplied at a price below that of domestic beer, they accorded in fact treatment to imported beer less favourable than that accorded to domestic beer: when they were set at the level at which domestic brewers supplied beer - as was presently the case in New Brunswick and Newfoundland - they did not change the competitive opportunities accorded to domestic beer but did affect the competitive opportunities of imported beer which could otherwise be supplied below the minimum price. The Panel noted, moreover, that one of the basic purposes of Article III was to ensure that the contracting parties’ internal charges and regulations were not such as to frustrate the effect of tariff concessions granted under Article II ...

“The Panel considered that the case before it did not require a general finding on the consistency of minimum prices with Article III:4. However, it did consider that the above considerations justified the conclusion that the maintenance by an import and sales monopoly of a minimum price for an imported product at a level at which a directly competing, higher-priced domestic product was supplied was inconsistent with Article III:4.”¹⁹²

The 1992 Panel Report on “United States - Measures Affecting Alcoholic and Malt Beverages” examined “price affirmation requirements” (maximum price levels) in the states of Massachusetts and Rhode Island.

“The Panel noted that the price affirmation measures apply with respect to sales of alcoholic beverages to wholesalers, and that in-state producers are not required to sell through wholesalers whereas out-of-state and foreign producers are required to do so. ... The Panel considered that the price affirmation measures of Massachusetts and Rhode Island prevent the imported alcoholic beverages from being priced in accordance with commercial considerations in that imported products may not be offered below the price of these products in neighbouring states. In the view of the Panel, these measures thus

¹⁹⁰DS31/R, dated 11 October 1994, paras. 5.52-5.55.

¹⁹¹Havana Reports, p. 64, para. 49, reflecting E/CONF.2/C.3/A/W.35, p. 1-2 (withdrawal of Norwegian amendment relating to mixing requirements used to enforce standards (see page 183) on the understanding that this statement would be inserted in the Sub-Committee’s Report).

¹⁹²DS17/R, adopted 18 February 1992, 39S/27, 84-85, paras. 5.30-5.31.

accord less favourable treatment to imported products than to the like domestic products with respect to their internal sale and offering for sale, inconsistent with Article III:4.”¹⁹³

(c) *Requirements affecting internal offering for sale*

The 1988 Panel Report on “Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies” examined, *inter alia*, the application by provincial liquor boards of practices concerning listing and delisting of alcoholic beverages for sale, and availability of points of sale, which discriminated against imported alcoholic beverages. The Panel treated these measures as restrictions made effective through state-trading operations contrary to Article XI:1 and considered that it was therefore not necessary to decide whether the practices were contrary to Article III:4. “However, the Panel saw great force in the argument that Article III:4 was also applicable to state-trading enterprises at least when the monopoly of the importation and monopoly of the distribution in the domestic markets were combined, as was the case of the provincial liquor boards in Canada. This interpretation was confirmed *e contrario* by the wording of Article III:8(a)”.¹⁹⁴

The 1992 Panel Report on “Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies” notes as follows.

“The Panel ... turned to the United States claim that the practice of the liquor boards of Ontario to limit listing of imported beer to the six-pack size while according listings in different package sizes to domestic beer was inconsistent with the General Agreement. The Panel noted that this package-size requirement, though implemented as a listing requirement, was in fact a requirement that did not affect the importation of beer as such but rather its offering for sale in certain liquor board outlets. The Panel therefore considered that this requirement fell under Article III:4. ... The Panel *found* that the imposition of the six-pack configuration requirement on imported beer but not on domestic beer was inconsistent with that provision.”¹⁹⁵

The 1992 Panel Report on “United States - Measures Affecting Alcoholic and Malt Beverages” examined the requirement, imposed by certain states in the US, that imported beer and wine be sold only through in-state wholesalers or other middlemen, while some in-state like products were permitted to be sold directly to retailers, and in some cases at retail on producers’ premises.

“In the view of the Panel, therefore, the requirement that imported beer and wine be distributed through in-state wholesalers or other middlemen, when no such obligation to distribute through wholesalers exists with respect to in-state like domestic products, results in ‘treatment ... less favourable than that accorded to like products’ from domestic producers, inconsistent with Article III:4. The Panel considered that even where Canadian producers have the right to establish in-state wholesalers, as is the case in some states, subject to varying conditions, the fact remains that the wholesale level represents another level of distribution which in-state product is not required to use.”¹⁹⁶

See also at page 167 above. The same Panel also examined the exemption of Mississippi-produced wine from “local option” rules prohibiting sale of alcoholic beverages in “dry” subdivisions of the state of Mississippi.

“... The Panel noted that the local option law in Mississippi permits wines produced in the state to continue to be sold in those political subdivisions of the state that choose to reinstate prohibition laws, while prohibiting out-of-state and imported wines from being sold in those same subdivisions. The Panel considered that the Mississippi local option law, on its face, accords less favourable treatment to imported wine than to wine of domestic origin, because domestic wine produced in-state may continue to be sold

¹⁹³DS23/R, adopted 19 June 1992, 39S/206, 290, para. 5.59.

¹⁹⁴L/6304, adopted 22 March 1988, 35S/37, 90, para. 4.26.

¹⁹⁵DS17/R, adopted 18 February 1992, 39S/27, 75, para. 5.4.

¹⁹⁶DS23/R, adopted 19 June 1992, 39S/206, 280, para. 5.32.

even where a local political subdivision prohibits the sale of imported wine. The Mississippi law would therefore appear to be inconsistent with Article III:4.”¹⁹⁷

The same Panel also examined the listing requirements of state-operated liquor stores in certain US states.

“Having regard to the past panel decisions and the record in the instant case, the present Panel was of the view that the listing and delisting practices here at issue do not affect importation as such into the United States and should be examined under Article III:4. The Panel further noted that the issue is not whether the practices in the various states affect the right of importation as such, in that they clearly apply to both domestic (out-of-state) and imported wines; rather, the issue is whether the listing and delisting practices accord less favourable treatment – in terms of competitive opportunities – to imported wine than that accorded to the like domestic product. Consequently, the Panel decided to analyze the state listing and delisting practices as internal measures under Article III:4.”¹⁹⁸

(d) *Regulations on quality or quantity of products consumed*

The 1990 Panel Report on “Thailand - Restrictions on importation of and internal taxes on cigarettes” examined the argument of the United States that Thailand could achieve its public health objectives through internal measures consistent with Article III:4 and that the inconsistency with Article XI:1 could therefore not be considered to be ‘necessary’ within the meaning of Article XX(b).

“The Panel noted that the principal health objectives advanced by Thailand to justify its import restrictions were to protect the public from harmful ingredients in imported cigarettes, and to reduce the consumption of cigarettes in Thailand. The measures could thus be seen as intended to ensure the quality and reduce the quantity of cigarettes sold in Thailand.

“The Panel then examined whether the Thai concerns about the *quality* of cigarettes consumed in Thailand could be met with measures consistent, or less inconsistent, with the General Agreement. It noted that other countries had introduced strict, non-discriminatory labelling and ingredient disclosure regulations which allowed governments to control, and the public to be informed of, the content of cigarettes. A non-discriminatory regulation implemented on a national treatment basis in accordance with Article III:4 requiring complete disclosure of ingredients, coupled with a ban on unhealthy substances, would be an alternative consistent with the General Agreement. The Panel considered that Thailand could reasonably be expected to take such measures to address the quality-related policy objectives it now pursues through an import ban on all cigarettes whatever their ingredients.

“The Panel then considered whether Thai concerns about the *quantity* of cigarettes consumed in Thailand could be met by measures reasonably available to it and consistent, or less inconsistent, with the General Agreement. The Panel first examined how Thailand might reduce the *demand* for cigarettes in a manner consistent with the General Agreement. The Panel noted the view expressed by the WHO that the demand for cigarettes, in particular the initial demand for cigarettes by the young, was influenced by cigarette advertisements and that bans on advertisement could therefore curb such demand. At the Forty-third World Health Assembly a resolution was approved stating that the WHO is:

‘Encouraged by ... recent information demonstrating the effectiveness of tobacco control strategies, and in particular ... comprehensive legislative bans and other restrictive measures to effectively control the direct and the indirect advertising, promotion and sponsorship of tobacco’.¹⁹⁹

¹⁹⁷*Ibid.*, 39S/289, para. 5.56.

¹⁹⁸DS23/R, adopted 19 June 1992, 39S/206, 292, para. 5.63.

¹⁹⁹Note 3 to this paragraph provides: “Forty-third World Health Assembly, Fourteenth plenary meeting, Agenda Item 10, 17 May 1990 (A43/VR/14; WHA43.16).”

“The resolution goes on to urge all member states of the WHO

‘to consider including in their tobacco control strategies plans for legislation or other effective measures at the appropriate government level providing for: ...

‘(c) progressive restrictions and concerted actions to eliminate eventually all direct and indirect advertising, promotion and sponsorship concerning tobacco’

“A ban on the advertisement of cigarettes of both domestic and foreign origin would normally meet the requirements of Article III:4. It might be argued that such a general ban on all cigarette advertising would create unequal competitive opportunities between the existing Thai supplier of cigarettes and new, foreign suppliers and was therefore contrary to Article III:4.²⁰⁰ Even if this argument were accepted, such an inconsistency would have to be regarded as unavoidable and therefore necessary within the meaning of Article XX(b) because additional advertising rights would risk stimulating demand for cigarettes. The Panel noted that Thailand had already implemented some non-discriminatory controls on demand, including information programmes, bans on direct and indirect advertising, warnings on cigarette packs, and bans on smoking in certain public places.

“The Panel then examined how Thailand might restrict the *supply* of cigarettes in a manner consistent with the General Agreement. The Panel noted that contracting parties may maintain governmental monopolies, such as the Thai Tobacco Monopoly, on the importation and domestic sale of products.²⁰¹ The Thai Government may use this monopoly to regulate the overall supply of cigarettes, their prices and their retail availability provided it thereby does not accord imported cigarettes less favourable treatment than domestic cigarettes or act inconsistently with any commitments assumed under its Schedule of Concessions.²⁰² As to the pricing of cigarettes, the Panel noted that the Forty-third World Health Assembly, in its resolution cited above, stated that it was:

‘Encouraged by ... recent information demonstrating the effectiveness of tobacco control strategies, and in particular ... policies to achieve progressive increases in the real price of tobacco’.

“It accordingly urged all member states

‘to consider including in their tobacco control strategies plans for ... progressive financial measures aimed at discouraging the use of tobacco’²⁰³

“For these reasons the Panel could not accept the argument of Thailand that competition between imported and domestic cigarettes would necessarily lead to an increase in the total sales of cigarettes and that Thailand therefore had no option but to prohibit cigarette imports.

“The Panel then examined further the resolutions of the WHO on smoking which the WHO made available. It noted that the health measures recommended by the WHO in these resolutions were non-discriminatory and concerned all, not just imported, cigarettes. The Panel also examined the Report of the WHO Expert Committee on Smoking Control Strategies in Developing Countries. The Panel observed that a common consequence of import restrictions was the promotion of domestic production and the fostering of interests in the maintenance of that production and that the WHO Expert Committee had made the following recommendation relevant in this respect:

‘Where tobacco is already a commercial crop every effort should be made to reduce its role in the national economy, and to investigate alternative uses of land and labour. The existence of a tobacco

²⁰⁰Note 2 to this sentence provides: “On the requirement of equal competitive opportunities, see the Report of the panel on ‘United States - Section 337 of the Tariff Act of 1930’ (L/6439, paragraph 5.26, adopted on 7 November 1989).”

²⁰¹Note 1 on page 37S/225 provides: “Cf. Articles III:4, XVII and XX(d).”

²⁰²Note 2 on page 37S/225 provides: “Cf. Articles III:2 and 4 and II:4.”

²⁰³Note 3 on page 37S/225 provides: “Forty-third World Health Assembly, Fourteenth plenary meeting, Agenda Item 10, 17 May 1990 (A43/VR/14; WHA43.16).”

industry of any kind should not be permitted to interfere with the implementation of educational and other measures to control smoking'.²⁰⁴

"In sum, the Panel considered that there were various measures consistent with the General Agreement which were reasonably available to Thailand to control the quality and quantity of cigarettes smoked and which, taken together, could achieve the health policy goals that the Thai government pursues by restricting the importation of cigarettes inconsistently with Article XI:1. The Panel found therefore that Thailand's practice of permitting the sale of domestic cigarettes while not permitting the importation of foreign cigarettes was an inconsistency with the General Agreement not 'necessary' within the meaning of Article XX(b)."²⁰⁵

In the November 1990 Council discussion on adoption of this Panel Report, the representative of Thailand stated that "Thailand took heart from the report that a set of GATT-consistent measures could be taken to control both the supply of and demand for cigarettes, as long as they were applied to both domestic and imported cigarettes on a national-treatment basis".²⁰⁶

(e) Marking requirements

The 1956 Working Party Report on "Certificates of Origin, Marks of Origin, Consular Formalities" notes "that the question of additional marking requirements, such as an obligation to add the name of the producer or the place of origin or the formula of the product, should not be brought within the scope of any recommendation dealing with the problem of marks of origin. The point was stressed that requirements going beyond the obligation to indicate origin would not be consistent with the provisions of Article III, if the same requirements did not apply to domestic producers of like products".²⁰⁷ See also the 1955 complaint referred to above at page 162 regarding a requirement to display a placard stating "We sell foreign eggs".

See also Article IX.

(f) Measures affecting internal transportation

During discussions on this provision at Geneva in 1947 it was stated that "transportation" referred to "all kinds of transportation, from a man's back to jet-propelled rockets".²⁰⁸ At the Havana Conference, a proposal to delete the references to transportation in Article III received no support, "on the grounds that these provisions were necessary to prevent indirect protection to domestic products by means of differential transportation charges".²⁰⁹

The 1992 Panel Report on "Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies" also examined practices concerning the internal transportation of beer in Canada. The delivery of beer in Canada is controlled or conducted by the provincial liquor boards, which require or permit the delivery of domestic beer by the brewer to the point of sale. Except for two provinces, imported beer must be sold to the provincial liquor board which either require or arrange delivery of the beer to their own distribution centres; the cost of delivery to the point of sale was included in the mark-up charged on imported beer.

"The Panel first examined the question of whether Article III:4 of the General Agreement permitted contracting parties to apply regulations to imported products that were different from those applied to domestic products. ... The Panel ... considered that the mere fact that imported and domestic beer were subject to different delivery systems was not, in itself, conclusive in establishing inconsistency with

²⁰⁴Note 4 on page 37S/225 provides: "1982 Expert Committee on 'Smoking Control Strategies in Developing Countries', page 69; cited at page 16 in the WHO Submission to the Panel of 19 July 1990."

²⁰⁵DS10/R, adopted 7 November 1990, 37S/200, 223-226, paras. 76-81.

²⁰⁶C/M/246, 23 November 1990.

²⁰⁷L/595, adopted on 17 November 1956, 5S/102, 105-106, para. 13.

²⁰⁸EPCT/A/PV/9, p. 43.

²⁰⁹E/CONF.2/C.3/A/W.34, p. 4.

Article III:4 of the General Agreement. The Panel then examined whether the application by Canada of the different delivery systems accorded imported beer treatment no less favourable than that accorded to domestic beer. The Panel ... considered that Article III:4 required Canada to ensure that its regulations affecting the internal transportation of imported beer to points of sale accorded imported beer competitive opportunities at least equal to those accorded to domestic beer and that it was up to Canada to demonstrate that, in spite of the application of different transportation regulations to imported and domestic beer, imported beer was accorded no less favourable treatment in this respect.

“The Panel noted that Canada claimed that it met the requirements of Article III:4 by levying charges for the delivery of imported beer to the points of sale which were no higher than the costs actually incurred by the liquor boards. The Panel, therefore, examined whether Canada, by subjecting imported beer to a levy that corresponded to the actual cost of delivery by the liquor board, offered competitive opportunities to imported beer that were equivalent to the opportunities which would result from the application of the same delivery system to both imported and domestic beer. The Panel noted that such a levy did not necessarily correspond to the cost that the liquor board would incur for the delivery of imported beer if it delivered not only imported but also domestic beer. It could reasonably be assumed that it would, in that case, make economies of scale from which also imported beer could benefit. Nor did such a levy necessarily correspond to the cost of private delivery of imported beer. It could reasonably be assumed that the structure and efficiency of private delivery systems would be different from the systems operated by the liquor boards.

“The Panel further noted that, in order to prove that the levies charged by the liquor boards for delivering imported beer to the points of sale did not exceed the cost of private delivery of such beer, Canada could not base itself on the transportation costs actually incurred by the liquor boards or the domestic breweries; it would have to determine the costs of transporting beer under delivery systems not presently in existence. The Panel felt that, given the inherent difficulties in making such a determination, its result would always be open to challenge. The Panel also noted that, in order to meet its national treatment obligations, Canada did not have to abandon the delivery of imported beer by the liquor boards; it merely had to provide competitive opportunities to imported beer that were at least equal to those accorded to domestic beer, in other words allow for the possibility of private delivery of imported beer. This would enable foreign brewers to choose between liquor-board services and private delivery on purely commercial grounds. If, as claimed by Canada, imported beer did enjoy national treatment, there was no need to prohibit the private delivery of imported beer because the services of the liquor boards would be available at a price at which they could compete successfully with private delivery systems. ...”²¹⁰

The 1992 Panel Report on “United States - Measures Affecting Alcoholic and Malt Beverages” examined the requirement imposed by certain states that alcoholic beverages imported into the state be transported by common carriers authorized to operate as such within the state whereas in-state producers of alcoholic beverages could deliver their product to customers in their own vehicles.

“The Panel noted that Article III:4 requires that imported products be granted treatment no less favourable than that afforded to like domestic products with respect to laws and regulations affecting their transportation. In the view of the Panel, the requirement for imported beer and wine to be transported by common carrier, whereas domestic in-state beer and wine is not so required, may result in additional charges to transport these imported products and therefore prevent imported products from competing on an equal footing with domestic like products. Accordingly, the Panel found the requirement that imported beer and wine be transported by common carrier into the states of Arizona, California, Maine, Mississippi and South Carolina, which requirement does not exist in such states for in-state beer and wine, is inconsistent with Article III:4.”²¹¹

²¹⁰DS17/R, adopted 18 February 1992, 39S/27, 78-79, paras. 5.12-5.14.

²¹¹DS23/R, adopted 19 June 1992, 39S/206, 287, para. 5.50.

(6) “differential internal transportation charges”: second sentence of paragraph 4

The second sentence of paragraph 4 was drafted during the discussions of the Preparatory Committee at Geneva by a sub-committee which reviewed (*inter alia*) the Charter article on national treatment. The Report of this sub-committee states:

“The South African Delegation had objected to the inclusion of the word ‘transportation’ [in the first sentence of this paragraph] but agreed to its retention subject to the addition of a new sentence clarifying the intention that this paragraph should not be construed to prevent differential transport charges which are based on economic operation of the means of transport and not on the nationality of the product concerned. ... Since the present paragraph 2 [4] relates solely to the question of differential treatment between imported and domestic goods, the inclusion of the last sentence in that paragraph should not be understood to give sanction to the use of artificial measures in the form of differential transport charges designed to divert traffic from one port to another”.²¹²

The same statement regarding differential transport charges designed to divert traffic from one port to another is repeated in the report of Sub-Committee A of the Third Committee, which considered the national treatment article of the Charter at the Havana Conference.²¹³ The report also notes: “The Sub-Committee inserted the word ‘internal’ to make it clear that the phrase ‘differential transportation charges’ does not refer to international shipping”.²¹⁴ The Sub-Committee also rejected a proposal to delete the word ‘transportation’ in the first sentence and delete the second sentence.²¹⁵

Concerning discriminatory internal transportation charges constituting a subsidy, see Article XVI.

7. Paragraphs 5, 6 and 7: internal quantitative regulations (mixing regulations)

(1) Scope of paragraph 5

During discussions at the Geneva session of the Preparatory Committee for the Havana Conference, the representative of Norway stated in connection with one of the proposals to amend this paragraph, “In Norway we would normally have a regulation to define that margarine would include a certain amount of butter. ... For practical purposes [margarine] is produced in Norway ... With regard to butter ... if we decided that, for example, margarine should include 20 per cent butter, we would not lay down that that should be totally Norwegian butter, to the exclusion of foreign butter, but, whether of Norwegian or foreign origin, it would be on an equal footing ...”.²¹⁶ It was stated in reply that

“The mixing regulation described ... could not be classed as protective in purpose. ... The case presented ... is that of a mixing regulation which may be described as follows:

“A regulation requiring a product be composed of two or more materials in specified proportions, where all the materials in question are produced domestically in substantial quantities, and where there is no requirement that any specified quantity of any of the materials be of domestic origin.

“Stated in this way, it seems obvious that this case is not intended to be covered by Article [III].

“The opposite case of mixing regulations ... is where the regulation requires that a certain percentage of a product of domestic origin be used in the production of another product (e.g. that 25 per cent domestic wheat be used in making flour). Such a regulation would limit the use of the like foreign product and, hence, would under any interpretation be contrary to [Article III:5].

²¹²Report to Commission A by the Sub-Committee on Articles 14, 15 and 24, EPCT/174, pp. 6-7.

²¹³Havana Reports, p. 64, para. 51; see E/CONF.2/C.3/SR.II p. 2 (proposal to pick up this statement, citing prewar *Seehafen-Ausnahmstarife* of Germany).

²¹⁴*Ibid.*, para. 50.

²¹⁵*Ibid.*, para. 52.

²¹⁶EPCT/A/PV/9, p. 52-53.

“A third and more difficult case of mixing regulations are regulations which require that in producing an article a certain percentage of a specified material produced domestically be used when there is a competitive imported material which is not produced domestically in substantial quantities. It corresponds in the field of mixing regulations to the type of excise tax sought to be prohibited ... [by Article III:2, second sentence]”.²¹⁷

This and other questions were referred to an ad-hoc Sub-committee, the report of which noted:

“The Sub-committee was ... in agreement that under the provisions of Article 18 [III] regulations and taxes would be permitted which, while perhaps having the effect of assisting the production of a particular domestic product (say, butter), are directed as much against the domestic production of another product (say, domestic oleomargarine), of which there was a substantial domestic production, as they are against imports (say, imported oleomargarine)”.²¹⁸

This statement was reiterated in the reports adopted at the Havana Conference.

Later, in discussions in the Third Committee at Havana, it was clarified in a statement that:

“... requiring flour mills, for instance, to use twenty-five per cent wheat of domestic origin would be considered an internal quantitative regulation relating to ‘use’ under paragraph 5. The paragraph was also intended to relate to mixing regulations such as the mixture of alcohol and gasoline in the manufacture of motor fuel. ... paragraph 5 would not preclude regulations designed to eke out supplies of short materials or to enforce objective standards”.²¹⁹

It was also stated that “If a Member required that fifty per cent of the timber used in building should come from domestic sources, the regulation was not related to the mixture nor to the processing of the timber, but to its use”.²²⁰

During the Review Session in 1954-55, “the delegate for Sweden proposed an interpretative note for paragraph 5, on the lines of the statement adopted at the Havana Conference [including the example on butter and oleomargarine] ... After discussion the representative of Sweden expressed his willingness to withdraw his proposal but desired that the Working Party’s report should record his statement that the system of levying internal fees on home-produced and imported raw materials for oleomargarine manufacture, as well as on imports of oleomargarine, in order to help in the stabilization of the marketing of butter - which was mentioned in the report of Sub-Committee A of Committee III at Havana and found by that Sub-Committee to be consistent with the terms of Article 18 (Article III of GATT) was still in force. The Working Party took note of the Swedish statement”.²²¹

In the 1994 panel report on “United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco”, the panel examined a claim that the US’ Domestic Marketing Assessment (“DMA”) was inconsistent with Article III:5. The DMA legislation required each “domestic manufacturer of cigarettes”, as defined in the legislation, to certify to the Secretary of the U.S. Department of Agriculture (“USDA”) for each calendar year, the percentage of domestically produced tobacco used by such manufacturer to produce cigarettes during the year. A domestic manufacturer that failed to make such a certification or to use at least 75 per cent domestic tobacco was subject to penalties in the form of a nonrefundable marketing assessment (i.e. the DMA) and was required to purchase additional quantities of domestic burley and flue-cured tobacco.

²¹⁷EPCT/A/SR/10 p. 2-3, EPCT/W/181, p. 10.

²¹⁸EPCT/174, p. 8-9; statement repeated verbatim in Havana Reports, p. 64, para. 54.

²¹⁹E/CONF.2/C.3/SR.40, p. 6.

²²⁰*Ibid.*, p. 7.

²²¹L/329, Report of the Review Working Party on “Schedules and Customs Administration”, adopted 26 February 1955, 3S/205, 210, para. 9.

“As to the applicability of Article III:5, first sentence, to the DMA, the Panel considered that it first had to determine whether the United States had established an ‘internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions ...’. The Panel noted the following in this respect:

“(a) First, the DMA was established by an Act of the U.S. Congress, Section 1106(a) of the 1993 Budget Act, and was implemented through regulations of USDA. The effective date for the DMA was 1 January 1994. It thus constituted a *regulation* within the meaning of Article III:5.

“(b) Second, the Panel noted that the opening sentence of the DMA legislative provision, Section 1106(a) of the 1993 Budget Act, stated:

‘CERTIFICATION. A *domestic manufacturer* of cigarettes *shall certify* to the Secretary, for each calendar year, the percentage of the quantity of tobacco used by the manufacturer to produce cigarettes during the year that is produced in the United States’. (*emphasis added*)

“The DMA was thus an internal regulation imposed on domestic manufacturers of cigarettes.

“(c) Third, the Panel noted that the second sub-paragraph of the DMA legislative provision stated:

‘PENALTIES. In General. Subject to subsection (f) [exception for crop losses due to natural disasters], a *domestic manufacturer of cigarettes that has failed*, as determined by the Secretary after notice and opportunity for a hearing, to *use in the manufacture of cigarettes* during a calendar year a *quantity of tobacco grown in the United States that is at least 75 percent of the total quantity of tobacco used* by the manufacturer or to comply with subsection (a) [certification requirement], *shall be subject to* the requirements of subsections (c), (d) and (e) [*penalties in the form of a nonrefundable marketing assessment and a required purchase of additional quantities of domestic burley and flue-cured tobacco*].’ (*emphasis added*)

“The DMA was thus a *quantitative* regulation in that it set a minimum *specified proportion* of 75 per cent for the use of U.S. tobacco in manufacturing cigarettes.

“(d) Fourth, the DMA was an internal quantitative regulation relating to the *use* of a product, in that it *required the use* of U.S. domestically grown tobacco.

“The Panel thus found that the DMA was an ‘internal quantitative regulation relating to the ... use of products in specified amounts or proportions ...’, within the meaning of the first part of the first sentence of Article III:5.

“The Panel then turned to a consideration of whether the DMA ‘requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources’, as provided in the second part of the first sentence of Article III:5. The Panel noted the following in this respect:

“(a) The DMA required each domestic manufacturer of cigarettes to certify to the Secretary of USDA, for each calendar year, the percentage of the quantity of tobacco used by the manufacturer to produce cigarettes during the year that was produced in the United States.

“(b) Subject to an exception dealing with crop losses due to disasters, a domestic manufacturer that failed to make the required certification or to use at least 75 per cent domestic tobacco was subject to penalties including the required purchase of additional domestic tobacco.

“The Panel thus concluded that the DMA was an internal quantitative regulation relating to the use of tobacco in specified amounts or proportions which required, directly or indirectly, that a minimum specified proportion of tobacco be supplied from domestic sources, inconsistently with Article III:5, first sentence.”²²²

(2) “otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1”

See Interpretative Note *ad* Article III, paragraph 5.

The 1978 Panel Report on “EEC - Measures on Animal Feed Proteins” examined the measures in question in relation to this paragraph.

“Given the reference in Article III:5, second sentence, to Article III:1, the Panel then examined the consistency of the EEC Regulation as an ‘internal quantitative regulation’ with the provisions of Article III:1, particularly as to whether the Regulation afforded protection to domestic production. The Panel noted that the EEC Regulation considered, in its own terms, that denatured skimmed milk powder was an important source of protein which could be used in feedingstuffs. The Panel also noted that surplus stocks could originate either from domestic production or imports, but that the intervention agencies from which the buyers of vegetable proteins had to purchase a certain quantity of denatured skimmed milk powder only held domestically produced products. The Panel further noted that, although globally about 15 per cent of the EEC apparent consumption of vegetable protein was supplied from domestic sources, not all the individual products subject to the EEC measures were produced domestically in substantial quantities.

“The Panel concluded that the measures provided for by the Regulation with a view to ensuring the sale of a given quantity of skimmed milk powder protected this product in a manner contrary to the principles of Article III:1 and to the provisions of Article III:5, second sentence.”²²³

The interpretation of the second sentence of Article III:5 was the subject of the Panel Report on “Spain - Measures concerning Domestic Sale of Soyabean Oil”,²²⁴ which was not adopted, and of subsequent discussions in the Council. Several contracting parties expressed reservations with regard to the Panel’s interpretation of Article III. The Council took note of the Report as well as of the statements made in the discussion.²²⁵

In Council discussions in 1982, the European Communities expressed the view that Finland’s decision to make exports of leather footwear to the Soviet Union subject, *inter alia*, to the condition that the soles incorporated in such footwear should be of domestic origin, was a violation of certain provisions of the General Agreement, particularly Article III.²²⁶ Finland considered the claim to be without legal justification and stated, *inter alia*, that “the economic rationale of restricting third country participation in bilateral clearing trade in non-convertible currencies with a non-contracting party ought to be evident”.²²⁷

In the 1994 Panel Report on “United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco”

“... the Panel noted that the second sentence of Article III:5 is subsidiary to the first sentence thereof, as the second sentence only becomes relevant where a contracting party is ‘otherwise apply[ing] internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1’, *i.e.* ‘so as to afford protection to domestic production’. The Panel was therefore of the view that, in light of the

²²²DS44/R, adopted on 4 October 1994, paras. 67-68.

²²³L/4599, adopted on 14 March 1978, 25S/49, 65, paras. 4.7-4.8.

²²⁴L/5142.

²²⁵C/M/152, L/5142, L/5161, L/5188.

²²⁶C/M/161, L/5369.

²²⁷C/M/161, L/5394.

finding of inconsistency of the DMA with Article III:5, first sentence, it would not be necessary to examine the consistency of the DMA with Article III:5, second sentence.²²⁸

(3) *Special customs treatment granted conditional on mixing or use of the imported product with domestic products*

The Report of Sub-Committee A of the Third Committee at the Havana Conference, which considered Article 18 of the Charter (on national treatment), notes as follows:

“The Sub-Committee is of the opinion that paragraph 5 ... would not prohibit the continuance of a tariff system which permits the entry of the product at a rate of duty lower than the normal tariff rate, provided the product is mixed or used with a certain proportion of a similar product of national origin. The Sub-Committee considered that such a provision would not be regarded as an internal quantitative regulation in terms of this paragraph for the reason that the use of a percentage of the local product is not made compulsory, nor is the import of the product in any way restricted”.²²⁹

(4) *Application of mixing regulations in time of shortages*

The question of the application of mixing regulations in time of shortages was fully discussed at Havana.²³⁰ The main points made in the course of the discussion were as follows.

- “... provided the regulation did not require that the product to be mixed had to be of domestic origin, or provided that the regulation was not imposed for protective purposes, then such a regulation would not contravene the Article.”²³¹
- In the event that regulations imposed in respect of shortages of raw materials had protective effects, “they would be covered by Article 43” [XX].²³²

Further, a clarification was given in the following statement:

“... under paragraph 5 a Member could not establish a mixing regulation which protected a domestic product as against an imported product during periods when there was no shortage in order that the industry in question would be in existence in the event of a future shortage”.²³³

(5) *Paragraph 6: existing mixing regulations and their alteration*

The report of the ad-hoc Geneva Sub-committee which examined the national treatment provisions of the Charter notes:

“The [New York Draft provision] is aimed at preventing only those internal quantitative regulations which are clearly directed against imported products for the purposes of protecting domestic products. The new text removes the requirement that existing internal quantitative regulations not expressly approved by the Organization should be terminated at the expiration of one year after the entry into force of the Charter. The revised draft would permit the continuation of regulations in force on 1 July 1939 or 10 April 1947, whichever date the Member selects, subject to the requirement that such requirements as are retained shall be negotiable and shall not be altered to the detriment of imports. The alternative dates

²²⁸DS44/R, adopted on 4 October 1994, para. 69. The footnote to this paragraph provides: “Cf. Report of the panel on United States - Measures Affecting Alcoholic and Malt Beverages, adopted on 19 June 1992, BISD 39S/206, 270, where that panel found that it would not be appropriate to consider Canada’s Article III:1 allegations to the extent that it found the U.S. measures to be inconsistent with the more specific provisions of Articles III:2 and III:4.”

²²⁹EPCT/174, p. 8.

²³⁰E/CONF.2/C.3/SR.40, pp. 5-8; also earlier discussion at E/CONF.2/C.3/A/W.38, p. 1-2 (discussing regulation requiring mixing of imported gasoline with domestic alcohol).

²³¹E/CONF.2/C.3/SR.40, p. 6.

²³²E/CONF.2/C.3/SR.40, p. 5.

²³³E/CONF.2/C.3/SR.40, p. 7.

were thought desirable by the Sub-Committee in order particularly to take account of the departures from normal pre-war practices rendered necessary by war-time or post-war emergencies".²³⁴

10 April 1947 was the opening date of the Second Session of the Preparatory Committee at Geneva. During the Havana Conference, it was decided to add a third alternative date for existing mixing regulations, the date of the signing of the Havana Conference Final Act (24 March 1948).²³⁵ This date was chosen rather than the date of entry into force of the Charter "to avoid giving Members an opportunity to impose new regulations which would be contrary to paragraph [5]".²³⁶

The Report of Sub-Committee A of the Third Committee at the Havana Conference, which considered Article 18 of the Charter (on national treatment), notes that "a Member would be free to alter the details of an existing regulation provided that such alterations do not result in changing the overall effect of the regulation to the detriment of imports".²³⁷ During the Review Session of 1954-55, it was proposed that an interpretative note to Article III:6 be added on the lines of this statement; however,

"The Working Party considered that it was not necessary to insert a note in the Agreement as paragraph 6 is to be interpreted in this sense, with the understanding that such changes would be of a minor character and would not apply to a concession provided for in a schedule to the General Agreement".²³⁸

Sub-Committee A at Havana also noted in its report that:

"The delegate from Ireland inquired whether the phrase 'shall not be modified to the detriment of imports' would permit changes in the amounts or proportions of a product required to be mixed under an existing regulation in Ireland, which changes are the result of changes in crops from year to year. The Sub-Committee decided that since the regulation in question clearly contemplates such changes, the changes would not be precluded by paragraph 6 ...".²³⁹

The Working Party on "The Haitian Tobacco Monopoly" in 1955 examined whether the licensing of tobacco imports by the Tobacco Régie required a release under the provisions of Article XVIII:12 (prior to the Review Session amendments to Article XVIII). "The representative of Haiti declared that the licensing system served solely to enforce the internal quantitative regulations of the Régie and did not impose any additional limitation of the quantity that may be imported. The Working Party therefore took the view that in these circumstances Article XI would not apply, that the import control should be considered under the terms of the exception in Article [XX:(d)] and that the internal regulation to which it relates should be considered under paragraphs 5 and 6 of Article III." The mixing regulation on tobacco was found to have been in effect on one of the dates specified in Article III:6. "The representative of Haiti also informed the Working Party that the provisions of paragraph 6 were fully complied with in that the regulation in force on the base date had not been altered to the detriment of imports. In these circumstances the Working Party did not see anything in paragraphs 5 or 6 of Article III which required a release under Article XVIII for these measures."²⁴⁰

²³⁴EPCT/174, p. 7-8.

²³⁵Havana Reports, p. 65, para. 60.

²³⁶E/CONF.2/C.3/SR.40, p. 9.

²³⁷Havana Reports, p. 65, para. 58.

²³⁸Report of the Review Working Party on "Schedules and Customs Administration", L/329, adopted on 26 February 1955, 3S/205, 211, para. 11.

²³⁹Havana Reports, p. 65, para. 59; see also E/CONF.2/C.3/W.35 p. 4 (regulation in question required mixing of imported petroleum with industrial alcohol made from domestic potatoes).

²⁴⁰L/454, adopted on 22 November 1955, 4S/38, 39-40, paras. 9-10. Before the revision of Article XVIII in the Review Session, Article XVIII:12 provided for notification and concurrence with regard to certain measures affecting imports which were not otherwise permitted by the General Agreement.

(6) Paragraph 7

Article 22 of the Geneva Draft Charter (corresponding to GATT Article XIII) provided in its paragraph 5 that internal quantitative restrictions would be included within its scope. The chairman of the working party of Sub-Committee A which redrafted Article 18 at Havana explained that “in the Working Party’s view it would not be feasible or desirable to allocate between sources of supply by internal quantitative restrictions, as implied by paragraph 5 of Article 22. Article 18 was concerned with allocation between domestic and foreign sources of supply and the word ‘external’ had been inserted before ‘sources of supply’ in order to ensure most-favoured-nation treatment. For this reason the Working Party had recommended new paragraph 7 and the deletion of the reference to Article 18 in paragraph 5 of Article 22”.²⁴¹

In later discussions at Havana, it was stated that “the objectives of the Geneva draft and paragraph 7 were the same, i.e., to secure non-discrimination as between foreign suppliers with respect to products subject to internal mixing regulations. The Sub-Committee had thought that the best way to assure non-discrimination was to permit free competition. In the case of import quotas this was not always possible, so Article 22 [XIII] permitted allocation in accordance with certain rules. The same reasons of practicality did not apply, however, in the case of internal quantitative regulations, and therefore paragraph 7 had been inserted as the best method of securing most-favoured-nation treatment”.²⁴²

(7) Relationship between provisions on mixing regulations and other provisions of Article III

During discussions in Sub-Committee A at Havana, it was stated that “there was some inconsistency between the language of paragraphs 2 [III:4] and 3 [III:5], in that paragraph 2 refers only to ‘like’ products whereas it was not the intention of the drafters that paragraph 3 should be restricted to ‘like’ products”.²⁴³

The 1978 Panel Report on “EEC - Measures on Animal Feed Proteins” examined an EEC Regulation requiring domestic producers or importers of oilseeds, cakes and meals, dehydrated fodder and compound feeds and importers of corn gluten feed to purchase a certain quantity of surplus skimmed milk powder held by intervention agencies and to have it denatured for use as feed for animals other than calves.

“The Panel examined the obligation under the EEC Regulation, to purchase a certain quantity of denatured skimmed milk powder from intervention agencies, in terms of the provisions of Article III:5, that is whether the EEC measures constituted an ‘internal quantitative regulation relating to the mixture, processing or use’ within the meaning of Article III:5.

“The Panel noted that the Council Regulation (EEC) No. 563/76 referred, in its stated considerations, to the considerable stocks of skimmed milk powder held by intervention agencies and to the objective of increasing the utilization of skimmed milk powder as a protein in feedingstuffs for animals other than calves. In other words, the Regulation was intended to dispose on the internal market (‘utilization’) of a given quantity (‘stocks’) of skimmed milk powder in a particular form (‘denatured’ i.e. utilizable only for the intended purposes). The Panel therefore considered that the EEC Regulation was an ‘internal quantitative regulation’ in the sense of Article III:5. However, the Panel found that this ‘internal quantitative regulation’ as such was not related to the ‘mixture, processing and use ... in specified amounts or proportions’ within the meaning of Article III:5 because, at the level of its application, the EEC Regulation introduced basically an obligation to purchase a certain quantity of skimmed milk powder and the purchase obligation falls under Article III:1.”²⁴⁴

The 1984 Panel Report on “Canada - Administration of the Foreign Investment Review Act” examined also a claim by the United States that purchase undertakings (see pages 165 above) which obliged the investor to purchase in Canada a specified amount or proportion of his requirements were contrary to Article III:5.

²⁴¹E/CONF.2/C.3/A/W.49, p. 2.

²⁴²E/CONF.2/C.3/SR.41, p. 2.

²⁴³E/CONF.2/C.3/A/W.38, p. 2.

²⁴⁴L/4599, adopted on 14 March 1978, 25S/49, 64-65, paras. 4.5-4.6.

“... The Panel noted that these cases had been characterized by both parties as *purchase* undertakings ... and had also been presented as such by the United States. ... In this regard the Panel noted that in paragraph 5 of Article III the conditions of purchase are not at issue but rather the existence of internal quantitative regulations relating to the mixture, processing or use of products (irrespective of whether these are purchased or obtained by other means). On the basis of the presentations made, the Panel (which was unable to go into a detailed examination of individual cases where purchase undertakings referred to percentages or specific amounts) therefore did not find sufficient grounds to consider the undertakings in question in the light of Article III:5, but came to the conclusion that they fell under the purchase requirements that had been found inconsistent with Article III:4.”²⁴⁵

In the 1994 Panel Report on “United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco”,

“The Panel noted that both Article III:5 and Article III:4 deal with internal regulations, but that Article III:5 is the more specific of the two provisions. In view of the Panel's finding of inconsistency of the DMA with Article III:5, and following the reasoning enunciated in paragraph 69, the Panel considered that it would not be necessary to examine the consistency of the DMA with Article III:4.”²⁴⁶

8. Paragraph 8

(1) *Paragraph 8(a): “procurement by governmental agencies”*

The ITO Charter, as proposed in the original United States draft, would have provided for national and most-favoured-nation treatment in respect of governmental purchases of supplies for governmental use. However, this provision was deleted from the London Draft Charter “as it appears to the Preparatory Committee that an attempt to reach agreement on such a commitment would lead to exceptions almost as broad as the commitment itself”.²⁴⁷ See also the material on the drafting history of Article XVII:2 under that provision.

During discussions in Sub-Committee A at Havana, it was agreed that “paragraph 5 [III:8] was an exception to the whole of Article 18 [III]”.²⁴⁸ It was noted later that “the Sub-Committee had considered that the language of paragraph 8 would except from the scope of Article 18 [III] and hence from Article 16 [I], laws, regulations and requirements governing purchases effected for governmental use where resale was only incidental”.²⁴⁹

During discussions at Havana, in response to a question regarding the case of a government which received tied loans and purchased equipment from the countries granting the loans, and which might resell such equipment later to private enterprises, it was stated that paragraph 8 “had been redrafted by the Sub-Committee specifically to cover purchases made originally for governmental purposes and not with a view to commercial resale, which might nevertheless later be sold; nor ... [could] Article 18 [III] be construed as applying to contracts for purchases in foreign countries, since paragraph 8 refers only to laws, regulations or requirements relating to mixture, processing or use, which might grant protection or give more favourable treatment to domestic as opposed to foreign products”.²⁵⁰

²⁴⁵L/5504, adopted on 7 February 1984, 30S/140, 162, para. 5.13.

²⁴⁶DS44/R, adopted on 4 October 1994, para. 72. The footnote to this paragraph provides as follows: “Cf. Report of the panel on United States - Measures Affecting Alcoholic and Malt Beverages, adopted on 19 June 1992, BISD 39S/206, 270, where that panel found that it would not be appropriate to consider Canada's Article III:1 allegations to the extent that it found the U.S. measures to be inconsistent with the more specific provisions of Articles III:2 and III:4.”

²⁴⁷London Report, p. 9, para. (d)(iv).

²⁴⁸E/CONF.2/C.3/A/W.39, p. 1.

²⁴⁹E/CONF.2/C.3/SR.41, p. 3.

²⁵⁰E/CONF.2/C.3/SR.41.

The 1979 Agreement on Government Procurement negotiated in the Tokyo Round of Trade Negotiations, as amended in 1988, provides in Article II:

“1. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, the Parties shall provide immediately and unconditionally to the products and suppliers of other Parties offering products originating within the customs territories (including free zones) of the Parties, treatment no less favourable than:

- (a) that accorded to domestic products and suppliers; and
- (b) that accorded to products and suppliers of any other Party.

“2. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, the Parties shall ensure:

- (a) that their entities shall not treat a locally-established supplier less favourably than another locally-established supplier on the basis of degree of foreign affiliation or ownership;
- (b) that their entities shall not discriminate against locally-established suppliers on the basis of the country of production of the good being supplied, provided that the country of production is a Party to the Agreement in accordance with the provisions of paragraph 4 of this Article.

“3. The provisions of paragraph 1 shall not apply to customs duties and charges of any kind imposed on or in connexion with importation, the method of levying such duties and charges, and other import regulations and formalities.”²⁵¹

(a) “governmental”

The report of the Sub-committee which examined the national treatment articles of the Charter at Geneva provides that this “word was intended to include all governmental bodies, including local authorities”.²⁵²

The 1952 Panel Report on “Belgian Family Allowances” examined a Belgian law imposing a 7.5 per cent levy on foreign goods purchased by public bodies when these goods originated in countries whose system of family allowances did not meet specific requirements. Having found that this levy was an internal charge under Article III:2, and further that the m.f.n. requirements of Article I:1 applied to the exemptions from the levy, the Panel further observed that:

“[the] undertaking to extend an exemption of an internal charge unconditionally is not qualified by any other provision of the Agreement. The Panel did not feel that the provisions of paragraph 8(a) of Article III were applicable in this case as the text of the paragraph referred only to laws, regulations and requirements and not to internal taxes or charges. As regards the exception contained in paragraph 2 of Article XVII, it would appear that it referred only to the principle set forth in paragraph 1 of that Article, i.e. the obligation to make purchases in accordance with commercial considerations, and did not extend to matters dealt with in Article III”.²⁵³

See also Article I:1(c) and 2 of the Agreement on Government Procurement of 1979.²⁵⁴

The Panel Report on “United States - Procurement of a Sonar Mapping System”, which has not been adopted, examined as a threshold issue whether the acquisition of a sonar mapping system by a private company, Antarctic Support Associates (ASA), in connection with a contract between ASA and the US

²⁵¹26S/33, 35 and 34S/12, 13.

²⁵²EPCT/174, p. 9.

²⁵³G/32, adopted on 7 November 1952, 1S/59, 60, para. 4.

²⁵⁴26S/34.

National Science Foundation (NSF), was a government procurement subject to the obligations of the Agreement on Government Procurement or a private procurement subject to the disciplines of the GATT.

“The Panel noted that there was no definition of government procurement in the Agreement. The scope of the Agreement was instead determined by the wording of Article I which spoke of ‘any procurement of products ... by’ covered entities. It specified further that procurement could be ‘through such methods as purchase or as lease, rental or hire-purchase, with or without an option to buy’. The Panel considered that, since these methods were all means of obtaining the use or benefit of a product, the word ‘procurement’ could be understood to refer to the obtaining of such use or benefit. At the same time, the wording of Article I:1(a) made it clear that such use was to be obtained through procurement ‘by’ an entity, which suggests that the entity has some form of controlling influence over the obtaining of the product.

“Some guidance as to the meaning of government procurement can be obtained from examination of those provisions of the General Agreement in which reference is made to it. The Panel noted that the General Agreement, in referring to government procurement, spoke in terms of ‘products for immediate or ultimate consumption in governmental use’ (Article XVII:2), and ‘procurement by governmental agencies of products purchased for governmental purposes’ (Article III:8(a)). The Panel noted that the emphasis in these provisions on the concepts of governmental use, governmental purposes and procurement by government agencies supported its own understanding of the concept of government procurement as explained in paragraph 4.7 below.

“While not intending to offer a definition of government procurement within the meaning of Article I:1(a), the Panel felt that in considering the facts of any particular case the following characteristics, none of which alone could be decisive, provide guidance as to whether a transaction should be regarded as government procurement within the meaning of Article I:1(a): payment by government, governmental use of or benefit from the product, government possession and government control over the obtaining of the product.

“In the present case the European Community suggested that the fact that the procurement of the sonar mapping system would take place by means of a contract between two private companies could lead to the conclusion that it is a private transaction outside the scope of the Agreement. The Panel concurred with the Community’s view that this would normally be the case; the purchase by service contractors of products they need in order to be able to render the services contracted for would not normally be government procurement. The fact that government money was used would not necessarily overturn such a view. Nor would the fact that a number of conditions and guarantees relating to the procurement were required by the government necessarily lead to the conclusion that it was procurement by the government; they could simply reflect normal concern for the proper use of government funds.

“However, there were a number of factors in this case which, when taken together, led the Panel to conclude that it was indeed a case of government procurement. The Panel noted first that payment for the system would be made with government money; due to the contractually-prescribed reimbursement of ASA’s costs by the NSF, the purchase money for the system remained government money. The amount of the purchase was also specifically determined by the government, with the maximum permissible price legislatively prescribed (Section 307 of P.L. 101-302).

“Secondly, the NSF would take title to the sonar mapping system as of the time of its delivery; at no stage would it become the property of ASA. Having obtained title at the moment of the purchase the NSF, at the expiry of the contract with ASA, would be able to choose whether to continue to use, or to dispose of, the system. Whereas ownership is not a necessary element of government procurement, as is clear from the various methods of procurement mentioned in Article I:1(a), transfer of title to the Government is a strong indication that government procurement is involved. The NSF would also enjoy the benefits of the system’s purchase - Antarctic research and the preparation of seabed maps - which were clearly for government purposes, and the Government can thus be regarded as the ultimate beneficiary of the system.

“Thirdly, the Panel noted that the selection of the system was subject to the final approval of the NSF, which also retained the right to cancel the contract between ASA and the supplier of the sonar mapping system, with compensation, at its convenience. Other indicators of the extent of the Government’s control of the procurement, perhaps less significant, include the fact that the NSF attached to the procurement many non-technical requirements, some of which could influence the final selection of the system. These requirements include the application of numerous Federal Acquisition Regulations (FARs), including the ‘Buy American’ domestic sourcing rules, implementing various social and political objectives of the United States Government.

“Fourthly, the Panel noted that the nature of the contract between the NSF and ASA meant that ASA would have no commercial interest in the transaction in the sense of a profit motive or a commercial risk, since it would not directly profit from the selection of the lowest-cost bid among competing manufacturers of sonar mapping systems. In making its selection therefore ASA would be functioning less like a private buyer than like a procurement agency acting on behalf of a third party.

“The Panel concluded that, in the light of the Government’s payment for, ownership and use of the sonar mapping system and given the extent of its control over the obtaining of the system, the acquisition of the sonar mapping system was government procurement within the meaning of Article I:1(a), first sentence, and not ‘private’ procurement outside the Agreement as proposed in the alternative by the European Community.”²⁵⁵

- (b) *“not with a view to commercial resale or with a view to use in the production of goods for commercial sale”*

At Havana, paragraph 8(a) of Charter Article 18 on national treatment was revised by adding the word “commercial” before “resale” and “sale”. This change was brought into the General Agreement in 1948 when the original text of Article III was replaced by the text of Article 18 of the Charter; however, the parallel changes which were made at Havana to paragraph 2 of Article 29 (on government procurement) were not brought over into the text of paragraph 2 of Article XVII.²⁵⁶

See also the Interpretative Note to paragraph 2 of Article XVII (non-application of state trading obligations to government procurement) where it is stated in respect of the terms “production of goods” that “The term ‘goods’ is limited to products as understood in commercial practice, and is not intended to include the purchase or sale of services”.

The Report of the Working Party on “Accession of Venezuela” notes that

“Referring to the purchases by state enterprises, some members questioned whether the buy national provisions of Decree 1182 were consistent with the provisions of Articles XVII and III of the General Agreement. A member added that in order to conform to Article III obligations the preference provided by Decree 1182 should only be applied to imports by the State for its own consumption and not to imports by enterprises engaged in normal commerce. ... The representative of Venezuela ... confirming that Decree 1182 provided a buy-Venezuela preference ... noted that its provisions did not distinguish between Government purchases for governmental use and purchases by State enterprises for commercial purposes.

“The representative of Venezuela ... stated that by 30 June 1994, his Government would ensure that Decree 1182 will be brought into conformity with Article III of the General Agreement, and that its application to purchases other than those for ultimate consumption in governmental use would not deny the benefits of Article III to imports from other contracting parties. The representative of Venezuela also stated that if Decree 1182 was still in effect at that time without the above-mentioned actions having been taken, the matter will be reviewed by the CONTRACTING PARTIES. The representative of Venezuela further

²⁵⁵GPR.DS1/R, dated 23 April 1992 (unadopted), paras. 4.5-4.13.

²⁵⁶Working Party Report on “Modifications to the General Agreement”, GATT/CP.2/22/Rev.1, adopted 1-2 September 1948, II/39.

confirmed that his Government would, if requested, consult with interested contracting parties concerning the effect of Decree 1182 on their trade”.²⁵⁷

(c) *Tied loans*

See the reference to tied loans above at page 190. A Brazilian proposal in the Review Session that the General Agreement be amended to prohibit tied loans so that funds could be spent in the cheapest markets was not adopted.²⁵⁸

See also Interpretative Note ad Article XVII, paragraph 1(b).

A Note relating to Article I:1 of the Agreement on Government Procurement states:

“Having regard to general policy considerations relating to tied aid, including the objective of developing countries with respect to the untying of such aid, this Agreement does not apply to procurement made in furtherance of tied aid to developing countries so long as it is practised by Parties”.²⁵⁹

(2) *Paragraph 8(b): “payment of subsidies exclusively to domestic producers”*

The chairman of the working party of Sub-Committee A which redrafted Article 18 at Havana explained that “the Working Party had tried to clarify the wording of sub-paragraph (b). This provision had been added to the Geneva draft because it was felt that if subsidies were paid on domestic and not on imported products, it might be construed that Members were not applying the ‘national treatment’ rule”.²⁶⁰

The Report of the Sub-Committee at the Havana Conference which examined Article 18 of the Charter (the text of which constitutes Article III of the General Agreement) notes with respect to paragraph 8(b) that

“This sub-paragraph was redrafted in order to make it clear that nothing in Article 18 could be construed to sanction the exemption of domestic products from internal taxes imposed on like imported products or the remission of such taxes. At the same time the Sub-Committee recorded its view that nothing in this sub-paragraph or elsewhere in Article 18 would override the provisions of Section C of Chapter IV [on Subsidies]”.²⁶¹

The 1958 Panel Report on “Italian Discrimination against Agricultural Machinery,” which examined the consistency with Article III:4 of an Italian law providing special credit facilities to farmers for the purchase of agricultural machinery produced in Italy, notes that the “Panel agreed with the contention of the United Kingdom delegation that in any case the provisions of paragraph 8(b) would not be applicable to this particular case since the credit facilities provided under the Law were granted to the purchasers of agricultural machinery and could not be considered as subsidies accorded to the producers of agricultural machinery”.²⁶²

The 1990 Panel Report on “European Economic Community - Payments and Subsidies paid to Processors and Producers of Oilseeds and related Animal-Feed Proteins” examined EEC legislation providing for payment of subsidies to processors of oilseeds whenever they established by documentary evidence that they had transformed oilseeds of Community origin.

“The Panel first examined the United States’ claim that the payments to processors generate an incentive to purchase domestic rather than imported oilseeds inconsistently with Article III:4. The Panel noted that the Community considers the payments made to processors to be covered by Article III:8(b) which provides that Article III ‘... shall not prevent the payment of subsidies exclusively to domestic

²⁵⁷L/6696, adopted on 11 July 1990, 37S/43, 65-66, paras. 70-71.

²⁵⁸SR.9/18, p. 1; see also 3S/243, para. 37.

²⁵⁹26S/55.

²⁶⁰E/CONF.2/C.3/A/W.49, p. 2.

²⁶¹Havana Reports, p. 66, para. 69; see also E/CONF.2/C.3/SR.13 p. 1-2.

²⁶²L/833, adopted on 23 October 1958, 7S/60, 64, para. 14.

producers ...’ The Community argues that the payments to processors are made conditional upon the transformation or purchase of domestic oilseeds sold at prices determined by the Community Regulations, are therefore passed on to the producers of domestic oilseeds and consequently constitute producer subsidies within the meaning of that provision.

“The Panel noted that Article III:8(b) applies only to payments made *exclusively* to domestic producers and considered that it can reasonably be assumed that a payment not made directly to producers is not made ‘exclusively’ to them. It noted moreover that, if the economic benefits generated by the payments granted by the Community can at least partly be retained by the processors of Community oilseeds, the payments generate a benefit conditional upon the purchase of oilseeds of domestic origin inconsistently with Article III:4. Under these circumstances Article III:8(b) would not be applicable because in that case the payments would not be made exclusively to domestic producers but to processors as well.”²⁶³

The 1992 Panel Report on “United States - Measures Affecting Alcoholic and Malt Beverages” examined a United States tax measure providing a credit against excise taxes for small United States producers of beer and wine, which was not available for imported beer and wine. The Panel found that this tax law operated to create lower tax rates on domestic beer and wine than on like imported products.

“The Panel then considered the additional argument of the United States that the lower federal excise tax rate was allowable as a subsidy to domestic producers under Article III:8(b). The United States maintained that the clear intent of the lower tax was to subsidize small producers and that reduction in the rate of the excise tax was a GATT-consistent means of providing such a subsidy....

“The Panel noted that in contrast to Article III:8(a), where it is stated that ‘this Article *shall not apply to* ... [government procurement]’, the underlined words are not repeated in Article III:8(b). The ordinary meaning of the text of Article III:8(b), especially the use of the words ‘shall not prevent’, therefore suggests that Article III does apply to subsidies, and that Article III:8(b) only clarifies that the *product-related* rules in paragraphs 1 through 7 of Article III ‘shall not prevent the payment of subsidies exclusively to domestic *producers*’ (emphasis added). The words ‘payment of subsidies’ refer only to direct subsidies involving a payment, not to other subsidies such as tax credits or tax reductions. The specific reference to ‘payments derived from the proceeds of internal taxes ... applied consistently with the provisions of this Article’ relates to after-tax-collection payments and also suggests that tax credits and reduced tax rates inconsistent with Article III:2, which neither involve a ‘payment’ nor result in ‘proceeds of internal taxes applied consistently with ... this Article’, are not covered by Article III:8(b).

“This textual interpretation is confirmed by the context, declared purpose and drafting history of Article III. The context of Article III shows its close interrelationship with the fundamental GATT provisions in Articles I and II and the deliberate separation of the comprehensive national treatment requirements in Article III from the subsidy rules in Article XVI. The most-favoured-nation requirement in Article I, and also tariff bindings under Article II, would become ineffective without the complementary prohibition in Article III on the use of internal taxation and regulation as a discriminatory non-tariff trade barrier. The additional function of the national treatment requirements in Article III to enhance non-discriminatory conditions of competition between imported and domestic products could likewise not be achieved. As any fiscal burden imposed by discriminatory internal taxes on imported goods is likely to entail a trade-distorting advantage for import-competing domestic producers, the prohibition of discriminatory internal taxes in Article III:2 would be ineffective if discriminatory internal taxes on imported products could be generally justified as subsidies for competing domestic producers in terms of Article III:8(b).

“Article III:8(b) limits, therefore, the permissible producer subsidies to ‘payments’ after taxes have been collected or payments otherwise consistent with Article III. This separation of tax rules, e.g. on tax

²⁶³L/6627, adopted on 25 January 1990, 37S/86, 124, paras. 136-137.

exemptions or reductions, and subsidy rules makes sense economically and politically. Even if the proceeds from non-discriminatory product taxes may be used for subsequent subsidies, the domestic producer, like his foreign competitors, must pay the product taxes due. The separation of tax and subsidy rules contributes to greater transparency. It also may render abuses of tax policies for protectionist purposes more difficult, as in the case where producer aids require additional legislative or governmental decisions in which the different interests involved can be balanced.

“The Panel considered that the drafting history of Article III confirms the above interpretation. The Havana Reports recall in respect of the provision corresponding to Article III:8(b):

‘This sub-paragraph was redrafted in order to make it clear that nothing in Article [III] could be construed to sanction the exemption of domestic products from internal taxes imposed on like imported products or the remission of such taxes. At the same time the Sub-Committee recorded its view that nothing in this sub-paragraph or elsewhere in Article [III] would override the provisions [of Article XVI]’.²⁶⁴

“The drafters of Article III explicitly rejected a proposal by Cuba at the Havana Conference to amend the Article to read:

‘The provisions of this Article shall not preclude the exemption of domestic products from internal taxes as a means of indirect subsidization in the cases covered under Article [XVI]’.²⁶⁵

“The Panel found, therefore, that the expansive interpretation of Article III:8(b) suggested by the United States is not supported by the text, context, declared purpose and drafting history of Article III and, if carried to its logical conclusion, such an interpretation would virtually eliminate the prohibition in Article III:2 of discriminatory internal taxation by enabling contracting parties to exempt all domestic products from indirect taxes. The Panel accordingly found that the reduced federal excise tax rates on beer are not covered by Article III:8(b).”²⁶⁶

In the 1994 Panel Report on “United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco”, the panel examined a claim regarding the No Net Cost Assessment (“NNCA”) levied on domestic and imported tobacco, the proceeds of which were deposited in an account used to reimburse the U.S. Government for any losses resulting from the domestic tobacco price-support programme.

“The Panel was cognizant of the fact that a remission of a tax on a product and the payment of a producer subsidy out of the proceeds of such a tax could have the same economic effects. However, the Panel noted that the distinction in Article III:8(b) is a formal one, not one related to the economic impact of a measure. Thus, in view of the explicit language of Article III:8(b), which recognizes that the product-related rules of Article III ‘shall not prevent the payment of subsidies exclusively to domestic producers’, the Panel did not consider, as argued by the complainants, that the payment of a subsidy to tobacco producers out of the proceeds of the NNCA resulted in a form of tax remission inconsistent with Article III:2.”²⁶⁷

...

“The Panel then considered the complainants' claim that the NNCA was inconsistent with Article III:2, second sentence, because the NNCA charged on imported tobacco reduced the cost of the price support programme to the domestic tobacco producer, without providing any benefit to imported tobacco. The Panel did not consider that it needed to examine this claim in view of the fact that

²⁶⁴The footnote to this paragraph refers to Havana Reports, page 66.

²⁶⁵The footnote to this paragraph refers to E/CONF.2/C.3/6, page 17; E/CONF.2/C.3/A/W.32, page 2.

²⁶⁶DS23/R, adopted 19 June 1992, 39S/206, 271-273, paras. 5.7-5.12.

²⁶⁷The footnote to this paragraph notes: “See report of the panel on United States - Measures Affecting Alcoholic and Malt Beverages, adopted on 19 June 1992, BISD 39S/206, 271-273 for a discussion of the reasons for the distinction in GATT between tax exemptions and remissions on the one hand and producer subsidies on the other.”

Article III:8(b), which explicitly recognizes that subsidies to domestic producers are not subject to the national treatment rules of Article III, applies to all provisions of Article III, including that of Article III:2, second sentence.”²⁶⁸

See also material on this panel report above.

9. Paragraph 9

During discussions on this paragraph at Havana it was agreed to retain it in Article 18 [III] “on the grounds that ‘internal maximum price control measures’ were internal regulations within the terms of paragraphs 1 and 4 of Article 18”.²⁶⁹ At Havana it was also stated that “this provision would apply in the case of a country establishing a maximum control price for a commodity of which that country was such an important consumer that its price was likely to become the effective world price. If such a price were too low, it would be prejudicial to the interests of exporting countries”.²⁷⁰

The Report of the Working Party on “Accession of El Salvador” contains, *inter alia*, the statement of the representative of El Salvador that “from the date of accession, price regulations would be applied in conformity with Article III:9 of the General Agreement”.²⁷¹

10. Paragraph 10

See the chapter on Article IV regarding the background of paragraph 10 and Article IV. The exception in Paragraph 10 to the general provisions of Article III is defined therein as applying to “internal quantitative regulations relating to exposed cinematograph films and meeting the requirements of Article IV”. As for taxes on films, the Report of the Working Party on “Accession of the United Arab Republic” discusses a “film tax” in relation to Article III:2 and the Protocol of Provisional Accession.²⁷² See also references to the New Zealand film hire tax and renters’ film quota in Annex A of the General Agreement.

B. RELATIONSHIP WITH OTHER ARTICLES OF THE GENERAL AGREEMENT

1. Article I

The unconditional most-favoured-nation clause in Article I:1 includes within its scope “all matters referred to in paragraphs 2 and 4 of Article III”. In response to a request for an interpretation of paragraph 1 of Article I with respect to rebates of excise duties, the Chairman of the CONTRACTING PARTIES ruled on 24 August 1948 that “the most-favoured-nation treatment principle embodied in that paragraph would be applicable to any advantage, favour, privilege or immunity granted with respect to internal taxes”.²⁷³ Under the Protocol Amending Part I and Articles XXIX and XXX of the General Agreement, which was agreed in the Review Session of 1954-55, the words “and with respect to the application of internal taxes to exported goods” would have been included in paragraph 1 to remove any uncertainty as to the application of Article I to discrimination in the exemption of exports from the levy of an excise tax.²⁷⁴ See further under Article I:1.

The 1952 Panel Report on “Belgian Family Allowances” examined a Belgian law providing for a charge to be levied on foreign goods purchased by public bodies when these goods originated in a country whose system of family allowances did not meet specific requirements. Having found that this charge was an internal charge under Article III:2 (see below), the Panel noted:

²⁶⁸DS44/R, adopted 4 October 1994, para. 109, III.

²⁶⁹E/CONF.2/C.3/A/W.49, p. 3; see also E/CONF.2/C.3/A/W.46 and E/CONF.2/C.3/A/W.48 p. 1-2.

²⁷⁰E/CONF.2/C.3/A/W.46 p. 3.

²⁷¹L/6771, adopted on 12 December 1990, 37S/9, 21, para. 36.

²⁷²L/3362, adopted on 27 February 1970, 17S/33, 37, para. 17.

²⁷³II/12, CP.2/SR.11, CP.3/SR.19.

²⁷⁴3S/206, para. 3. This Protocol was abandoned as of 31 December 1967; see 15S/65.

“Belgium has granted exemption from the levy under consideration to products purchased by public bodies when they originate in Luxemburg and the Netherlands, as well as in France, Italy, Sweden and the United Kingdom. If the General Agreement were definitively in force in accordance with Article XXVI, that exemption would have to be granted unconditionally to all other contracting parties. ... The consistency or not of the system of family allowances in force in the territory of a given contracting party with the requirements of the Belgian law would be irrelevant in this respect, and the Belgian legislation would have to be amended insofar as it introduced a discrimination between countries having a given system of family allowances and those which had a different system or no system at all, and made the granting of an exemption dependent on certain conditions”.²⁷⁵

See also the Note *Ad* Article I:1, which provides that “The obligations incorporated in paragraph 1 of Article I by reference to paragraphs 2 and 4 of Article III ... shall be considered as falling within Part II for the purposes of the Protocol of Provisional Application”. See further on page 204 below.

The 1987 Panel Report on “Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages” examined, *inter alia*, a claim by the EEC under Article III:1 and 2 with respect to these duties, taxes and labelling practices. In interpreting Article III:2, the Panel examined its context:

“The *context* of Article III:2 shows that Article III:2 supplements, within the system of the General Agreement, the provisions on the liberalization of customs duties and of other charges by prohibiting discriminatory or protective taxation against certain products from other GATT contracting parties. ... For instance, the prohibition under GATT Article I:1 of different tariff treatment for various types of ‘like’ products (such as unroasted coffee, see BISD 28S/102, 112) could not remain effective unless supplemented by the prohibition of different internal tax treatment for various types of ‘like’ products. ... Article I:1 was generally construed, in order to protect the competitive benefits accruing from reciprocal tariff bindings, as prohibiting ‘tariff specialization’ discriminating against ‘like’ products”.²⁷⁶

The 1990 Panel Report on “EEC - Regulation on Imports of Parts and Components” examined, *inter alia*, a claim by Japan that since the EEC Regulation at issue provided for imposition of duties on products produced or assembled in the EEC on the basis of the proportion of parts imported from Japan used in production or assembly of such products, imposition of duties or acceptance of undertakings under that Regulation was inconsistent with Articles I and II or III. The Panel “found that the anti-circumvention duties are not levied ‘on or in connection with importation’ within the meaning of Article II:1(b), and therefore do not constitute customs duties within the meaning of that provision”.²⁷⁷ It then “found that the anti-circumvention duties are inconsistent with Article III:2, first sentence, [and] saw no need for examining whether the anti-circumvention duties are also inconsistent with the obligations of the EEC under Article III:2, second sentence, and Article I:1”.²⁷⁸ The Panel “found the acceptance by the EEC of parts undertakings limiting the use of imported parts and components to be inconsistent with Article III:4, [and therefore] saw no need for examining whether the acceptance of such undertakings is also inconsistent with Article I:1 of the General Agreement”.²⁷⁹

See also the discussion of the relation between Article I and III in the unadopted 1994 Panel Report on “EEC - Import Régime for Bananas”.²⁸⁰

2. Article II

A number of panels have examined whether a measure was an internal tax or charge (under Article III) or a duty or charge “imposed on or in connection with importation” (under Article II). In the 1952 Panel

²⁷⁵G/32, adopted on 7 November 1952, 1S/59, 60, para. 3.

²⁷⁶L/6216, adopted on 10 November 1987, 34S/83, 113-114, para. 5.5(b).

²⁷⁷L/6657, adopted on 16 May 1990, 37S/132, 193 para. 5.8.

²⁷⁸*Ibid.*, 37S/193-194, para. 5.10.

²⁷⁹*Ibid.*, 37S/197-198, para. 5.22.

²⁸⁰DS38/R, dated 11 February 1994, paras. 143-148.

Report on “Belgian Family Allowances” the Panel began by examining the nature of the Belgian law in question:

“After examining the legal provisions regarding the methods of collection of that charge, the Panel came to the conclusion that the 7.5 per cent levy was collected only on products purchased by public bodies for their own use and not on imports as such, and that the levy was charged, not at the time of importation, but when the purchase price was paid by the public body. In those circumstances, it would appear that the levy was to be treated as an ‘internal charge’ within the meaning of paragraph 2 of Article III of the General Agreement, and not as an import charge within the meaning of paragraph 2 of Article II”.²⁸¹

The 1978 Panel Report on “EEC - Measures on Animal Feed Proteins” examined an EEC Regulation requiring domestic producers or importers of oilseeds, cakes and meals, dehydrated fodder and compound feeds and importers of corn gluten feed to purchase a certain quantity of surplus skimmed milk powder held by intervention agencies and to have it denatured for use as feed for animals other than calves. The Panel examined the consistency with Articles II and III of these aspects of the Regulation and of the requirement for producers and importers to present either a protein certificate (certifying the purchase and denaturing of a certain quantity of milk powder) or a security deposit.

“The Panel ... considered the question of whether the EEC measures should be examined both as internal measures under Article III and border measures under Article II. In this regard, the Panel reviewed the drafting history of Articles II and III and their subsequent application by contracting parties, particularly with a view to ascertaining the relationship between these two Articles...

“The Panel also recalled its own findings that (a) the EEC measures applied to both imported and domestically produced vegetable proteins (except in the case of corn gluten); (b) the EEC measures basically instituted an obligation to purchase a certain quantity of skimmed milk powder and, as an ‘internal quantitative regulation’ fell under Article III:1; (c) the EEC security deposit and protein certificate were enforcement mechanisms for the purchase obligation.

“Having regard to the legal considerations referred to above and taking account of its own findings in relation to Article III:5 and Article III:1 that the EEC measures were an ‘internal quantitative regulation’, the Panel concluded that the EEC measures should be examined as internal measures under Article III and not as border measures under Article II”.²⁸²

In the 1985 Panel Report on “Canada - Measures Affecting the Sale of Gold Coins,” which has not been adopted,

“The Panel noted that Articles III and II of the General Agreement distinguish between charges applied to products ‘imported into the territory of any other contracting party’ (Article III:2) and charges ‘imposed on or in connection with importation’ (Article II:1(b) ... The Panel noted that the Ontario retail sales tax is levied at the time of retail sale of goods within the province, not at the time of importation into Canadian territory (see para. 5 above). The Ontario measure thus affects the internal retail sale of gold coins rather than the importation of Krugerrands as such. The Panel therefore considered that the tax was an ‘internal tax’ to be considered under Article III and not an ‘import charge’ to be considered under Article II”.²⁸³

The 1988 Panel Report on “Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies”

“...noted that Article 31:6 of the Havana Charter provided that ‘in applying the provisions of this Article, due regard shall be had for the fact that some monopolies are established and operated mainly

²⁸¹ G/32, adopted on 7 November 1952, 1S/59, 60, para. 2. See also page 191, 197 above.

²⁸² L/4599, adopted on 14 March 1978, 25S/49, 66-67, paras. 4.15, 4.17, 4.18.

²⁸³ L/5863, unadopted, dated 17 September 1985, para. 50.

for social, cultural, humanitarian or revenue purposes'. While the drafting history indicated that Article 31 should be applied to the extent that it was relevant to the context of the General Agreement, the Panel considered that Canada had the right to use import monopolies to raise revenue for the provinces, consistently with the provisions of the General Agreement. The Panel also considered that its conclusions on Article II:4 did not affect this right, because Article II:4, applied in the light of Article 31:4 of the Charter, permitted the charging of internal taxes conforming to the provisions of Article III. It noted that federal and provincial sales taxes were levied on alcoholic beverages and asked itself whether the fiscal elements of mark-ups, which produced revenue for the provinces, could also be justified as 'internal taxes conforming to the provisions of Article III', noting that Article III:2 also referred, not only to 'internal taxes', but also to 'other internal charges.' The panel was of the view that to be so considered, the fiscal element of mark-ups must of course meet the requirements of Article III, e.g., they must not be applied to imported or domestic products so as to afford protection to domestic production. The Panel also considered it important that, if fiscal elements were to be considered as internal taxes, mark-ups would also have to be administered in conformity with other provisions of the General Agreement, in particular Article X dealing with the Publication and Administration of Trade Regulations".²⁸⁴

In the 1990 Panel Report on "EEC - Regulation on Imports of Parts and Components," the Panel examined the argument of the EEC that the anti-circumvention duties at issue were customs or other duties imposed "on or in connection with importation" under Article II:1(b), or internal taxes or charges falling under Article III:2.

"The Panel noted that the anti-circumvention duties are levied, according to Article 13:10(a), 'on products that are introduced into the commerce of the Community after having been assembled or produced in the Community'. The duties are thus imposed, as the EEC explained before the Panel, not on imported parts or materials but on the finished products assembled or produced in the EEC. They are not imposed conditional upon the importation of a product or at the time or point of importation. The EEC considers that the anti-circumvention duties should, nevertheless, be regarded as customs duties imposed 'in connection with importation' within the meaning of Article II:1(b). The main arguments the EEC advanced in support of this view were: firstly, that the purpose of these duties was to eliminate circumvention of anti-dumping duties on finished products and that their nature was identical to the nature of the anti-dumping duties they were intended to enforce; and secondly, that the duties were collected by the customs authorities under procedures identical to those applied for the collection of customs duties, formed part of the resources of the EEC in the same way as customs duties and related to parts and materials which were not considered to be 'in free circulation' within the EEC.

"In the light of the above facts and arguments, the Panel first examined whether the *policy purpose of a charge* is relevant to determining the issue of whether the charge is imposed 'in connection with importation' within the meaning of Article II:1(b). The text of Articles I, II, III and the Note to Article III refers to charges 'imposed on importation', 'collected ... at the time or point of importation' and applied 'to an imported product and to the like domestic product'. The relevant fact, according to the text of these provisions, is not the policy purpose attributed to the charge but rather whether the charge is due on importation or at the time or point of importation or whether it is collected internally. This reading of Articles II and III is supported by their drafting history and by previous panel reports (e.g. BISD 1S/60; 25S/49, 67). ... The Panel further noted that the policy purpose of charges is frequently difficult to determine objectively. Many charges could be regarded as serving both internal purposes and purposes related to the importation of goods. Only at the expense of creating substantial legal uncertainty could the policy purpose of a charge be considered to be relevant in determining whether the charge falls under Article II:1(b) or Article III:2. The Panel therefore concluded that the policy purpose of the charge is not relevant to determining the issue of whether the charge is imposed in 'connection with importation' within the meaning of Article II:1(b).

²⁸⁴L/6304, adopted on 22 March 1988, 35S/37, 88-89, para. 4.20.

“The Panel proceeded to examine whether the mere *description or categorization of a charge under the domestic law* of a contracting party is relevant to determining the issue of whether it is subject to requirements of Article II or those of Article III:2. The Panel noted that if the description or categorization of a charge under the domestic law of a contracting party were to provide the required ‘connection with importation’, contracting parties could determine themselves which of these provisions would apply to their charges. They could in particular impose charges on products after their importation simply by assigning the collection of these charges to their customs administration and allocating the revenue generated to their customs revenue. With such an interpretation the basic objective underlying Articles II and III, namely that discrimination against products from other contracting parties should only take the form of ordinary customs duties imposed on or in connection with importation and not the form of internal taxes, could not be achieved. The same reasoning applies to the *description or categorization of the product subject to a charge*. The fact that the EEC treats imported parts and materials subject to anti-circumvention duties as not being ‘in free circulation’ therefore cannot, in the view of the Panel, support the conclusion that the anti-circumvention duties are being levied ‘in connection with importation’ within the meaning of Article II:1(b).

“In the light of the above, the Panel found that the anti-circumvention duties are not levied ‘on or in connection with importation’ within the meaning of Article II:1(b), and consequently do not constitute customs duties within the meaning of that provision.”²⁸⁵

3. Article XI

The Working Party on “The Haitian Tobacco Monopoly” in 1955 examined whether the licensing of tobacco imports by the Tobacco Régie required a release under the provisions of Article XVIII:12 (prior to the Review Session amendments to Article XVIII). “The representative of Haiti declared that the licensing system served solely to enforce the internal quantitative regulations of the Régie and did not impose any additional limitation of the quantity that may be imported. The Working Party therefore took the view that in these circumstances Article XI would not apply, that the import control should be considered under the terms of the exception in Article [XX:(d)] and that the internal regulation to which it relates should be considered under paragraphs 5 and 6 of Article III.”²⁸⁶ See also the references to this case above in the material on mixing regulations; see also the reference to border enforcement of mixing regulations under the Interpretative Note Ad Article III.

The 1984 Panel Report on “Canada - Administration of the Foreign Investment Review Act” notes that

“The Panel shares the view of Canada that the General Agreement distinguishes between measures affecting the ‘importation’ of products, which are regulated in Article XI:1, and those affecting ‘imported products’, which are dealt with in Article III. If Article XI:1 were interpreted broadly to cover also internal requirements, Article III would be partly superfluous. Moreover, the exceptions to Article XI:1, in particular those contained in Article XI:2, would also apply to internal requirements restricting imports, which would be contrary to the basic aim of Article III. The Panel did not find, either in the drafting history of the General Agreement or in previous cases examined by the CONTRACTING PARTIES, any evidence justifying such an interpretation of Article XI. For these reasons, the Panel, noting that purchase undertakings do not prevent the importation of goods as such, reached the conclusion that they are not inconsistent with Article XI:1.”²⁸⁷

The 1987 Panel Report on “United States - Taxes on Petroleum and Certain Imported Substances” provides that “The general prohibition of quantitative restrictions under Article XI and the national

²⁸⁵L/6657, adopted on 16 May 1990, 37S/132, 192-93, paras. 5.5-5.8. The “previous panel reports” referred to in para. 5.6 are the Reports on “Belgian Family Allowances”, G/32, adopted on 7 November 1952, 1S/59, 60, para. 2, and “EEC - Measures on Animal Feed Proteins”, L/4599, adopted on 14 March 1978, 25S/49, 67, paras. 4.16-4.18.

²⁸⁶L/454, adopted on 22 November 1955, 4S/38, 39, para. 9. Before the revision of Article XVIII in the Review Session, Article XVIII:12 provided for notification and concurrence with regard to certain measures affecting imports which were not otherwise permitted by the General Agreement.

²⁸⁷L/5504, adopted on 7 February 1984, 30S/140, 162-163, para. 5.14.

treatment obligation of Article III ... have essentially the same rationale, namely to protect expectations of the contracting parties as to the competitive relationship between their products and those of other contracting parties. Both articles are not only to protect current trade but also create the predictability needed to plan future trade".²⁸⁸

A series of three cases in 1988 and 1992 examined the application of Articles III and XI to regulations affecting imported alcoholic beverages in Canada and the United States. The 1988 Panel Report on "Canada - Import, Distribution and Sale of Alcoholic Drinks by Provincial Marketing Agencies" provides that

"The Panel ... *concluded* that the practices concerning listing/delisting requirements and the availability of points of sale which discriminate against imported alcoholic beverages were restrictions made effective through state-trading operations contrary to Article XI:1. ...

"The Panel then examined the contention of the European Communities that the practices complained of were contrary to Article III. The Panel noted that Canada did not consider Article III to be relevant to this case, arguing that the Interpretative Note to Articles XI, XII, XIII, XIV and XVIII made it clear that provisions other than Article XVII applied to state-trading enterprises by specific reference only. The Panel considered that it was not necessary to decide in this particular case whether the practices complained of were contrary to Article III:4 because it had already found that they were inconsistent with Article XI. However, the Panel saw great force in the argument that Article III:4 was also applicable to state-trading enterprises at least when the monopoly of the importation and monopoly of the distribution in the domestic markets were combined, as was the case of the provincial liquor boards in Canada. This interpretation was confirmed *e contrario* by the wording of Article III:8(a)".²⁸⁹

The 1992 Panel Report on "Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies" examined a United States claim that the practice of the liquor boards of Ontario to limit listing of imported beer to the six-pack size while according listings in different package sizes to domestic beer was inconsistent with the General Agreement.

"... The Panel noted that this package-size requirement, though implemented as a listing requirement, was in fact a requirement that did not affect the importation of beer as such but rather its offering for sale in certain liquor-board outlets. The Panel therefore considered that this requirement fell under Article III:4 of the General Agreement, which required, *inter alia*, that contracting parties accord to imported products '... treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal ... offering for sale ...'. The Panel *found* that the imposition of the six-pack configuration requirement on imported beer but not on domestic beer was inconsistent with that provision."²⁹⁰

With respect to restrictions imposed by provincial liquor authorities on access for imported beer to points of sale (with respect to which Canada invoked the Protocol of Provisional Application):

"The Panel which had examined in 1988 the practices of the Canadian liquor boards had analysed the restrictions on access to points of sale under Articles III:4 and XI:1 of the General Agreement. While that Panel had found these restrictions to be inconsistent with Canada's obligations under Article XI:1, it had also pointed out that it 'saw great force in the argument that Article III:4 was also applicable to State-trading enterprises at least when the monopoly of the importation and monopoly of the distribution in the domestic markets were combined, as was the case of the provincial liquor boards in Canada'. The present Panel, noting that Canada now considered Article III:4 to be applicable to practices of the liquor boards, examined this issue again. ... The Panel found that, by allowing the access of domestic beer to points of sale not available to imported beer, Canada accorded domestic beer competitive opportunities

²⁸⁸L/6175, adopted on 17 June 1987, 34S/136, 160, para. 5.2.2; see also reference to this passage in Panel Report on "European Economic Community - Payments and Subsidies paid to Processors and Producers of Oilseeds and related Animal-Feed Proteins", L/6627, adopted on 25 January 1990, 37S/86, 130, para. 150.

²⁸⁹L/6304, adopted 22 March 1988, 35S/37, 89-90, paras. 4.25-4.26.

²⁹⁰DS17/R, adopted 18 February 1992, 39S/27, 75, para. 5.4.

denied to imported beer. For these reasons the present Panel saw great force in the argument that the restrictions on access to points of sale were covered by Article III:4. However, the Panel considered that it was not necessary to decide whether the restrictions fell under Article XI:1 or Article III:4 because Canada was not invoking an exception to the General Agreement applicable only to measures taken under Article XI:1 (such as the exceptions in Articles XI:2 and XII) and the question of whether the restrictions violated Article III:4 or Article XI:1 of the General Agreement was therefore of no practical consequence in the present case”.²⁹¹

The Panel also examined minimum prices maintained for beer in certain provinces of Canada.

“The Panel first examined whether the minimum prices fell under Article XI:1 or Article III:4. The Panel noted that according to the Note *Ad Article III* a regulation is subject to the provisions of Article III if it ‘applies to an imported product and to the like domestic product’ even if it is ‘enforced in case of the imported product at the time or point of importation’. The Panel found that, as the minimum prices were applied to both imported and domestic beer, they fell, according to this Note under Article III.”²⁹²

The 1992 Panel on “United States - Measures Affecting Alcoholic and Malt Beverages” examined the listing requirements of state-operated liquor stores in certain US states:

“Having regard to the past panel decisions and the record in the instant case, the present Panel was of the view that the listing and delisting practices here at issue do not affect importation as such into the United States and should be examined under Article III:4. The Panel further noted that the issue is not whether the practices in the various states affect the right of importation as such, in that they clearly apply to both domestic (out-of-state) and imported wines; rather, the issue is whether the listing and delisting practices accord less favourable treatment – in terms of competitive opportunities – to imported wine than that accorded to the like domestic product. Consequently, the Panel decided to analyze the state listing and delisting practices as internal measures under Article III:4”.²⁹³

The 1991 Panel Report on “United States - Restrictions on Imports of Tuna,” which has not been adopted, examined the relationship between Articles III and XI, and found that the restrictions at issue were governed not by Article III but by Article XI.

“The Panel noted that Mexico had argued that the measures prohibiting imports of certain yellowfin tuna and yellowfin tuna products from Mexico imposed by the United States were quantitative restrictions on importation under Article XI, while the United States had argued that these measures were internal regulations enforced at the time or point of importation under Article III:4 and the Note *Ad Article III*, namely that the prohibition of imports of tuna and tuna products from Mexico constituted an enforcement of the regulations of the MMPA relating to the harvesting of domestic tuna.

“The Panel examined the distinction between quantitative restrictions on importation and internal measures applied at the time or point of importation, and noted the following. While restrictions on importation are prohibited by Article XI:1, contracting parties are permitted by Article III:4 and the Note *Ad Article III* to impose an internal regulation on products imported from other contracting parties provided that it: does not discriminate between products of other countries in violation of the most-favoured-nation principle of Article I:1; is not applied so as to afford protection to domestic production, in violation of the national treatment principle of Article III:1; and accords to imported products treatment no less favourable than that accorded to like products of national origin, consistent with Article III:4. ...

“... The Panel noted that the MMPA regulates the domestic harvesting of yellowfin tuna to reduce the incidental taking of dolphin, but that these regulations could not be regarded as being applied to tuna

²⁹¹*Ibid.*, 39S/75-76, para. 5.6.

²⁹²*Ibid.*, 39S/84, para. 5.28.

²⁹³DS23/R, adopted 19 June 1992, 39S/206, 292, para. 5.63.

products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product. Therefore, the Panel found that the import prohibition on certain yellowfin tuna and certain yellowfin tuna products of Mexico and the provisions of the MMPA under which it is imposed did not constitute internal regulations covered by the Note *Ad Article III*.²⁹⁴

In this connection see also the unadopted panel report of 1994 on “United States - Restrictions on Imports of Tuna”.²⁹⁵

4. Article XVII

See under Article XVII.

5. Article XX(d)

See under Article XX.

6. Article XXIV:12

See under Article XXIV.

7. Part IV

See under Part IV.

C. EXCEPTIONS AND DEROGATIONS

1. Exceptions to the scope of the national treatment requirement

See discussion above of paragraphs 3, 6, 8 and 10 of Article III.

2. Protocol of Provisional Application

The Report of the Working Party on “Brazilian Internal Taxes” notes that the majority of the members of the Working Party took the view

“... that the Protocol of Provisional Application limited the operation of Article III only in the sense that it permitted the retention of an absolute difference in the level of taxes applied to domestic and imported products, required by existing legislation, and that no subsequent change in legislation should have the effect of increasing the absolute margin of difference”.²⁹⁶

The Interpretative Note to Article I paragraph 1 provides that “The obligations incorporated in paragraph 1 of Article I by reference to paragraphs 2 and 4 of Article III ... shall be considered as falling within Part II for the purposes of the Protocol of Provisional Application”. The objective of this provision, which was based on a proposal by the US delegation, was to reserve legislation regarding preferential internal taxes until definitive acceptance of the Agreement.²⁹⁷ Similar provisions appear in the standard text of protocols of access; see discussion under Article I.

²⁹⁴DS21/R (unadopted) dated 3 September 1991, 39S/155, 193, 195, paras. 5.8-5.9, 5.14.

²⁹⁵DS29/R, dated 16 June 1994, para. 5.8-5.9.

²⁹⁶GATT/CP.3/42, adopted 30 June 1949, II/181, 183, para. 12.

²⁹⁷Proposal at EPCT/W/343; discussion at EPCT/TAC/PV/26, p. 9-II (referring to preferential internal tax on processing of coconut oil from the Philippines, later notified as measure under the Protocol of Provisional Application; see L/309/Add.2).

3. Protocols of accession

Paragraph 3 of the Protocol for the Accession of the Philippines to the General Agreement provides as follows.

“The Philippines intends to bring into line with Article III of the General Agreement, the sales and specific taxes with respect to the items listed in document L/4724/Add.1 whose rates, in accordance with the relevant sections of Titles IV and V of the Philippines Internal Revenue Code in force on the date of this Protocol, vary according to whether the items are locally manufactured or imported and will endeavour to do so as soon as possible in the light of its development, financial and trade needs. If by 31 December 1984, the above-mentioned taxes are still in effect with differential rates for imported items, the matter will be reviewed by the CONTRACTING PARTIES.”²⁹⁸

A Decision of the CONTRACTING PARTIES of 27 November 1984²⁹⁹ extended this time-limit until 31 December 1989; a Decision of 4 December 1989³⁰⁰ further extended this time-limit until 31 December 1991 at which point it lapsed; consensus was not reached on a further extension.³⁰¹

Paragraph 3 of the Protocol for the Accession of Thailand to the General Agreement provides as follows.

“Thailand intends to bring into line with Article III of the General Agreement, the business and excise taxes with respect to items on which the incidence of these taxes varies according to whether the items are locally produced or imported, and will endeavour to do so as soon as possible in the light of the provisions of Part IV, and in particular Thailand’s development, financial and trade needs. If by 30 June 1987, the incidence of the above-mentioned taxes still varies as between locally produced and imported items, the matter will be reviewed by the CONTRACTING PARTIES.”³⁰²

A Decision of the CONTRACTING PARTIES of 17 June 1987³⁰³ extended this time-limit to 30 June 1990; a Decision of 3 October 1990³⁰⁴ retroactively extended this time-limit until 31 December 1991 at which point it lapsed.

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

The US-UK *Proposals* provided in section III.A that “Members should undertake: 1. To accord to products imported from other members treatment no less favorable than that accorded to domestic products with regard to matters affecting the internal taxation and regulation of the trade in goods”. This principle was elaborated in Article 9 of the US Draft Charter. These provisions were debated at London in the Technical Sub-Committee of Committee II and were redrafted by an ad-hoc group of rapporteurs; however, no national treatment article appeared in the London Draft Charter, as the drafting of this and most of the other general commercial provisions was deferred until the New York meetings of the Drafting Committee. After further work in the Drafting Committee, provisions on national treatment appeared as Article 15 of the New York Draft Charter. At Geneva, the national treatment article was considered in the plenary sessions of Commission A and in an ad-hoc Sub-Committee on the Charter articles on most-favoured-nation treatment, national treatment and tariff negotiations; this article appeared as Article 18 of the Geneva Charter. It was at this time that the provisions on films were separated into a different article. Article III of the original General Agreement text of 30 October 1947 corresponded almost exactly to Article 18 of the Geneva Draft Charter.

²⁹⁸26S/193, para. 3.

²⁹⁹L/5741, 31S/7; see C/M/183.

³⁰⁰L/6619, 36S/44; see C/M/237.

³⁰¹W.47/23, SR.47/3 p. 6, C/W/694, C/M/254, p. 6-7.

³⁰²29S/4, para. 3.

³⁰³L/6190, 34S/28; see C/M/211.

³⁰⁴L/6736, 37S/29; see C/M/243, C/M/244, C/M/245 p. 22.

At the Havana Conference, extensive debates on this provision of the Charter took place in the Third Committee, in its Sub-Committee A on Tariff Negotiations, Internal Taxation and Regulation, and Working Party 3 of the Sub-Committee which focused exclusively on national treatment. As the Chairman of Sub-Committee A stated:

“... the text of Article 18 had been recast, because the Geneva text, in itself the result of many compromises, was somewhat cryptic and obscure. The text recommended by the Sub-Committee differed considerably in form from the original, but there was only one important change of substance. In the Geneva text discriminatory internal taxes which afforded protection to directly competitive or substitutable products in cases in which there was no substantial domestic production of the like product could be maintained subject to negotiations, but the Sub-Committee recommended their outright elimination as a sounder principle. Members would, of course, be free to convert the protective element of such taxes into customs duties”.³⁰⁵

The Report of Sub-Committee A adds that “The new form of the Article makes clearer than did the Geneva text the intention that internal taxes on goods should not be used as a means of protection”.³⁰⁶

The CONTRACTING PARTIES at their Second Session in September 1948 decided to replace the original text of Article III with the text of Article 18 of the Charter *mutatis mutandis*. The Working Party on “Modifications to the General Agreement” “noted that administrative difficulties might arise in the case of countries which would have to change their fiscal regulations twice - on acceptance of the Agreement, and again on ratification of the Charter. ... it recognized that the wording adopted at Havana was clearer and more precise than the text as it now stood”.³⁰⁷ These changes were effected through the Protocol Modifying Part II and Article XXVI, which entered into force 14 December 1948. Article III has not been amended since that date.

The Review Session Working Party on “Schedules and Customs Administration” in 1954-55 considered and rejected various proposals for the insertion of interpretative notes to Article III; see above at pages 144, 184 and 188.³⁰⁸ It was agreed at the Review Session to insert the provisions of Article IV (on cinematographic films) into paragraph 10 of Article III with no substantive change.³⁰⁹ However, as this amendment was made contingent on the entry into force of the Protocol Amending Part I and Article XXIX, which did not achieve the requisite unanimous approval and was abandoned, this amendment never entered into force.

³⁰⁵E/CONF.2/C.3/SR.40 p. 1.

³⁰⁶Havana Reports, p. 61, para. 36.

³⁰⁷GATT/CP.2/22/Rev.1, adopted 1 and 2 September 1948, II/39, 40-41, para. 11.

³⁰⁸See also Report of this Working Party, L/329, adopted 26 February 1955, 3S/205, 210-211, paras. 9-11.

³⁰⁹See W.9/236 (changes proposed by the Legal and Drafting Committee).

IV. RELEVANT DOCUMENTS*London*

Discussion: EPCT/C.II/PV/10 (p. 53), 13 (p. 51)
 Reports: EPCT/C.II/64,
 EPCT/C.II/54/Rev.1, pp. 4-5
 Other: EPCT/C.II/W.2, 5, 14

New York

Discussion: EPCT/C.6/6, 8, 84
 Reports: EPCT/C.6/55/Rev.1, 97/Rev.1

Geneva

Discussion: EPCT/EC/SR.2/3, 22
 EPCT/A/SR/9+Corr.1, 10+Corr.1-4, 22, 23, 26, 43
 EPCT/A/PV/22+Corr.1-5, 23+Corr.1-2, 26+Corr.1-3
 EPCT/B/SR.22
 EPCT/WP.1/SR/11
 EPCT/TAC/SR.10
 EPCT/TAC/PV/26 (p.29)
 Reports: EPCT/127, 162, 174, 178, 180, 186
 Other: EPCT/W/23, 25, 26, 28, 29, 30, 48, 56, 62, 79, 92, 99, 106, 112, 147, 149, 150, 181, 267, 272, 280, 301, 309, 313

Havana

Discussion: E/CONF.2/C.3/SR.9, 11, 13, 40, 41, 42
 Reports: E/CONF.2/C.3/59, 71
 Other: E/CONF.2/C.3/A/W.30 to 35, 38, 39, 46 to 50

CONTRACTING PARTIES

Discussion: GATT/CP.3/SR.9, 10, 30
 GATT/CP.5/SR.6/21
 Reports: GATT/CP.3/42
 GATT/CP.5/37
 G/25

Review Session

Discussion: SR.9/18, 20
 Reports: W.9/193+Corr.1, 200, 212+Corr.1, 236+Add.1, L/329, 3S/205
 Other: L/189+Add.1, 261/Add.1, 275
 W.9/45
 Spec/3/55, 85/55, 94/55

ARTICLE IV

SPECIAL PROVISIONS RELATING TO CINEMATOGRAPH FILMS

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I. TEXT OF ARTICLE IV

Article IV

Special Provisions relating to Cinematograph Films

If any contracting party establishes or maintains internal quantitative regulations relating to exposed cinematograph films, such regulations shall take the form of screen quotas which shall conform to the following requirements:

- (a) Screen quotas may require the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time actually utilized, over a specified period of not less than one year, in the commercial exhibition of all films of whatever origin, and shall be computed on the basis of screen time per theatre per year or the equivalent thereof;
 - (b) With the exception of screen time reserved for films of national origin under a screen quota, screen time including that released by administrative action from screen time reserved for films of national origin, shall not be allocated formally or in effect among sources of supply;
 - (c) Notwithstanding the provisions of sub-paragraph (b) of this Article, any contracting party may maintain screen quotas conforming to the requirements of sub-paragraph (a) of this Article which reserve a minimum proportion of screen time for films of a specified origin other than that of the contracting party imposing such screen quotas; *Provided* that no such minimum proportion of screen time shall be increased above the level in effect on April 10, 1947;
 - (d) Screen quotas shall be subject to negotiation for their limitation, liberalization or elimination.
-

II. INTERPRETATION AND APPLICATION OF ARTICLE IV

(1) *“cinematograph films”*

In discussions in the early 1960s, the United States stated that restrictions against showing foreign television programmes were technically a violation of Article III:4, but that some of the principles of Article IV might apply to them.¹ A Working Party was unable to come to any agreement on the subject.² Several Draft Resolutions proposed in 1962/63 were not adopted.³

In 1991, the United States requested consultations under Article XXII:1 concerning certain measures restricting the showing of non-European films on television. The EEC stated that the question of broadcasting, whether by television or by any other means, belonged essentially to the area of services.⁴

(2) *Discrimination between films*

At Havana an amendment to the Charter provision corresponding to Article IV was withdrawn in view of the interpretation that “The date fixed in sub-paragraph (c) clearly relates only to discriminatory measures as between foreign films, not as between domestic and foreign films”.⁵

(3) *Concessions on screen quotas*

Additional note 2 *ad* item 3708 of the Torquay Schedule XXXIII of the Federal Republic of Germany provided: “Should the Federal Republic of Germany establish a screen quota for the exhibition of films of foreign origin, the Federal Republic would then not maintain or establish any prohibitions or restrictions (other than non-discriminatory rates or charges), whether made effective through quotas, import or export licenses or other measures, on the importation of films which are the product of any other contracting party. Furthermore, should the Federal Republic of Germany establish such screen quota, this should not exceed 27 per cent. It is, however, confirmed herewith that, should a screen quota be instituted as indicated above, and in case the German foreign exchange position demands prohibitions or restrictions, these can only be effected through the non-transfer of proceeds”. In 1956 this concession was withdrawn pursuant to negotiations under Article XXVIII.⁶

(4) *Relationship with Article III*

See Article III:10.

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

The corresponding provisions in the Havana Charter appear in Article 19, in the New York Draft in Article 15(4) and in the Geneva Draft in Article 19. Article 9 of the US Draft Charter, on national treatment, proposed to treat internal quantitative restrictions on exhibition as a prohibited mixing requirement. While the London Draft Charter included no agreed national treatment provisions (as resolution of these issues was deferred), the New York Drafts of the Charter and the General Agreement dealt with internal quantitative regulations on distribution or exhibition of cinematograph films in a separate paragraph of the article on national treatment.

After discussion at the Geneva session of the Preparatory Committee, provisions substantially identical to those in the present GATT Article IV were drafted by a Special Subcommittee on Films. “The Sub-Committee agreed that the New Zealand renters’ quota is in purpose and effect the equivalent of a screen quota ... This particular quota is in fact a preferential quota of the type referred to in [the Charter provision corresponding to

¹L/1615, L/1646, L/1686.

²L/1741.

³L/1908, L/2120.

⁴C/M/236 p. 34.

⁵Havana Reports, p. 68, para. 80.

⁶SECRET/27, Spec/86/56; 283 UNTS 267.

GATT Article XIV:5(b).]” A note was therefore added to Annex A treating this film quota as a screen quota under Article IV.⁷ The date of 10 April 1947 referred to in sub-paragraph (c) was the opening date of the Geneva session.

At the Review Session, it was agreed to incorporate Article IV into Article III:10, as an amendment contingent on the entry into force of the Protocol Amending Part I and Articles XXIX and XXX of the General Agreement.⁸ However, this Protocol never entered into effect and was formally abandoned at the end of 1967.⁹

IV. RELEVANT DOCUMENTS

London

Other: EPCT/C.II/W.5, 14

New York

Discussion: EPCT/C.6/8

Reports: EPCT/C.6/97 (p. 11)

Geneva

Discussion: EPCT/A/SR.9, 10 (pp. 18-30), 43

EPCT/EC/PV.2/22

EPCT/TAC/SR.10

EPCT/TAC/PV/10+Corr.1, 26

Reports: EPCT/175, 189, 196, 212, 214/Add.1/Rev.1

Other: EPCT/W/312

Havana

Discussion: E/CONF.2/C.3/SR.13, 41

Reports: E/CONF.2/C.3/59

Review Session

Reports: W.9/236, 3S/25

⁷Report of the Special Sub-Committee on Films, EPCT/175.

⁸Protocol Amending the Preamble and Parts II and III of the General Agreement, para. 1(B).

⁹15S/65.

ARTICLE V

FREEDOM OF TRANSIT

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I. TEXT OF ARTICLE V AND INTERPRETATIVE NOTE AD ARTICLE V

Article V

Freedom of Transit

1. Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without transshipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this article “traffic in transit”.

2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.

3. Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.

4. All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic.

5. With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.*

6. Each contracting party shall accord to products which have been in transit through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party. Any contracting party shall, however, be free to maintain its requirements of direct consignment existing on the date of this Agreement, in respect of any goods in regard to which such direct consignment is a requisite condition of eligibility for entry of the goods at preferential rates of duty or has relation to the contracting party's prescribed method of valuation for duty purposes.

7. The provisions of this Article shall not apply to the operation of aircraft in transit, but shall apply to air transit of goods (including baggage).

Interpretative Note *Ad* Article V from Annex I

Paragraph 5

With regard to transportation charges, the principle laid down in paragraph 5 refers to like products being transported on the same route under like conditions.

II. INTERPRETATION AND APPLICATION OF ARTICLE V

A. SCOPE AND APPLICATION OF ARTICLE V

Paragraph 1 and the last sentence of paragraph 2 were based on the text of the Barcelona Convention and Statute on Freedom of Transit of 20 April 1921. Notes to the New York Draft Charter 16 (which corresponds to Article V) state that there is no apparent inconsistency between that Article and the Barcelona Convention.¹ As of 31 December 1994, the Barcelona Convention was still in force and had 46 parties.²

1. Scope of Article V

The Report of the New York Drafting Committee on Article 16 of the New York Draft Charter (which corresponded to Article V) states:

“The original text referred in general to persons, goods and means of transport. The text recommended by the Drafting Committee refers to goods and means of transport only, since the transit of persons was considered not to be within the scope of the Charter, and since traffic of persons is subject to immigration laws and may properly be the concern of an international agency other than the organization.”³

The operation of aircraft in transit was exempted as a subject that would be dealt with by the International Civil Aviation Organization (ICAO), but air transit of goods, including baggage, is covered by paragraph 7.⁴ A working party at the Geneva session of the Preparatory Committee discussed whether the principle of freedom of transit applied to goods consigned to a country in bond without a final destination. There was some difference of opinion and the working party did not pursue the matter.⁵ Minutes of the discussions of Sub-Committee C of the Third Committee at the Havana Conference note that: “In the opinion of the Sub-Committee the case of grazing livestock ... was not considered as coming within the ambit of this Article.”⁶

¹7 LNTS 11; see comment p. 12 of New York Report, which notes also that “Should the question of a new transit convention be raised, the Committee felt that the Organization might wish to co-operate.” See also EPCT/C.II/W.11 (comparison of the Statute Annex to the Barcelona Convention and Article 10 of the Proposed Charter); EPCT/34/Rev.1, p. 12; EPCT/C.II/PV.2, p. 63; EPCT/C.II/PV.10, p. 3.

²*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1994*, UN Doc. ST/LEG/SER.E/13 (1995).

³New York Report, p. 12; similar statement appears at EPCT/C.II/54/Rev.1, p. 8.

⁴EPCT/C.II/54/Rev.1, p. 7.

⁵EPCT/A/SR.20, p. 3; EPCT/109.

⁶E/CONF.2/C.3/C/W.5 p. 1 (transit facilities for grazing livestock; exemption for “seasonal nomads”).

2. Paragraph 1: “traffic in transit”

At the Havana Conference it was agreed to add an interpretative note to paragraph 1 of Article 33 of the Havana Charter, as follows: “The assembly of vehicles and mobile machinery arriving in a knocked-down condition or the disassembly (or disassembly and subsequent reassembly) of bulky articles shall not be held to render the passage of such goods outside the scope of ‘traffic in transit,’ provided that any such operation is undertaken solely for convenience of transport”.⁷ The 1948 Working Party Report on “Modifications to the General Agreement” notes that while the working party considered a proposal for the insertion into the General Agreement of this interpretative note, the working party “came to the conclusion that such insertion was not necessary, since the text of Article 33, paragraph 1, of the Charter tallied with that of Article V, paragraph 1, of the General Agreement, and the CONTRACTING PARTIES, who all signed the Final Act of the conference of Havana, could not interpret these provisions in any way other than that laid down in the note *Ad Article 33 of the Charter*”.⁸

Also at Havana, Sub-Committee C of the Third Committee on Articles 32-39 “agreed to state in its report that a movement between two points in the same country passing through another country was clearly ‘in transit’ through the other country within the meaning of paragraph 1”.⁹

2. Paragraph 2

(1) *Freedom of transit*

At the Forty-fifth Session Austria informed the CONTRACTING PARTIES that with effect from 1 December 1989, Austria had limited traffic of certain heavy trucks during night hours on certain Austrian roads. This measure applied to trucks of all nationalities, including Austrian trucks. On 28 February 1990 Austria requested consultations under Article XXII:1 with respect to a measure by the Federal Republic of Germany banning the circulation of 212,000 Austrian lorries during night hours in the entire territory of the Federal Republic. The German measure applied only against Austrian trucks, and, in the view of Austria, was inconsistent with, *inter alia*, Article V.¹⁰

See also the reference to freedom of transit and Article V in the Working Party Report on “Accession of the United Arab Republic”.¹¹

(2) *Neighbouring countries*

At Havana, a proposal to append a note to the corresponding paragraph of the Charter article on transit “to the effect that this Article does not preclude agreements between neighbouring countries for the regulation of transit in respect of their own trade was not approved because such agreements are clearly permissible under the terms of the Article if they do not prejudice the interests of other members in violation of the most-favoured-nation provisions of the Charter, and if they do not limit freedom of transit for other Members”.¹² See also under Article XXIV:3(a).

The Interpretative Note *Ad* Paragraph 6 of Article 33 of the Charter provided: “If, as a result of negotiations in accordance with paragraph 6 [not included in the GATT], a member grants to a country which has not direct access to the sea more ample facilities than those already provided for in other paragraphs of Article 33 [V], such special facilities may be limited to the landlocked country concerned unless the Organization finds, on the complaint of any other member, that the withholding of the special facilities from the complaining member contravenes the most-favoured-nation provisions of this Charter”.

⁷Havana Reports, p. 71, para. 9.

⁸GATT/CP.2/22/Rev.1, adopted on 1 and 2 September 1948, II/39, 44, para. 26.

⁹Havana Reports, p. 71, para. 10.

¹⁰DS14/1, C/M/241 p. 29.

¹¹L/3362, adopted on 27 February 1970, 17S/33, 41, para. 27.

¹²Havana Reports, p. 72, para. 12.

4. Paragraphs 3, 4 and 5: “charges”

It was stated by one delegation during the London session of the Preparatory Committee that “the words ‘or similar charges’ should not be held to imply that traffic in transit shall be exempted from the charges imposed alike on domestic and in transit traffic”.¹³ The Report of the Technical Subcommittee which considered the general commercial provisions of the draft Charter during discussions at London stated:

“It is understood that the word ‘charges’ in [paragraph 4] includes charges for transportation by Government-owned railroads or Government-owned modes of transportation. Since this paragraph only provides that such charges shall be ‘reasonable’, it is believed that the question of preferential rail rates comes under paragraph 5”.¹⁴

The Interpretative Note *Ad* Paragraphs 3, 4 and 5 of Article 33 of the Havana Charter stated: “The word ‘charges’ as used in the English text of paragraph(s) 3, 4 and 5 shall not be deemed to include transportation charges”. It was agreed during discussion of this provision “that transportation charges on traffic in transit did not come within the purview of Article 32 [V], but were subject to the provisions of paragraph 2 of Article 18 [III] ...”.¹⁵

See also the reference to internal transportation charges in Article III:4, as well as the Interpretative Note *Ad* Article V:5.

5. Paragraph 6

(1) “products which have been in transit”

The Report of the Technical Subcommittee which examined the general commercial provisions of the draft Charter during the discussions at London states that “... it is understood that paragraphs 2-5 of this Article cover the treatment to be given by a member country to products in transit through its territory between any other member country and any third country, and paragraph 6 covers the treatment to be given by a member country to product cleared from customs within its territory after transit through any other member country”.¹⁶

(2) “date of this Agreement”

The proviso for direct consignment requirements existing on the “date of this Agreement” was added in order to provide for the difficulties of certain countries which required that goods benefiting from historical preferences accorded by them be shipped directly to them from the country of origin.¹⁷ See also the last sentence of Article II:1(c) and the material on it in this volume.

Article XXVI:1 provides that “The date of this Agreement shall be 30 October 1947”. This date applies for the obligations under Article V:6 of the original contracting parties; of the former territories of the original contracting parties which, after attaining independence or commercial autonomy, succeeded to contracting party status under Article XXVI:5(c); and of Chile. When the modalities of accession to the General Agreement were first considered, at the Third Session in Annecy in 1949, the Working Party decided to draft the Annecy Protocol of Terms of Accession using instead the date of the Havana Final Act, 24 March 1948, and this approach was followed for the next group of accessions in the Torquay Protocol of 1951.¹⁸ Since the next accession thereafter, which was the accession of Japan in 1955, the standard terms in accession protocols have provided that the “date of this Agreement” for the purposes of Article V:6 shall be the date of

¹³EPCT/C.II/54/Rev.1, p. 10.

¹⁴EPCT/C.II/54/Rev.1 p. 10.

¹⁵Havana Reports p. 72, para. 13.

¹⁶EPCT/C.II/54/Rev.1 p. 11.

¹⁷EPCT/C.II/42 p. 5-6; EPCT/C.II/54/Rev.1 p. 11.

¹⁸Annecy Protocol, dated 10 October 1949, I/79, 81, para. 5(b); Torquay Protocol, dated 21 April 1951, I/86, 88, para. 5(b).

the protocol of accession or (where the acceding government had previously acceded provisionally) the date of the declaration on provisional accession.¹⁹

B. EXCEPTIONS AND DEROGATIONS

See Article V:7. With regard to frontier traffic, see also Article XXIV:3.

The Rapporteurs' Report on the Charter Article corresponding to Article V during the London session of the Preparatory Committee notes, in response to a suggestion that a member be permitted to divert in-transit traffic from the most convenient route if conditions such as a famine required reservation of that route for other use: "It would seem that Article 32(b) and (e) [GATT Articles XX(b) and XXI(b)(iii)] afford ample protection for cases in which transit must be suspended or diverted for humanitarian or security reasons."²⁰

III. PREPARATORY WORK

Article V of the GATT corresponds to Article 33 of the Havana Charter. Relevant provisions in the US-UK *Proposals* appear in Chapter III-2. The corresponding Article in the US Draft is Article 10, in the New York Draft Article 16 and in the Geneva Draft Article 32.

The Interpretative Note in the General Agreement does not appear in the Havana Charter. On the other hand, the General Agreement does not include paragraph 6 of Article 33 of the Charter, a provision inserted at the Havana Conference "in view of the great importance of this matter to many countries, particularly to those countries which have no access to the sea"²¹, nor does it include three interpretative notes annexed to Article 33 of the Havana Charter. These provisions were not picked up in 1948 when the Working Party on Modifications to the General Agreement in the Second Session considered which of the changes made at Havana should be taken into the General Agreement. Article V has never been amended.

IV. RELEVANT DOCUMENTS

See below at the end of Article X.

¹⁹E.g. Protocol for the Accession of Bolivia, L/6562, 37S/5.

²⁰EPCT/C.II/W.11 p. 1.

²¹Havana Reports, p. 3, para. 16.

ARTICLE VI

ANTI-DUMPING AND COUNTERVAILING DUTIES

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I. TEXT OF ARTICLE VI AND INTERPRETATIVE NOTE AD ARTICLE VI**Article VI***Anti-dumping and Countervailing Duties*

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

- (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,
- (b) in the absence of such domestic price, is less than either
 - (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
 - (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.*

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.*

3. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.*

4. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

5. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

6. (a) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

(b) The CONTRACTING PARTIES may waive the requirement of sub-paragraph (a) of this paragraph so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping or subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The CONTRACTING PARTIES shall waive the requirements of sub-paragraph (a) of this paragraph, so as to permit the levying of a countervailing duty, in cases in which they find that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party.*

(c) In exceptional circumstances, however, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty for the purpose referred to in sub-paragraph (b) of this paragraph without the prior approval of the CONTRACTING PARTIES; *Provided* that such action shall be reported immediately to the CONTRACTING PARTIES and that the countervailing duty shall be withdrawn promptly if the CONTRACTING PARTIES disapprove.

7. A system for the stabilization of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the commodity concerned that:

- (a) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and
- (b) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties.

Interpretative Note *Ad* Article VI from Annex I

Paragraph 1

1. Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by an exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer.

2. It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

Paragraphs 2 and 3

1. As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.

2. Multiple currency practices can in certain circumstances constitute a subsidy to exports which may be met by countervailing duties under paragraph 3 or can constitute a form of dumping by means of a partial depreciation of a country's currency which may be met by action under paragraph 2. By "multiple currency practices" is meant practices by governments or sanctioned by governments.

Paragraph 6 (b)

Waivers under the provisions of this sub-paragraph shall be granted only on application by the contracting party proposing to levy an anti-dumping or countervailing duty, as the case may be.

II. INTERPRETATION AND APPLICATION OF ARTICLE VI

A. SCOPE AND APPLICATION OF ARTICLE VI

1. Institutional background

In the Kennedy Round of multilateral trade negotiations, the 1967 Agreement on Implementation of Article VI was negotiated, and entered into force on 1 July 1968. In the Tokyo Round of multilateral trade negotiations, two agreements relating to Article VI were negotiated, and entered into force on 1 January 1980: the 1979 Agreement on Implementation of Article VI, and the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII. The 1967 agreement was limited in participation to those contracting parties and the EEC which had accepted it; the 1979 agreements were limited in participation to contracting parties that had accepted them, or governments not contracting parties to the GATT which had acceded to them.

In the Uruguay Round of multilateral trade negotiations, new agreements were negotiated, which are included in Annex 1A of the WTO Agreement, entered into force with it on 1 January 1995, and bind all Members of the WTO: the 1994 Agreement on Implementation of Article VI, and the Agreement on Subsidies and Countervailing Measures. Information is provided in this chapter from relevant panel reports and decisions under the 1967 and 1979 agreements and in GATT practice, but not on the WTO agreements.

See further at page 252.

2. Scope of Article VI

(1) “Dumping”

During the London meetings of the Preparatory Committee, in the discussions of the Technical Sub-Committee on Article 11 of the US proposed Charter on anti-dumping duties, it was stated that “the discussion had shown that there were four types of dumping: price, service, exchange and social. Article 11 permitted measures to counteract the first type. It would obligate members not to impose anti-dumping duties with respect to the other three types. It seemed to be generally agreed that exchange dumping was a question for the Fund to consider. Social dumping was a matter for consideration by the Committee studying industrialization”.¹

The Report of the Sub-Committee at the Havana Conference which considered and extensively debated the article of the Charter on anti-dumping and countervailing duties noted regarding the text of this Article, “The Article as agreed to by the Sub-Committee condemns injurious ‘price dumping’ as defined therein and does not relate to other types of dumping”.² The Report of another Sub-Committee which considered the general exceptions to Chapter IV, the commercial policy chapter of the Charter, noted as well that, in discussing an amendment to the provision corresponding to GATT Article XX(d), “designed to exempt measures against so-called ‘social dumping’ from the provisions of Chapter IV, the Sub-Committee expressed the view that this objective was covered for short-term purposes by paragraph 1 of Article 40 [XIX] and for long-term purposes by Article 7 [on worker rights] in combination with Articles 93, 94 and 95 [on dispute settlement]”.³

The 1960 Second Report of the Group of Experts on “Anti-Dumping and Countervailing Duties” notes that “the Group decided that what was generally known as freight dumping did not fall under the provisions of Article VI”.⁴

¹EPCT/C.II/48, p. 1.

²Havana Reports, p. 74, para. 23; see also E/CONF.2/C.3/C/18, p. 3. In 1948 this Article of the Havana Charter was brought into the General Agreement and replaced the prior text of Article VI; see Section III below.

³Havana Reports, p. 84, para. 19.

⁴L/1141, adopted on 27 May 1960, 9S/194, 199, para. 27; concerning freight dumping see further SR.13/16, Spec/326/58, and Spec/343/58.

(2) Measures under Article VI

See the material below at page 237 on “Use of measures against dumping or subsidization other than anti-dumping or countervailing duties on imports”.

3. Paragraph 1**(1) “dumping ... is to be condemned if it causes or threatens material injury ...”**

The first sentence of Article VI:1 was drafted at the Havana Conference “as a preamble to Article [VI] ... which would, in effect, constitute a general condemnation of the practice of dumping”.⁵ In discussions at the Review Session in 1954-55, in connection with the rejection of a proposal to add a clause specifically obligating contracting parties to prevent dumping by their commercial enterprises, it was agreed to add the following statement to the Working Party’s Report:

“In connexion with the effect of Article VI on the practice of dumping itself, they agreed that it follows from paragraph 1 of Article VI that contracting parties should, within the framework of their legislation, refrain from encouraging dumping, as defined in that paragraph, by private commercial enterprises”.⁶

(2) “the price of the product exported”

In the 1959 Report of the Group of Experts on “Anti-Dumping and Countervailing Duties”

“... the Group noted that although paragraph 1 of Article VI of the General Agreement refers to the price at which products are introduced into the commerce of another country, the same paragraph later speaks of the price of the product ‘exported’. The Group concluded that the latter was a guide as to how the ‘dumped price’ should most appropriately be established. The Group further noted that Article VI also stipulated that ‘due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability’. In view of this, it seemed that the essential aim was to make an effective comparison between the normal domestic price in the exporting country and the price at which the like product left that country.

“The Group took the view that it was the export price that had to be compared with the normal domestic price and agreed that the export price would ideally be the ex-factory price on sales for export; an equally satisfactory price would be the f.o.b. price, port of shipment. In the exceptional case where the actual f.o.b. price on an invoice could not appropriately be used (for example, where the export sale was between associated houses), the export price might be taken to be a notional f.o.b. price calculated by making adjustments such as would normally be made to convert a c.i.f. or other price to f.o.b. The aim should in any event be to arrive at a price which was genuinely comparable with the domestic price in the exporting country”.⁷

In the Second Report of the Group of Experts on “Anti-Dumping and Countervailing Duties”

“It was noted that it sometimes happened that importers sold imported products at a loss, for example, in order to gain a foothold in a market. However, provided that the f.o.b. export price of the article was not below the normal domestic value of the comparable article in the country of export, this was not dumping in the GATT sense. It could become dumping if the importer were in some way recompensed for his loss by the exporter. If a refund or any other consideration was given by the exporter, this should be taken into account in determining the export price and if the consequent export price was less than the normal value, the result would be a dumping price”.⁸

⁵E/CONF.2/C.3/C/18, p. 2.

⁶L/334 and Addendum, adopted on 3 March 1955, 3S/222, 223, para. 4; discussion at SR.9/41 p. 2.

⁷L/978, adopted on 13 May 1959, 8S/145, 146, paras. 5-6.

⁸L/1141, adopted on 27 May 1960, 9S/194, 199, para. 28.

(a) *“hidden dumping by associated houses”*

See Interpretative Note to paragraph 1. See also Articles 2(e) and 2.5 of the Agreements on Implementation of Article VI of the General Agreement on Tariffs and Trade of 1967 and 1979 respectively⁹ which provide: “In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine”.¹⁰

(b) *Indirect dumping*

The Report of the Review Working Party on “Other Barriers to Trade” provides as follows:

“The Working Party also agreed that in the case where goods are not imported directly from the country of origin but are consigned to the country of importation from an intermediate territory, it would be in accordance with the terms of Article VI to determine the margin of dumping by comparing the price at which the goods are sold from the country of consignment to the country of importation with the comparable price (as defined in paragraph 1 of Article VI) in either the country of consignment or the country of origin of the goods. It is of course understood that where goods are merely transhipped through a third country without entering into the commerce of that country, it would not be permissible to apply anti-dumping duties by reference to prices of like goods in the country”.¹¹

The Report of the Group of Experts on “Anti-Dumping and Countervailing Duties” notes that:

“In their examination of the problem of the determination of the normal value or the domestic market price in the exporting country the Group then considered the question of dumping of goods where the exporting country is not the producing country of the goods concerned... The Group noted that since the wording of Article VI, paragraph 1(a), referred only to the comparable price in the exporting country, there was some doubt whether action against indirect dumping was strictly in accordance with the letter of the Agreement. However, despite this doubt, the Group were generally of the opinion that it was reasonable for countries to have the right to protect themselves against indirect dumping (whether of processed or unprocessed goods), particularly in view of the provision of Article VI which permits the imposition of countervailing duties to offset the effects of subsidies whether these are granted in the producing country or the exporting country, and in this connection the Group noted the conclusions recorded in paragraph 5 of the report of the Review Working Party on Other Barriers to Trade (BISD, Third Supplement, page 223)”.¹²

See also Articles 2(c) and 2:3 of the Agreement on Implementation of Article VI of the General Agreement of 1967 and 1979 respectively¹³, which provide: “In the case where products are not imported directly from the country of origin but are exported to the country of importation from an intermediate country, the price at which the products are sold from the country of export to the country of importation shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely transhipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export”. Similarly, Article 2:11 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII provides that “In cases where products are not imported directly from the country of origin but are exported to the country of importation from an intermediate country, the provisions of this

⁹15S/25; 26S/172.

¹⁰26S/173.

¹¹L/334, adopted on 3 March 1955, 3S/222ff.

¹²L/978, adopted on 13 May 1959, 8S/148, 149, para. 11.

¹³15S/24, 25; 26S/171, 172.

Agreement shall be fully applicable and the transaction or transactions shall, for the purposes of this Agreement, be regarded as having taken place between the country of origin and the country of importation".¹⁴

(3) "normal value"

(a) Criteria for determining normal value

Paragraph 1 of Article VI sets out three ways to determine the normal value of the exported goods. The Panel Report on "Swedish Anti-Dumping Duties" notes in this respect:

"The Panel was of the opinion that if the Swedish authorities considered that it was not possible to find 'a comparable price in the ordinary course of trade for the like product when destined for consumption in the exporting country', no provision in the General Agreement would prevent them from using one of the other two criteria laid down in Article VI".¹⁵

The Report of the Group of Experts on "Anti-Dumping and Countervailing Duties" contains a discussion of the order in which the criteria of paragraph 1 of Article VI should be used:

"The Group had some discussion on whether the criteria in paragraph 1(b)(i) and paragraph 1(b)(ii) of Article VI were alternative and equal criteria to be used at the discretion of the importing country, or whether paragraph 1(b)(ii) could only be used in cases where it had not been possible to determine a normal market value under paragraph 1(a) or paragraph 1(b)(i) of Article VI. The Group was of the opinion that paragraph 1(b)(i) and paragraph 1(b)(ii) laid down alternative and equal criteria to be used at the discretion of the importing country but only after it had failed to establish a normal market value under paragraph 1(a) of Article VI ... The Group thought that no order of priority for these two criteria could be imposed but, though it might often be easier to collect the necessary information for the use of the criterion under paragraph 1(b)(i), the use of the criterion under paragraph 1(b)(ii) was sometimes preferable in that, since it was normal and reasonable for different prices to be charged in different markets, the use of the criterion under paragraph 1(b)(i) could often produce misleading results. The Group agreed that the criteria under paragraph 1(b) of Article VI could only be used where no domestic price existed as defined in paragraph 1(a) or in cases where there were sales to the home market but where it was not possible to determine normal value from these sales, for example because they did not fall within 'the ordinary course of trade' as required in paragraph 1(a)".¹⁶

See also Articles 2(d) and 2.4 of the 1967 and 1979 Agreements on Implementation of Article VI respectively: "When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to any third country which may be the highest such export price but should be a representative price, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits. As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin".¹⁷

(b) "the comparable price ... for consumption in the exporting country"

The 1959 Report of the Group of Experts on "Anti-Dumping and Countervailing Duties" notes:

"The Group discussed the problems that arose from the fact that rarely was there only one selling price of a product on the domestic market. More frequently, there was a whole range of different domestic prices for a particular product, varying according to the quantity sold and the terms of individual contracts. The Group agreed that, despite the difficulties of determining the normal domestic

¹⁴26S/59.

¹⁵L/328, adopted on 26 February 1955, 3S/81, 89, para. 28.

¹⁶L/978, adopted on 13 May 1959, 8S/145, 148, para. 10.

¹⁷15S/24, 25; 26S/171, 172.

price in the exporting country where these circumstances occurred, it would not be desirable to adopt a uniform system of averaging of relevant price quotations; such a system could in certain circumstances nullify attempts to deal with genuine dumping and could in other circumstances lead the importing country to conclude that there was a margin of dumping where in fact dumping had not occurred. The Group agreed that the use of weighted averages should be confined to cases where it was impossible to use a more direct method of establishing the normal domestic price".¹⁸

In the 1962 Panel Report on "Exports of Potatoes to Canada," the Panel examined a complaint by the United States concerning the imposition by Canada of an import charge on potatoes in addition to the bound specific duty, as a result of the application under the Canadian Customs Act of "values for duty" on potatoes imported below a certain price.

"The Panel ... considered that there was no basic difference between the price, in the ordinary course of trade, of exported potatoes and potatoes intended for domestic consumption in the United States. The Panel felt that the problem for Canadian producers was caused by specific climatic differences which could in certain years give rise to exceptional difficulties. The Panel concluded that the imposition of an additional charge could not be justified by Article VI of the General Agreement, since the main requirement laid down in paragraph 1(a) of the Article was not satisfied, namely that the price of the product exported from one country to another was less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."¹⁹

(c) *"the cost of production in the country of origin plus a reasonable addition for selling cost and profit"*

The Panel on "Swedish Anti-Dumping Duties" notes, concerning the anti-dumping measures examined by the panel:

"The Panel concluded that, in effect, the Swedish authorities were relying on the third criterion [in Article VI] which related to the cost of production. The Panel felt that the use by the Swedish authorities of a weighted average as between the Italian prices could only give a rough estimate of the normal price and that if this approach were retained, it would be reasonable to expect that, if the average included not only the 'unmarked' and 'marked' first-choice stockings of a given type, but also the second and third choices of the same type, the results would be more accurate".²⁰

The Second Report of the Group of Experts on "Anti-Dumping and Countervailing Duties" notes:

"It was presumed by the Group that the term 'production costs' included all those items involved, directly or indirectly, in the cost of producing an article. While the precise apportionment of these costs to various headings might differ in various countries, the term would normally cover such items as, for example, the cost of materials and components, labour, general over-heads, depreciation on plant and machinery and interest on capital investment.

"The Group noted the provision in paragraph 1(b)(ii) of Article VI that to the cost of production, when this criterion was being used for the determination of normal value, there was to be 'a reasonable addition for selling costs and profit'. The effect of this was to construct what might be regarded as a national ex-factory sales price on the domestic market of the exporting country in circumstances where there was no such actual price or not one that could be used for the determination of normal value. As in the case of 'production costs', the practices of various countries differed on the items to be included under the heading of 'selling costs'. Typical examples were such items as advertising costs and sales commission. The Group agreed, however, that whatever the particular method used for determining both production and sales costs the aim should always be to arrive at a normal value which was genuinely comparable with the

¹⁸L/978, adopted on 13 May 1959, 8S/145, 147, para. 9.

¹⁹L/1927, adopted on 16 November 1962, 11S/88, 93, para. 17.

²⁰L/328, adopted 26 February 1955, 3S/81, 89 para. 30.

export price. Only thus could it be properly determined whether or not merchandise was being sold at less than its normal value in the meaning of Article VI”.²¹

The Panel Report on “New Zealand - Imports of Electrical Transformers from Finland” examined the imposition of anti-dumping duties in respect of a sale of two custom-built large power transformers.

“... The Panel noted that - in the absence of a domestic price in Finland for custom-built transformers of this kind - the New Zealand authorities had based their determination of normal value on the cost-of-production method foreseen in Article VI:1(b)(ii). The Panel also noted that Finland, while not objecting to the use of this method as such, had contested the individual elements of the calculation as being too high, resulting in a constructed price much higher than the actual price of the Finnish exporter. In the Finnish view, the New Zealand authorities should have instead used the cost elements provided by the exporter. The Panel, having heard the arguments put forward by both sides and having perused the documents submitted, concluded that the Finnish exporter, whether through its own fault or not, had not provided all of the necessary cost elements which would have enabled the New Zealand authorities to carry out a meaningful cost-of-production calculation on the basis of the information supplied by the exporter alone. ... In the view of the Panel, the New Zealand authorities were therefore justified in making a cost calculation, where necessary, on the basis of price elements obtained from other sources.

“The Panel then considered the evidence put forward by both sides as to the appropriateness of the cost elements used by the New Zealand authorities in arriving at their decision that dumping had occurred. The Panel noted that this evidence was of a highly technical nature, especially because it related to complicated custom-built products. It also noted that Article VI did not contain any specific guidelines for the calculation of cost-of-production and considered that the method used in this particular case appeared to be a reasonable one. In view of this and having noted the arguments put forward by both sides as regards the costing of certain inputs used in the manufacture of the transformers, the Panel considered that there was no basis on which to disagree with the New Zealand authorities’ finding of dumping ...”.²²

(d) “like product”

During discussions at the Havana Conference it was stated that the words “like product” “meant in this instance the same product”.²³ The 1959 Report of the Group of Experts on “Anti-Dumping and Countervailing Duties” notes as follows:

“In discussing the meaning of the term ‘like product’, the Group agreed that this term should be interpreted as a product which is identical in physical characteristics subject, however, to such variations in presentation which are due to the need to adapt the product to special conditions in the market of the importing country (i.e., to accommodate different tastes or to meet specific legal or statutory requirements). Some members drew attention to the fact that such an approach was also in conformity with the [statement cited above] concerning the term ‘like product’ ... where it is stated that the words “‘like product’ meant in this instance the same product’. For the purpose of an adjustment as mentioned above, however, downward or upward corrections of the price of the like product should be permitted so as to take into account the differences in the type of the products destined for the home market and for the various export markets.

“The Group pointed out that the meaning of ‘like product’ as agreed by them should not be interpreted either too broadly so as to cover products of a different kind with higher prices on the internal market, nor too stringently so as to elude the application of paragraph 1(a) of Article VI.

“During the discussion of the term ‘like product’ the Group found some discrepancy in the English and French texts of paragraph 1 of Article VI. In the English text the words ‘*the* like product’ are used and in the French text the words ‘*un* produit similaire’, which are slightly vaguer, are used. The Group

²¹L/1141, adopted on 27 May 1960, 9S/194, 196, paras. 12-13.

²²L/5814, adopted on 18 July 1985, 32S/55, 66-67, paras. 4.2-4.3.

²³E/CONF.2/C.3/SR.30, p. 5.

nevertheless thought that this slight discrepancy between the two texts would have no practical effect if the term ‘like product’ were interpreted as suggested by the Group”.²⁴

Articles 2(b) and 2:2 of the 1967 and 1979 Agreements on Implementation of Article VI of the General Agreement respectively, as well as a footnote to Article 6:1 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement, contain the following definition:

“Throughout this Code [Agreement] the term ‘like product’ (‘produit similaire’) shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration”.²⁵

See also the material on “domestic industry” below at page 245.

- (e) *Note 2 Ad Paragraph 1: “imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State”*

The addition of Note 2 Ad Paragraph 1 was agreed in the Review Session of 1954-55. The Report of the Review Working Party on “Other Barriers to Trade” notes that “The Working Party considered a proposal by Czechoslovakia for amending sub-paragraph 1(b) to deal with the special problem of finding comparable prices for the application of that sub-paragraph to the case of a country all, or substantially all, of whose trade is operated by a state monopoly. The Working Party was not prepared to recommend the amendment of the Article in this respect, but agreed to an interpretative note to meet the case”.²⁶

The Report of the Working Party on the “Accession of Poland” records:

“With regard to the implementation, where appropriate, of Article VI of the General Agreement with respect to imports from Poland, it was the understanding of the Working Party that the second Supplementary Provision in Annex I to paragraph 1 of Article VI of the General Agreement, relating to imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, would apply. In this connexion it was recognized that a contracting party may use as the normal value for a product imported from Poland the prices which prevail generally in its markets for the same or like products or a value for that product constructed on the basis of the price for a like product originating in another country, so long as the method used for determining normal value in any particular case is appropriate and not unreasonable”.²⁷

The same text appears in the Report of the Working Party on “Accession of Romania”,²⁸ a text similar to the second sentence of this paragraph appears in the Report of the Working Party on “Accession of Hungary”.²⁹ See also Articles 2(g) and 2:7 of the 1967 and 1979 Agreements on Implementation of Article VI of the General Agreement respectively, which provide that “This Article is without prejudice to the Second Supplementary Provision to paragraph 1 of Article VI in Annex I of the General Agreement”.³⁰ See also Article 15 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement.³¹

²⁴L/978, adopted on 13 May 1959, 8S/145, 149, paras. 12-14.

²⁵15S/24, 25; 26S/171, 172; 26S/56, 65 fn. 1.

²⁶L/334, adopted 3 March 1955, 3S/222, 223 para. 6; see also proposals at W.9/86, Spec/93/55.

²⁷L/2806, adopted on 26 June 1967, 15S/109, 111, para. 13.

²⁸L/3557, adopted on 6 October 1971, 18S/94, 96 para. 13.

²⁹L/3889, adopted on 30 July 1973, 20S/34, 37, para. 18.

³⁰15S/24, 26; 26S/171, 173.

³¹26S/56, 74-75.

(f) *Special problems of developing countries*

The 1975 Report of the Working Party on “Acceptance of the Anti-Dumping Code” records that:

“It appeared from communications from developing countries and from the discussion in the Working Party that the fundamental problem for developing countries in respect of possible anti-dumping measures against their exports was that the home market prices in developing countries for domestically manufactured products were, for various reasons, in most cases higher than those obtainable in the export markets. In order to find outlets abroad for their manufactures, developing countries were thus compelled to sell at prices which could be termed ‘dumped’ under the criteria of Article VI of GATT and the Anti-Dumping Code, although there were no intentions of causing injury or of dumping in the traditional sense of the word on the side of the exporters. A solution would therefore have to be based on the recognition that in the cases of developing countries it was not reasonable to use home market prices or production costs as normal values in dumping investigations”.

...

“The Working Party, not being able to agree on a solution to the problems referred to it by the Council, considered that it should limit itself to reporting to the Council the opinions expressed in the course of its deliberations.”³²

Article 13 of the 1979 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, which was agreed in the Tokyo Round, provides that:

“It is recognized that special regard must be given by developed countries to the special situation of developing countries when considering the application of anti-dumping measures under this Code. Possibilities of constructive remedies provided for by this Code shall be explored before applying anti-dumping duties where they would affect the essential interests of developing countries”.³³

On 5 May 1980 the Committee on Anti-Dumping Practices established under the 1979 Agreement adopted decisions concerning the application and interpretation of the Agreement, including the following:

“The Committee, cognizant of the commitment in Article 13 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade that special regard must be given by developed countries to the special situation of developing countries when considering the application of anti-dumping measures under the Agreement, takes the following decision concerning the application and interpretation of the Agreement in relation to developing countries:

“(i) In developing countries, governments play a large rôle in promoting economic growth and development in accordance with their national priorities, and their economic regimes for the export sector can be different from those relating to their domestic sectors resulting *inter alia* in different cost structures. The Agreement is not intended to prevent developing countries from adopting measures in this context, as long as they are used in a manner which is consistent with the provisions of the General Agreement on Tariffs and Trade, as applicable to these countries.

“(ii) In the case of imports from a developing country, the fact that the export price may be lower than the comparable price for the like product when destined for domestic consumption in the exporting country does not *per se* justify an investigation or the determination of dumping unless the other factors mentioned in Article 5:1 are also present. Due consideration should be given to all cases where, because special economic conditions affect prices in the home market, these prices do not provide a commercially realistic basis for dumping calculations. In such cases the normal value for the purposes of ascertaining whether the goods are being dumped shall be determined by methods such as a comparison of the export price with the comparable price of the like product when exported to any third country or with the cost of production of

³²L/4239, adopted on 21 November 1975, 22S/27, 28, paras. 4 and 14.

³³26S/184. See also references to “special regard” in Article XXXVII of the General Agreement.

the exported goods in the country of origin plus a reasonable amount for administrative, selling and other costs”.³⁴

(4) *Comparisons between normal value and export price*

The Report of the Group of Experts on “Anti-Dumping and Countervailing Duties” discusses adjustments for differences affecting price comparability:

“The Group first considered the problem of the determination of the normal value or the domestic market price in the exporting or producing country in the light of the definition in paragraph 1(a) of Article VI [price-to-price comparisons]. ... some members of the Group took the view that if there were differences in [quantities sold in the home market and quantities exported] these should be taken into account in order to meet fully the requirement in paragraph 1 of Article VI that ‘due allowance shall be made in each case for differences in conditions and terms of sale’. The Group recognized that, while it was logical and reasonable to make adjustments to take account of different quantities and that countries should follow the general principle of adjustments in each case, difficulties might nevertheless arise in securing the necessary information on which such adjustments should be based. Furthermore, it was thought that each case had to be considered on its merits in the light of the objective of comparison of like quantities.

“The Group further agreed that in order to effect a true comparison between the export price and the normal value of the product in the home market, countries should aim at a comparison of prices at the same level in the trade - e.g., wholesale - and at the same date or dates as near to each other as possible. They should also take into account any such relevant factors as differences in taxation.”³⁵

“... For the purposes of an adjustment ... downward or upward corrections of the price of the like product should be permitted so as to take into account the differences in the type of the products destined for the home market and for the various export markets”.³⁶

See also Articles 2(f) and 2.6 of the 1967 and 1979 Agreements on Implementation of Article VI of the General Agreement respectively:

“In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to the provisions of Article VI:1(b) of the General Agreement, the two prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability. In the cases referred to in paragraph [(e)][5] of Article 2 allowance for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made”.³⁷

(5) *“introduced into the commerce”*

Canada initiated anti-dumping proceedings against certain electric generators exported by Italy, on the basis of prices bid in response to requests for tenders, but before the generators in question had been imported. In a Request for conciliation under Article 15:3 of the 1979 Agreement on Implementation of Article VI concerning this action by Canada, the EEC referred to the terms of Article 2:1 of the Agreement (“if the export price of the product concerned”) and from this drew the conclusion that “this implies that there must have been exports of the product concerned before there can be dumping”.³⁸ The Canadian representative maintained “that both Article VI of the GATT and Article 2 [of the Agreement] were clear in that dumping was regarded as pertaining to the situation where a product of one country was introduced into the commerce

³⁴ADP/2, Decisions of 5 May 1980, 27S/16, 17.

³⁵L/978, adopted on 13 May 1959, 8S/145, 146-147, paras. 7-8.

³⁶*Ibid.*, 8S/149, para. 12.

³⁷15S/26, 26S/173. See also discussion at 26S/270-271.

³⁸ADP/M/11, para. 53; ADP/16, p. 3.

of another country at an export price which was less than the comparable price in the country of exportation. In the case of the bids, both of these conditions were fulfilled. He added that the effective implementation of Article VI and the [Agreement] would be frustrated if importing authorities were unable to deal with such contractual arrangements at time of tender”.³⁹

4. Paragraph 2

(1) *“a contracting party may levy on any dumped product an anti-dumping duty”*

The 1955 Panel Report on “Swedish Anti-Dumping Duties” examined a Swedish Decree imposing a basic price scheme under which an anti-dumping duty was levied on imports of nylon stockings whenever the invoice price was lower than a minimum price fixed by the Swedish Government. The Panel noted:

“... Article VI does not oblige an importing country to levy an anti-dumping duty whenever there is a case of dumping, or to treat in the same manner all suppliers who resort to such practices. The wording of paragraph 6 supports that view. The importing country is only entitled to levy an anti-dumping duty when there is material injury to a domestic industry or at least a threat of such an injury”.⁴⁰

As regards the burden of proof of facts justifying the imposition of anti-dumping duties, the same Panel Report notes:

“The Panel ... considered the argument developed by the Italian representative to the effect that the Swedish Decree [on a basic price scheme for stocking imports] reversed the onus of proof since the customs authorities can act without being required to prove the existence of dumping practices or even to establish a *prima facie* case of dumping. ... it was clear from the wording of Article VI that no anti-dumping duties should be levied unless certain facts had been established. As this represented an obligation of the contracting party imposing such duties, it would be reasonable to expect that that contracting party should establish the existence of these facts when its action is challenged.”⁴¹

“... The Italian delegation contended that the main injury suffered by exporters was due to the fact that the Swedish Government was levying an anti-dumping duty on Italian stockings although it had not established that the export prices of the products were less than the normal value of those products as required in Article VI of the GATT. The Panel agreed that if the Swedish Decree was being applied in such a manner as to impose an anti-dumping levy in the absence of dumping practices, the Italian Government ... could claim an impairment of benefits.

“The Swedish representative stated that it appeared doubtful to his delegation that the CONTRACTING PARTIES could consider that question and that it was the right of the national authorities to decide whether dumping had really taken place. The Panel agreed that no provision of the General Agreement could limit in any way the rights of national authorities in that respect. But for the reason set forth in paragraph 15 above, it would be reasonable to expect from the contracting party which resorts to the provisions of Article VI, if such action is challenged, to show to the satisfaction of the CONTRACTING PARTIES that it had exercised its rights consistently with those provisions”.⁴²

In the Report of the Group of Experts on “Anti-Dumping and Countervailing Duties,” “the Group agreed that it was essential that countries should avoid immoderate use of anti-dumping and countervailing duties, since this would reduce the value of the efforts that had been made since the war to remove barriers to trade. These duties were to be regarded as exceptional and temporary measures to deal with specific cases of injurious dumping or subsidization”.⁴³ The Report sets out “understandings on various points” in the field of anti-dumping. The Report of the Group of Experts on “Anti-Dumping and Countervailing Duties” notes that “There was agreement that decisions concerning the application of anti-dumping measures should be taken at a

³⁹ADP/M/11, para. 54.

⁴⁰L/328, adopted on 26 February 1955, 3S/81, 83, para. 8.

⁴¹*Ibid.*, 3S/85-86, para. 15.

⁴²*Ibid.*, 3S/87-88, para. 22-23.

⁴³L/978, adopted on 13 May 1959, 8S/145, para. 4.

high administrative level and that all such decisions should be published in an official form. It was also suggested that the reasons for the decision should be made public ...".⁴⁴ See also the discussion in the Second Report of the Group of Experts on Anti-Dumping and Countervailing Duties⁴⁵ of investigations in exporting countries, governmental or administrative hearings in importing countries, and contacts between governments concerned prior to the imposition of anti-dumping or countervailing duties.

See also Articles 8 ("Imposition and Collection of Anti-Dumping Duties") and 9 ("Duration of Anti-Dumping Duties") of the 1967 and 1979 Agreements on Implementation of Article VI of the General Agreement and Article 4 ("Imposition of Countervailing Duties") of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement.⁴⁶

(2) Basic price systems

The Panel Report on "Swedish Anti-dumping Duties" examined two variations on a "basic price" system for anti-dumping proceedings. At first, "an anti-dumping duty was levied whenever the invoice price was lower than the relevant minimum price fixed by the Swedish Government, the importer being entitled to obtain a refund of that duty if the case of dumping was not established. [In a later system] basic prices ... were retained as an administrative device enabling the Swedish Customs Authorities to exempt from anti-dumping enquiries any consignment the price of which was higher than the basic price: the actual determination of dumping policies and the levying of the anti-dumping duty were related to the concept of normal value ... The anti-dumping duty is assessed in relation to the basic price only when that price is lower than the normal value of the imported product". The Panel found as follows:

"The Panel recognized ... that the basic price system would have a serious discriminatory effect if consignments of the goods exported by the low-cost producers had been delayed and subjected to uncertainties by the application of that system and the case for dumping were not established in the course of the enquiry. ...

"As regards the second argument relating to the fact that the basic price system is unrelated to the actual prices on the domestic markets of the various exporting countries, the Panel was of the opinion that this feature of the scheme would not necessarily be inconsistent with the provisions of Article VI so long as the basic price is equal to or lower than the actual price on the market of the lowest cost producer. If that condition is fulfilled, no anti-dumping duty will be levied contrary to the provisions of Article VI".⁴⁷

The Second Report on "Anti-Dumping and Countervailing Duties" discusses "pre-selection systems" (in which an anti-dumping investigation is conducted with respect to imports below a particular price, and anti-dumping duties are applied only after a specific complaint has been investigated and a finding of dumping and material injury made); and "basic price systems".

"The Group recognized that, where basic price systems were operated so as to limit anti-dumping action in a particular case to the margin of dumping judged to be materially injurious, these systems were fully within the terms of Article VI and in fact constituted part of a pre-selection system. Nevertheless, the majority of the Group considered that such systems might be open to abuse and they were not therefore in favour of their adoption. Most members of the Group felt that it was, in any case, understood that the basic price system was satisfactory only provided that:

- (a) the basic price was less than, or at most equal to the lowest normal price in any of the supplying countries;

⁴⁴*Ibid.*, 8S/145, 151, para. 21.

⁴⁵L/1141, adopted on 27 May 1960, 9S/194.

⁴⁶15S/31-32, 26S/180-181, 26S/61-62.

⁴⁷L/328, adopted 26 February 1955, 3S/81, 84, paras. 9-10.

- (b) domestic importers or foreign exporters had in all cases the opportunity to demonstrate that their products, although they were sold below the basic price, were not sold at a dumping price; and
- (c) the governments using this system periodically revised the basic price on the basis of the fluctuations of the lowest normal price in any of the supplying countries".⁴⁸

Article 8(d) of the 1967 Agreement and paragraph 8:4 of the 1979 Agreement on Implementation of Article VI of the General Agreement set out rules for the application of a "basic price system". In October 1981, the Committee on Anti-Dumping Practices adopted an Understanding on Article 8:4 of the Agreement providing, *inter alia*, that

"The Committee agreed that basic price systems as provided for in Article 8:4 were intended exclusively as a device to facilitate the calculation and collection of anti-dumping duties following a full investigation for each country and product concerned, and for supplies concerned, resulting in a finding of injurious dumping. However, the Committee recognized that the wording of Article 8:4 contained ambiguities and, in the light of different possible interpretations, concluded that Article 8:4 is not essential to the effective operation of the Agreement and shall not provide the basis for any anti-dumping investigation or for imposition and collection of anti-dumping duties.

"At the same time, the Committee discussed special monitoring schemes, in so far as they are related to anti-dumping systems. The Committee recognizes that such schemes are not envisioned by Article VI of the GATT or the Agreement and it is of the view that they give cause for concern in that they could be used in a manner contrary to the spirit of the Agreement. The Committee agreed that such schemes shall not be used as a substitute for initiating and carrying out anti-dumping investigations in full conformity with all provisions of the Agreement ...".⁴⁹

(3) *Initiation of investigations*

The Second Report of the Group of Experts on Anti-Dumping and Countervailing Duties provides that: "The Group agreed that, since the criterion of material injury was one of the two factors required to allow anti-dumping action, the initiative for such action should normally come from domestic producers who considered themselves injured or threatened with injury by dumping. Governments would, however, have the right to take such initiative when the conditions set forth in Article VI existed".⁵⁰

The Report of the Panel, under the Agreement on Implementation of Article VI, on United States - Anti-dumping Duties on Gray Portland Cement and Cement Clinker from Mexico", which has not been adopted, examined the initiation of the anti-dumping investigation which had led to the measures in question. The investigation had been initiated on the basis of a petition which alleged that domestic industries in two regions of the United States had been injured or threatened with injury by dumped imports of gray portland cement and cement clinker from Mexico, and asserted that the petitioners accounted for a majority of domestic production of gray portland cement in the markets in those regions. The Panel examined this matter on the basis of Article 5:1 of the Agreement, which provides: "An investigation to determine the existence, degree and effect of any alleged dumping shall normally be initiated upon a written request by or on behalf of the industry⁵¹ affected ...". Footnote 9 declares: "As defined in Article 4". Article 4 in turn provides a definition of "industry". The Panel found that "in Article 5:1, the term 'on behalf of' involved a notion of agency or representation, and that a petition had to have the authorization or approval of the industry affected, the term 'industry' being defined in Article 4".⁵¹ The Panel also found that "'the producers of ... almost all of the production within such market' would satisfy the definition of 'industry' for the purpose of initiation".⁵²

⁴⁸L/1141, adopted on 27 May 1960, 9S/194, 195-196, para. 11.

⁴⁹ADP/M/6, 30S/68 (adoption); 28S/52 (text). See also discussion of various systems in the Committee on Anti-Dumping Practices, 25S/18-21.

⁵⁰L/1141, adopted on 27 May 1960, 9S/194 para. 5.

⁵¹ADP/82 (unadopted), dated 7 September 1992, para. 5.20.

⁵²*Ibid.*, para. 5.23.

"The Panel ... noted that the term 'on behalf of' involved a notion of agency or representation and that Article 4 provided the definition of the term 'industry' in Article 5:1, on behalf of which the petition had to be made. In the case of a national market, one of the two definitions of industry according to Article 4:1 was domestic producers whose collective output of the like products constituted a major proportion of the total domestic production of those products. Thus, in a national market, evidence of 'support by a major proportion' would meet the requirement under Article 5:1 because there would be evidence of support for the petition by the industry concerned. However, the Panel considered that in view of the fact that Article 5:1 required that an industry in a regional market be defined as 'producers of all or almost all of the production within such market', support for a petition by producers accounting for a major proportion of the production in that market would not be adequate to satisfy the requirement that a petition had to have the authorization or approval of the producers of all or almost all of the production in the regional market. ...

"Accordingly, the Panel concluded that the producers in a regional market in respect of whom injury had to be found, namely 'the producers of all or almost all of the production within such market', were the producers by or on behalf of which the request for initiating an anti-dumping investigation in a regional market had to be made under Article 5:1.⁵³

"... the Panel concluded that the United States' initiation of the anti-dumping investigation on gray portland cement and cement clinker imported from Mexico was inconsistent with Article 5:1 because the United States' authorities did not satisfy themselves prior to initiation that the petition was on behalf of producers of all or almost all of the production in the regional market. ..."⁵⁴

The 1993 Panel Report on "United States - Measures Affecting the Imports of Softwood Lumber from Canada" examined the consistency with the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of a decision to self-initiate a countervailing duty investigation:

"The Panel noted that the self-initiation of a countervailing duty investigation was subject to the provisions of Article 2:1 of the Agreement. This Article provided in relevant part:

'An investigation to determine the existence, degree and effect of any alleged subsidy shall normally be initiated upon a written request by or on behalf of the industry affected. The request shall include *sufficient evidence* of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of the General Agreement as interpreted by this Agreement⁶ and (c) a causal link between the subsidized imports and the alleged injury. If in *special circumstances* the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have *sufficient evidence* on all points under (a) to (c) above'. (emphasis added)

"Whereas the Agreement called for 'sufficient evidence' and identified the subject matter on which such evidence was to be adduced, the Panel noted that no specific guidance was given as to what might constitute sufficient evidence. The Panel thus proceeded to consider the meaning of the term "sufficient evidence" in Article 2:1 guided by the customary principles of international law on treaty interpretation, according to which treaty terms were to be given their ordinary meaning in their context and in the light of the treaty's object and purpose.

"The Panel considered that the concept of sufficiency of evidence had to be judged in relation to the particular action contemplated in Article 2:1 of the Agreement, that of initiating a countervailing duty investigation, as was made clear in Article 2:3 which referred to 'sufficient evidence to justify initiating an investigation'. (emphasis added) In the view of the Panel, the initiation requirement in Article 2:1 reflected a careful balancing of the rights and obligations of the parties, in particular between (1) the interest of the import-competing domestic industry in the importing country in securing the initiation of a countervailing duty investigation and (2) the interest of the exporting country in avoiding the potentially burdensome

⁵³*Ibid.*, paras. 5.26, 5.28.

⁵⁴*Ibid.*, para. 5.34.

consequences of a countervailing duty investigation initiated on an unmeritorious basis. With regard to the second of these, the Panel considered that in applying the appropriate standard to a review of the decision of a national authority to initiate a countervailing duty investigation, it should in particular be sensitive to the intended anti-harassment function of Article 2:1.

“In analysing further what was meant by the term ‘sufficient evidence’, the Panel noted that the quantum and quality of evidence to be required of an investigating authority prior to initiation of an investigation would necessarily have to be less than that required of that authority at the time of making a final determination. At the same time, it appeared to the Panel that ‘sufficient evidence’ clearly had to mean more than mere allegation or conjecture, and could not be taken to mean just any of the national investigative authorities and this factual basis had to be susceptible to review under the Agreement. Whereas the quantum and quality of evidence required at the time of initiation was less than that required to establish, pursuant to investigation, the required Agreement elements of subsidy, subsidized imports, injury and causal linkage between subsidized imports and injury, the Panel was of the view that the evidence required at the time of initiation nonetheless had to be relevant to establishing these same Agreement elements.

“The Panel recalled Canada’s position that ‘sufficient evidence’ in the context of initiation meant ‘that amount of proof which ordinarily satisfies an unprejudiced mind’. The Panel further recalled the United States’ position that ‘sufficient evidence’ meant ‘evidence that provides a reason to believe that subsidies may exist and that the domestic industry may be injured by reason of the subsidized imports’. The Panel was not persuaded of the correctness of either of these proposed standards. In the Panel’s view, the Canadian proposed standard suggested a level of proof more suitable to a determination made at a stage of the process subsequent to initiation rather than to the initiation itself. As for the United States’ proposed standard, the Panel agreed that ‘reason to believe’ was an appropriate yardstick, but that it was not the *potentiality* of the existence of subsidy or injury for which there had to be a reason to believe but rather a reason to believe that those two elements *existed*. This interpretation was confirmed by the wording of the last sentence of Article 2:1 which made clear that the investigating authorities ‘shall proceed only if they have sufficient evidence [of the *existence* of subsidy, injury and causation]’. In the view of the Panel, therefore, the term ‘sufficient evidence’ in the context of initiation of a countervailing duty investigation was to be interpreted to mean ‘evidence that provides a reason to believe that a subsidy exists and that the domestic industry is injured as a result of subsidized imports’.

“The Panel noted that it was the rôle of the national investigating authority in the importing country, not that of the Panel, to make the necessary determinations in connection with the initiation of a countervailing duty case. This point was underlined by the language in Article VI:6(a) of the General Agreement, which provided:

‘No contracting party shall levy any ... countervailing duty on the importation of any product of the territory of another contracting party unless *it determines* that the effect of the ... subsidization ... is such as to cause or threaten material injury ...’. (emphasis added)

“The rôle of the Panel was thus not to determine whether there was sufficient evidence for initiation but to review whether the national authorities in the importing country had made the initiation determination in accordance with relevant provisions of the Agreement.

“The Panel considered that in reviewing the action of the United States authorities in respect of determining the existence of sufficient evidence to initiate, the Panel was not to conduct a *de novo* review of the evidence relied upon by the United States authorities or otherwise to substitute its judgment as to the sufficiency of the particular evidence considered by the United States authorities. Rather, in the view of the Panel, the review to be applied in the present case required consideration of whether a reasonable, unprejudiced person could have found, based upon the evidence relied upon by the United States at the time of initiation, that sufficient evidence existed of subsidy, injury and causal link to justify initiation of the investigation.

"The Panel noted the argument of Canada that Article 2:1 required a higher standard of sufficient evidence to self-initiate a countervailing duty investigation than to initiate based upon a petition. The Panel noted that the relevant portion of Article 2:1 stated the following:

'If in special circumstances the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have sufficient evidence on all points under (a) to (c) above.'

"In the view of the Panel, Canada's claim was not well-founded in that there was nothing in the text of Article 2:1 to suggest a different level of evidence for self-initiation than for initiation pursuant to petition. Moreover, the Panel could not discern any purpose under the Agreement which could be served by a different level of 'sufficient evidence' in the case of self-initiation. The Panel recalled Canada's contention that the words 'only if' in the sentence cited above suggested a higher standard for self-initiation than for initiation based upon a petition. However, the Panel considered that the words 'only if' in the above context referred only to the elements mentioned in the second sentence of Article 2:1, not to a different level of 'sufficient evidence'. What was required in addition to 'sufficient evidence' was the existence of 'special circumstances'."⁵⁵

The 1994 Panel Report on "United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway" also addressed the issue of initiation of an investigation, finding that "A 'written request ... on behalf of the industry affected' ... meant a request on behalf of the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products."⁵⁶

"The Panel then turned to the question of the duty incumbent on investigating authorities to ensure that their actions with regard to the treatment of written requests for the initiation of anti-dumping investigations were consistent with their obligations under Article 5:1. The Panel considered that, in light of the requirement in Article 5:1 that a written request be by or on behalf of the industry affected and contain certain evidence, the investigating authorities could not, consistently with Article 5:1, initiate investigations automatically in response to any written request received. The requirements of Article 5:1 clearly implied a duty for the authorities to evaluate each such written request to ascertain whether it contained the required information, and to screen out those requests that failed to provide it. The investigating authorities therefore had to evaluate whether a written request for the initiation of an investigation was made "on behalf of" the industry affected.

...

"The Panel noted that the Agreement did not provide precise guidance as to the procedural steps to be taken for such an evaluation, and considered that the question of how this requirement is to be met depends on the circumstances of each particular case. In the Panel's view, this question, or in this case the steps the United States was required to take as a prerequisite to initiating an investigation, had to be evaluated on the basis of the information before the investigating authorities at the time of the initiation decision. ..."⁵⁷

The Panel concluded on the basis of its evaluation of the facts that "Under these circumstances the Department of Commerce could, in the Panel's view, reasonably treat this request as being 'on behalf of the industry affected' and the initiation was not inconsistent with the United States' obligations under the Agreement."⁵⁸

(4) *Provisional measures*

See Interpretative Note 1 to paragraphs 2 and 3; this Note was added at Havana "to answer any doubt that a Member could require security for the 'payment of anti-dumping or countervailing duty pending final determination of the facts in cases of suspected dumping or subsidization'".⁵⁹

⁵⁵SCM/153, adopted on 27 October 1993, paras. 330-336.

⁵⁶ADP/87, adopted by the Committee on Anti-Dumping Practices on 27 April 1994, para. 357.

⁵⁷*Ibid.*, paras. 358, 360.

⁵⁸*Ibid.*, para. 362.

The Group of Experts on Anti-dumping and Countervailing Duties in its 1959 report discussed, *inter alia*, the question of provisional anti-dumping measures.

“It was recognized that in certain circumstances the use of such measures might be justified in order to limit the material injury to a domestic industry, even though it was noted that Article VI made no mention of them. On the other hand, it was generally felt that provisional measures should be used sparingly and for the shortest possible time in order to interfere as little as possible with normal trade and in order that they should not assume a protectionist character. For this reason, any such measures should preferably be introduced after the responsible administration of the importing country had carried out an initial confidential investigation that revealed that there was a serious case to consider further. Moreover, where possible, the provisional measures should not lead to a situation in which either the exporter or the importer of the product under investigation would suffer if the eventual decision were not to impose an anti-dumping duty. The Group agreed that it was desirable that such provisional measures should not be of retroactive application and that they should preferably take the form of bond or cash deposits as mentioned in Interpretative Note 1 to paragraphs 2 and 3 of Article VI. Furthermore, they should be based on provisions which would, as far as possible, permit the importer to determine the maximum duty which could be assessed”.⁶⁰

See also Article 10 (“Provisional Measures”) of the 1967 and 1979 Agreements on Implementation of Article VI of the General Agreement and Article 5 (“Provisional Measures and Retroactivity”) of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement.⁶¹

(5) *Retroactive effect of an anti-dumping duty*

The 1959 Report of the Group of Experts on Anti-dumping and Countervailing Duties provides: “The Group stressed that final decisions should not have any retroactive effect, except that in cases where provisional measures were applied it should be permitted to collect anti-dumping duties against the merchandise covered by such provisional measures”.⁶² See also Article 11 (“Retroactivity”) of the 1967 and 1979 Agreements on Implementation of Article VI of the General Agreement and Article 5:9 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement.⁶³

(6) *Duration of validity of anti-dumping duties*

The same Report provides: “It was generally agreed that anti-dumping duties should remain in place only so long as they were genuinely necessary to counteract dumping which was causing or threatening material injury to a domestic industry. In this connexion it was noted that any country imposing a duty would naturally be free to review it and the Group agreed that it might well be desirable for it to do so from time to time in the light of information at its disposal. It was further agreed that it should be open to exporters of the product concerned, if they considered that they had the necessary evidence, to request the importing country to carry out a review of the facts”.⁶⁴ See also Article 9 (“Duration of Anti-Dumping Duties”) of the 1967 and 1979 Agreements on Implementation of Article VI of the General Agreement and Article 4:9 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement.⁶⁵

(7) *Use of measures against dumping or subsidization other than anti-dumping or countervailing duties on imports*

Paragraph 7 of Article VI in the General Agreement as agreed in October 1947 (and paragraph 6 of the corresponding Article in the Geneva Draft Charter) provided that “No measures other than anti-dumping or countervailing duties shall be applied by any contracting party in respect of any product of the territory of any other contracting party for the purpose of offsetting dumping or subsidization”. The record of the discussions at

⁵⁹Havana Reports, p. 75 para. 27.

⁶⁰L/978, adopted on 13 May 1959, 8S/151-152, para. 23.

⁶¹15S/24, 32-33; 26S/171, 181-182; 26S/56, 61-62.

⁶²8S/151.

⁶³15S/24, 33-34; 26S/171, 182-183; 26S/56, 62.

⁶⁴*Ibid.*, 8S/151-152, para. 23.

⁶⁵15S/24, 32; 26S/171, 181; 26S/56, 63.

Havana notes: “The Subcommittee [on Article 34 of the Charter] agreed to the deletion of paragraph 6 of the Geneva Draft which expressly prohibited the use of measures other than anti-dumping or countervailing duties against dumping or subsidization. It did so with the definite understanding that measures other than compensatory anti-dumping or countervailing duties may not be applied to counteract dumping or subsidization except insofar as such other measures are permitted under other provisions of the Charter”.⁶⁶ After the close of the Havana Conference, the Working Party in the Second Session on “Modifications to the General Agreement” agreed to take the Havana Charter article into the General Agreement, entirely replacing the original Article VI. The Report of this Working Party notes:

“The working party, endorsing the views expressed by [the Subcommittee on Article 34 at the Havana Conference] agreed that measures other than compensatory anti-dumping and countervailing duties may not be applied to counteract dumping or subsidization except insofar as such other measures are permitted under other provisions of the General Agreement”.⁶⁷

The Report of the Review Working Party on “Other Barriers to Trade” includes the following passage:

“With respect to paragraph 3 of Article VI, the Working Party considered a proposal submitted by New Zealand which would have permitted under certain circumstances the use of quantitative restrictions to offset subsidization or dumping. This proposal did not receive the support of the Working Party, and has not been recommended”.⁶⁸

Article 16:1 of the 1979 Agreement on Implementation of Article VI of the General Agreement provides that “No specific action against dumping of exports from another Party can be taken except in accordance with the provisions of the General Agreement, as interpreted by this Agreement”; Article 19:1 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement provides that “No specific action against a subsidy of another signatory can be taken except in accordance with the provisions of the General Agreement, as interpreted by this Agreement”. Identical footnotes to each of these paragraphs provide that “This paragraph is not intended to preclude action under other relevant provisions of the General Agreement, where appropriate”.⁶⁹ The Preamble of the 1979 Agreement on Implementation of Article VII notes that “valuation procedures should not be used to combat dumping”.

The Panel Report of 1988 on “Japan - Trade in Semi-Conductors” notes as follows with regard to quantitative restrictions or other measures imposed on exports by an exporting country:

“ ... Having found Japan to have acted inconsistently with Article XI:1, the Panel examined Japan’s contention that its measures, being designed to prevent dumping, were justified by the spirit of Article VI, which condemned dumping. The Panel noted that Article VI:1 declared that dumping was to be condemned if it caused or threatened material injury to an established industry or materially retarded the establishment of an industry and that Article VI:2 allowed contracting parties to levy a duty on dumped products, subject to certain specified conditions. The provision was silent on actions by exporting countries. The Panel therefore found that Article VI did not provide a justification for measures restricting the exportation or sale for export of a product inconsistently with Article XI:1.

“The Panel proceeded to examine the contention of the EEC that the measures maintained by Japan to prevent dumping were contrary to Article VI because that provision gave the exclusive right of preventing dumping to the importing countries. The Panel noted that Article VI provided importing countries with the right to levy anti-dumping duties subject to certain specific conditions but was silent on actions by exporting countries”.⁷⁰

⁶⁶Havana Reports, p.74, para. 25; E/CONF.2/C.3/SR.30, p. 6.

⁶⁷II/41, para. 12.

⁶⁸L/334 and Addendum, Report adopted on 3 March 1955, 3S/223.

⁶⁹26S/171, 186; 26S/56, 78.

⁷⁰L/6309, adopted on 4 May 1988, 35S/116, 159, paras. 120-121.

5. Paragraph 3

(1) *“bounty or subsidy”*

See also the material below concerning the relationship between Article VI and Article XVI, and the material concerning the definition of a subsidy under Article XVI:1.

The Second Report of the Group of Experts on “Anti-Dumping and Countervailing Duties” records:

“With respect to the meaning of the word ‘subsidies’, a large majority of the experts considered that it covered only subsidies granted by governments or by semi-governmental bodies. Three experts considered that the word should be interpreted in a wider sense and felt that it covered all subsidies, whatever their character and whatever their origin, including also subsidies granted by private bodies. It was agreed that the word ‘subsidies’ covered not only actual payments, but also measures having an equivalent effect”.⁷¹

The 1994 Panel Report on “United States - Measures Affecting Imports of Softwood Lumber from Canada” examined a claim that the initiation of a countervailing duty investigation was inconsistent with the Agreement on Interpretation and Application of Articles VI, XVI and XXIII because under the circumstances there could be no subsidy from sales of timber from public lands.

“...the Panel recalled Canada's contention that the theory of economic rent taught that the exaction of economic rent - or revenue collection - for access to a natural resource such as timber could not cause any countervailable market distortion, in terms of an increase in the output or a decrease in the price of products made from the timber, which could constitute a subsidy. According to Canada, the granting of the right of access to the land on which the trees were standing and the collection of revenue (stumpage fees) from those granted the right of access was not the sale of a good. The tree became a good only once it was cut down and turned into a log. The Panel further recalled Canada's argument that stumpage fees were a component of the total cost of making logs but that they were not part of the per unit production cost or variable cost of producing the logs in that the stumpage fee did not influence the marginal cost of producing the next unit of product. The Panel then recalled the United States' contention that the administratively set stumpage fees in the Canadian provinces reduced the cost of the input product (logs) to the forest products industries, thus conferring a benefit on those industries.

“Reviewing these arguments, the Panel considered that assuming that Article XVI of the General Agreement and Part II of the Agreement only covered measures that had trade effects and that this trade effects characteristic also applied to countervailable subsidies under Article VI of the General Agreement and Part I of the Agreement, and assuming further that the theory of economic rent was relevant to the question of whether a governmental measure could have trade effects, the applicability of these arguments in the present case was nonetheless an empirical issue, in that it was not possible to determine without further investigation whether stumpage pricing practices in Canada affected the volume or pricing of lumber. The Panel noted in this regard, as argued by the United States, that there were also a number of studies suggesting, contrary to the argument of Canada, that stumpage fees did in fact affect prices and output of lumber. In the Panel's view, whereas the setting of the price for access to the natural resource in and of itself might relate only to the revenue collection function of government and might not constitute a benefit in connection with the harvesting or extraction of that resource, if the conditions of access were such that stumpage was available only to a specific group of enterprises, then the stumpage programme could potentially be considered as a benefit in connection with the right of access to harvest the resource.”⁷²

(2) *“the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation”*

The 1959 Report of the Group of Experts on Anti-dumping and Countervailing Duties refers to “the provision of Article VI which permits the imposition of countervailing duties to offset the effects of subsidies

⁷¹L/1141, adopted on 27 May 1960, 9S/194, 200, para. 34.

⁷²SCM/162, adopted by the Committee on Subsidies and Countervailing Measures on 27 April 1993, paras. 346-347.

whether these are granted in the producing country or the exporting country”.⁷³ The Second Report in 1960 of the same Group notes as well:

“Paragraph 3 of Article VI stipulated that no countervailing duty could be collected beyond the ‘estimated’ amount of the bounty or of the subsidy granted. In order to arrive at this estimate, the majority of the Group considered it normal, and at least desirable, that the country which became aware of the existence of a subsidy and which ascertained the injury which this subsidy caused, should enter into direct contact with the government of the exporting country. It was also desirable that the latter country should give information requested without delay. This would after all be in its own interest in that it would avoid the imposition of a countervailing duty on its exports at a rate which, failing this information, might be fixed at too high a level”.⁷⁴

The 1991 Panel Report on “United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada”

“... noted in this respect that the words in Article VI:3 ‘to determine’ and ‘estimated’ as well as the practices of the contracting parties under that provision, as reflected in Part I of the Subsidies Code, indicate that the decision as to the existence of a subsidy must result from an examination of all relevant facts. The Panel considered that the issue was not whether the United States had applied a methodology for establishing facts consistent with Article VI:3 but rather whether the facts which the United States did take into account were all the facts relevant for the determination it has made. The Panel therefore proceeded to examine whether the United States, by basing its determination that pork production is subsidized in Canada on a finding that the conditions set out in Section 771B had been met, had demonstrated that it had taken into account all facts necessary to meet the requirements of Article VI:3”.⁷⁵

See also the Guidelines on Amortization and Depreciation adopted by the Committee on Subsidies and Countervailing Measures.⁷⁶

(3) *Multiple currency practices*

See Interpretative Note 2 *Ad* paragraphs 2 and 3, which provides that “Multiple currency practices can in certain circumstances constitute a subsidy to exports ... or a form of dumping by means of partial depreciation of a country’s currency ... By ‘multiple currency practices’ is meant practices by governments or sanctioned by governments’. See also material on multiple exchange rates under Article XVI; see also the memorandum of the International Monetary Fund on multiple currency practices, annexed to the Report of the Review Working Party on “Quantitative Restrictions”.⁷⁷

6. Paragraph 4

(1) *“exemption ... from duties or taxes”*

The Panel on “Swedish Anti-Dumping Duties” examined the application of Article VI:4 where an anti-dumping scheme applied to products benefiting from an export rebate of duties and taxes. “... the Panel noted that there was no disagreement between the parties concerned regarding the obligation to take account of legitimate refund of duties and taxes”.⁷⁸

The 1977 Working Party Report on “Suspension of Customs Liquidation by the United States” examined a United States Federal court ruling that remission and exemption by Japan of consumption taxes on exported consumer electronic products was a countervailable export subsidy. Pending appeal of this decision, final duty payment (liquidation) of entries of these products had been held in suspense. The Working Party Report notes that

⁷³L/978, adopted 13 May 1959, 8S/145, 149, para. 11.

⁷⁴L/1141, adopted on 27 May 1960, 9S/194, 200, para. 35.

⁷⁵DS7/R, adopted on 11 July 1991, 38S/45.

⁷⁶SCM/64, adopted on 25 April 1985, 32S/154ff.

⁷⁷L/332/Rev. 1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 200.

⁷⁸L/328, adopted 26 February 1955, 3S/81, 86 para. 16.

“All but one member of the Working Party expressed views on the legal aspects of the matter. They agreed that the Japanese tax practices in question were in full accord with the provisions of GATT, its established interpretation as well as established practice of the GATT. They also agreed that, should the court decision be upheld finally and if countervailing duties were imposed, the imposition of such duties would be in contravention of the provisions of the GATT including Article VI:4 and the note to Article XVI, and would constitute a *prima facie* case of nullification or impairment of Japan’s rights under the General Agreement”.⁷⁹

(2) “borne by the like product”

The Second Report on Anti-dumping and Countervailing Duties noted the view of the Group, in relation to Article VI:4, that “If, however, it were established that the exemption or the reimbursement [of duties and taxes] exceeded the real charge which the product would have to pay in the exporting country, the difference could be considered as constituting a subsidy”.⁸⁰

During its consideration of the 1982 complaint by India concerning certain domestic procedures of the United States, the Committee on Subsidies and Countervailing Measures heard differing views concerning the linkage between payment of internal (cascading indirect) taxes and export tax rebates, and the evidence of such linkage which an importing country could require as a condition for making an adjustment to the level of subsidy determined to exist.⁸¹

See also the Guidelines on Physical Incorporation⁸², which were adopted by the Committee on Subsidies and Countervailing Measures, it being stated that these guidelines constituted an understanding on the manner in which signatories intended to calculate the amount of certain subsidies.⁸³

7. Paragraph 6

(1) “it determines ... material injury”

In the Report of the Group of Experts on “Anti-Dumping and Countervailing Duties”,

“At the outset of their discussions on the injury concept, the Group stressed that anti-dumping measures should only be applied when material injury, i.e. substantial injury, is caused or threatens to be caused. It was agreed that no precise definitions or set of rules could be given in respect of the injury concept, but that a common standard ought to be adopted in applying this criterion and that decisions about injury should be taken by authorities at a high level. It was suggested that legislation which provided for ‘injury’ only should be applied as if the word ‘material’ were stated therein...”

“In concluding the discussion on the use of the injury concept and in relating it to the term ‘industry’ it was the general consensus that, before deciding to impose an anti-dumping duty, the importing country should ensure that dumped goods:

- (a) are causing material injury to an established industry; or
- (b) clearly threaten material injury to an established industry; or
- (c) materially retard the establishment of a domestic industry”.⁸⁴

⁷⁹L/4508, adopted on 16 June 1977, 24S/134, 138, para. 15. The court ruling was reversed by higher US courts.

⁸⁰L/1141, adopted on 27 May 1960, 9S/194, 201 para. 36.

⁸¹See SCM/M/11, SCM/M/Spec/7.

⁸²SCM/68, adopted on 24 October 1985, 32S/156ff.

⁸³31S/262 para. 12.

⁸⁴L/978, adopted on 13 May 1959, 8S/145, 150, paras. 15, 17.

See also the provisions on determination of injury for purposes of Article VI, in Article 3 of the 1967 and 1979 Agreements on Implementation of Article VI of the General Agreement and Article 6 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement.⁸⁵

In the Panel Report on “New Zealand - Imports of Electrical Transformers from Finland”

“The Panel noted the view expressed by the New Zealand delegation that the determination of material injury was a matter specifically and expressly reserved, under the terms of Article VI:6(a), for the decision of the contracting party levying the anti-dumping duty. It also noted the contention that other contracting parties might inquire as to whether such a determination had been made, but that the latter could not be challenged or scrutinized by other contracting parties nor indeed by the CONTRACTING PARTIES themselves. The Panel agreed that the responsibility to make a determination of material injury caused by dumped imports rested in the first place with the authorities of the importing contracting party concerned. However, the Panel could not share the view that such a determination could not be scrutinized if it were challenged by another contracting party. On the contrary, the Panel believed that if a contracting party affected by the determination could make a case that the importation could not in itself have the effect of causing material injury to the industry in question, that contracting party was entitled, under the relevant GATT provisions, in particular Article XXIII, that its representations be given sympathetic consideration and that eventually, if no satisfactory adjustment was effected, it might refer the matter to the CONTRACTING PARTIES, as had been done by Finland in the present case. To conclude otherwise would give governments complete freedom and unrestricted discretion in deciding anti-dumping cases without any possibility to review the action taken in the GATT. This would lead to an unacceptable situation under the aspect of law and order in international trade relations as governed by the GATT. The Panel in this connection noted that a similar point had been raised, and rejected, in the report of the Panel on Complaints relating to Swedish anti-dumping duties (BISD 3S/81). The Panel fully shared the view expressed by that panel when it stated that ‘it was clear from the wording of Article VI that no anti-dumping duties should be levied until certain facts had been established. As this represented an obligation on the part of the contracting party imposing such duties, it would be reasonable to expect that that contracting party should establish the existence of these facts when its action is challenged’ (paragraph 15)”.⁸⁶

(2) *Threat of material injury*

The Report of the Group of Experts on “Anti-Dumping and Countervailing Duties” notes that “With respect to cases where material injury is *threatened* by dumped imports, the Group stressed that the application of anti-dumping measures had to be studied and decided with particular care”.⁸⁷ See also the provisions on determinations of threat of injury for purposes of Article VI, in Articles 3(e)-(f) and 3:6-7 of the 1967 and 1979 Agreements on Implementation of Article VI of the General Agreement respectively, and in the first footnote to Article 6:1 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement.⁸⁸ The Committee on Anti-Dumping Practices has adopted a Recommendation Concerning Determination of Threat of Material Injury.⁸⁹

In the course of its examination of an EEC complaint concerning anti-dumping action by Canada, the Committee on Anti-Dumping Practices, meeting in November 1983, discussed whether injury or a threat of injury can be caused by submission of tenders, even if the contract is awarded to other bidders and the offered goods have not been exported.⁹⁰

The Panel Report on “New Zealand - Imports of Electrical Transformers from Finland” provides the following in this regard:

⁸⁵15S/24, 26; 26S/171, 173; 26S/56, 64.

⁸⁶L/5814, adopted on 18 July 1985, 32S/55, 67-68, para. 4.4.

⁸⁷L/978, adopted on 13 May 1959, 8S/145, 150, para. 16.

⁸⁸15S/24, 27; 26S/171, 174-175; 26S/56, 64.

⁸⁹ADP/25, adopted 21 October 1985, 32S/182.

⁹⁰ADP/M/11, paras. 53-56.

“The Panel noted that while the decision of the New Zealand Minister of Customs to impose anti-dumping duties was based solely on material injury having been caused by the imports in question, the New Zealand delegation had also alleged before the Panel the existence of threat of material injury. In view of the high import penetration of the New Zealand transformer market, the significant increase in imports from all sources over one single year and the minimal impact of the actual Finnish imports in question, the Panel saw no reason to assume that imports from Finland would in the future change this picture significantly. The Panel noted in addition that at the time the ministerial decision was taken the Finnish exporter had not attempted to make any further sales to the New Zealand market. The Panel could therefore not agree that the imposition of anti-dumping duties could have been based on threat of material injury in terms of Article VI”.⁹¹

The 1993 Panel Report on “Korea - Anti-dumping Duties on Imports of Polyacetal Resins from the United States” examined an injury determination by the Korean authorities which was partially based on a finding of threat of injury:

“... It followed from the text of Article 3:6 that a proper examination of whether a threat of material injury was caused by dumped imports necessitated a prospective analysis of a present situation with a view to determining whether a ‘change in circumstances’ was ‘clearly foreseen and imminent’. Interpreted in conjunction with Article 3:1, a determination of the existence of a threat of material injury under Article 3:6 required an analysis of relevant future developments with regard to the volume, and price effects of the dumped imports and their consequent impact on the domestic industry.”

...

“... While Korea had argued that reliance on capacity of foreign producers to supply the Korean market was consistent with the Recommendation of the Committee on Anti-Dumping Practices, this Recommendation provided for the consideration of whether there existed ‘sufficient freely disposable capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing country’s market taking into account the availability of other export markets to absorb any additional exports.’ This indicated that capacity *per se* was not a sufficient factor in considering the likelihood of increased import volumes.”⁹²

(3) “to retard materially the establishment”

At Havana, it was stated that if an industry became economically unprofitable because of dumping, this would be covered by “retard materially”.⁹³

Article 3(a) of the 1967 Agreement on the Implementation of Article VI provided, *inter alia*, that “In the case of retarding the establishment of a new industry in the country of importation, convincing evidence of the forthcoming establishment of an industry must be shown, for example that the plans for a new industry have reached a fairly advanced stage, a factory is being constructed or machinery has been ordered”.⁹⁴

The 1993 Panel Report on “Korea - Anti-dumping Duties on Imports of Polyacetal Resins from the United States” examined an injury determination by the Korean authorities:

“... if the conclusion [on injury issues in the Korean determination] were to be interpreted to mean that the KTC had made a finding of injury based simultaneously on all three standards of injury, this would necessarily mean that the KTC’s statement was internally contradictory: the KTC could not logically have found that a domestic industry was being injured by dumped imports (which presupposed that such an industry was already established) and at the same time that the establishment of a domestic industry was materially retarded by those imports.”⁹⁵

⁹¹L/5814, adopted on 18 July 1985, 32S/55, 69-70, para. 4.8.

⁹²ADP/92 adopted by the Committee on Anti-Dumping Practices on 27 April 1993, paras. 271, 281.

⁹³E/CONF.2/C.3/SR.30, p. 5.

⁹⁴15S/26. There is no parallel provision in Article 3 of the 1979 Agreement on the Implementation of Article VI.

⁹⁵ADP/92, adopted by the Committee on Anti-Dumping Practices on 27 April 1993, para. 222.

(4) “to cause ... material injury”

The Panel Report on “New Zealand - Imports of Electrical Transformers from Finland” provides in this regard:

“In its examination, the Panel then turned to the question whether the New Zealand transformer industry had suffered material injury as a result of the imports of the two transformers from Finland.... The Panel did not question that this industry had been in a poor economic situation, due to lack of new orders, diminishing orders on hand in certain product categories, declining profitability, a large increase in imports and considerable uncertainty as to new orders. The Panel noted, on the other hand, that the Finnish imports in question ... represented only 2.4 per cent of total sales of the New Zealand transformer industry in 1983. In terms of MVA ratings ... the two Finnish transformers taken together ... represented 1.5 per cent of the sum of domestic production and imports, or 2.4 per cent of total imports. The Panel also considered it significant that imports increased from 1981/82 to 1982/83 by 250 per cent in MVA terms ... and that the imports from Finland represented only 3.4 per cent of this increase. In view of these facts, the Panel concluded that while the New Zealand transformer industry might have suffered injury from increased imports, the cause of this injury could not be attributed to the imports in question from Finland, which constituted an almost insignificant part in the overall sale of transformers in the period concerned. In this connection, the Panel rejected the contention advanced by the New Zealand delegation that, at least as far as material injury in terms of Article VI was concerned, ‘any given amount of profit lost’ by the complaining firm was in some sense an ‘injury’ to a domestic industry. ...

“In view of the reasons contained in the preceding paragraphs, the Panel came to the conclusion that New Zealand had not been able to demonstrate that any injury suffered by its transformer industry had been material injury caused by the imports from Finland. The Panel therefore found that the imposition of anti-dumping duties on these imports was not consistent with the provisions of Article VI:6(a) of the General Agreement”.⁹⁶

The 1992 Panel Report under the Agreement on Interpretation and Application of Articles VI, XVI and XXIII on “Canadian Countervailing Duties on Grain Corn from the United States” examined the countervailing duties in question in relation to, *inter alia*, Article 6:4 of the Agreement; this provision requires that “It must be demonstrated that the subsidized imports are, through the effects of the subsidy, causing injury within the meaning of this Agreement. There may be other factors which at the same time are injuring the domestic industry, and the injuries caused by other factors must not be attributed to the subsidized imports”.

“In the view of the Panel, the CIT's findings of injury and causality were themselves largely based on factors other than subsidized imports: in particular, the factor of a dramatic decline in world market prices resulting in large part from a United States subsidy under the 1985 Farm Bill. Clearly, if there is a general and dramatic decline in world market prices for grain corn, this will affect Canadian producers. It will affect Canadian producers even if Canada does not import any grain corn from the United States, even if it imports grain corn from third countries, even if it is completely self-sufficient in grain corn or, indeed, even if it is a net exporter of grain corn, as it was in some crop years during the period of the CIT investigation. In each case, the Canadian price for corn would still be directly impacted -- in a material way -- by the world price decline. Thus, the price depression experienced in the Canadian market would have occurred in all such cases, and the imposition of countervailing duties would be contrary to Article 6.4, which requires that price depression or prevention of price increases caused by other factors must not be attributed to subsidized imports. Since no case was made by the CIT that *subsidized imports* from the United States were responsible for the decline in prices suffered in Canada, the Panel concluded that the CIT determination was inconsistent with the requirements of Article 6 of the Subsidies Agreement.

⁹⁶L/5814, adopted on 18 July 1985, 32S/55, 69-70, paras. 4.7, 4.9.

“The Panel considered that the purpose of countervailing duties is to allow signatories to counteract injury from subsidized imports, not from a general decline in world market prices. Only a generally applicable import tariff, not however a countervailing duty on imports from a particular country, can normally prove effective in raising the domestic price when there is a general decline in world prices. The fact that in the present case the countervailing duty may have been partially effective in raising the price of grain corn in Canada, in that the United States was the only viable source for imports given the existence of phytosanitary regulations which effectively barred all other imports, does not relieve Canada of the duty of making an injury determination in accordance with Article 6, namely, of showing that subsidized imports are the cause of material injury. ...”⁹⁷

(5) “domestic industry”

The Sub-Committee that considered the Havana Charter article which became Article VI noted in its report: “The Sub-Committee desired it to be understood that, where the word ‘industry’ is used in the Article, it includes such activities as agriculture, forestry, mining etc., as well as manufacturing”.⁹⁸

The Report of the Group of Experts on “Anti-Dumping and Countervailing Duties” further notes:

“The Group discussed the term ‘industry’ in relation to the concept of injury and agreed that, even though individual cases would obviously give rise to particular problems, as a general guiding principle judgements of material injury should be related to total national output of the like commodity concerned or a significant part thereof. The Group agreed that the use of anti-dumping duties to offset injury to a single firm within a large industry (unless that firm were an important or significant part of the industry) would be protectionist in character, and the proper remedy for that firm lay in other directions”.⁹⁹

In the Panel Report on “New Zealand - Imports of Electrical Transformers from Finland”

“The Panel accepted the argument put forward by New Zealand that the complaining company represented the New Zealand transformer industry in terms of Article VI of the GATT since its output accounted for 92 per cent of the total domestic production. It found support for this view in the report of the Group of Experts on Anti-Dumping and Countervailing Duties (BISD 8S/145, paragraph 18) which had discussed the term industry in relation to the concept of injury and had concluded that as a general guiding principle, judgements of material injury should be related to total national output of the like commodity concerned or a significant part thereof. In this connection, the Group of Experts did refer to a single firm that was an important or significant part of the industry.

“In its examination whether the New Zealand transformer industry had suffered injury from the imports in question, the Panel subsequently dealt with the argument put forward by New Zealand that this industry was structured in such a way that there existed four distinguishable ranges of transformers, i.e. transformers between 1-5 MVA, 5-10 MVA, 10-20 MVA, and 20 MVA and above, which for purposes of injury determination had to be considered separately. The Panel was of the view that this was not a valid argument, especially in light of the fact that the complaining company, representing - as indicated above - the New Zealand transformer industry, in the year 1982/83 produced the whole range of transformers, most of which in a range (i.e. above 20 MVA) which was not at all affected by the imports from Finland. ... It was thus, in the Panel’s view, the overall state of health of the New Zealand transformer industry which must provide the basis for a judgement whether injury was caused by dumped imports. To decide otherwise would allow the possibility to grant relief through anti-dumping duties to individual lines of production of a particular industry or company - a notion which would clearly be at variance with the concept of industry in Article VI in a case like the present one where both the Finnish exporter and the New Zealand industry were engaged in the manufacture and distribution of power transformers”.¹⁰⁰

⁹⁷SCM/140, adopted on 26 March 1992, 39S/411, 435-436, paras. 5.2.9-5.2.10.

⁹⁸Havana Reports, p. 74, para. 24.

⁹⁹L/978, adopted on 13 May 1959, 8S/145, 150, para. 18.

¹⁰⁰L/5814, adopted on 18 July 1985, 32S/55, 68, paras. 4.5-4.6.

See the definition of “domestic industry” for purposes of determining injury in terms of Article VI of the GATT, in Article 4 of the 1967 and 1979 Agreements on Implementation of Article VI of the General Agreement and Article 6:5 and 6:7-9 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement¹⁰¹: these definitions provide:

“In determining injury, the term ‘domestic industry’ shall ... be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that when producers are related to the exporters or importers or are themselves importers of the allegedly subsidized product, the industry may be interpreted as referring to the rest of the producers ...”.

A footnote to this paragraph in the 1979 Agreements called for a group of experts to develop a definition of the word “related”. The 1981 Report of this group, adopted by the Committee on Anti-Dumping Practices and the Committee on Subsidies and Countervailing Measures, provides that for the purpose of these provisions, “producers shall be deemed to be related to the exporters or importers only if: (a) one of them directly or indirectly controls* the other; (b) both of them are directly or indirectly controlled* by a third person; or (c) together they directly or indirectly control* a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers”. A footnote to the asterisked words provides that “For the purposes of these Articles, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter”. The report notes that “The experts were of the opinion that the best approach would be to combine certain relevant criteria from the definition in [Article 15 of the Agreement on Implementation of Article VII of the General Agreement] with the requirement that the effect of the relationship was such as to cause the producer concerned to behave differently from non-related producers. At the same time they recognized that, as certain criteria were extremely difficult to evaluate, any such definition should allow sufficient flexibility and should be applied with appropriate care”.¹⁰²

The Panel on “United States - Definition of Industry Concerning Wine and Grape Products” under the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement, examined a dispute regarding amendments made in 1984 to the United States anti-dumping and countervailing duty laws which had provided that the definition of “industry” for anti-dumping and countervailing duty investigations in the case of wine and grapes would be as follows: “The term ‘industry’ means the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product; except that in the case of wine and grape products subject to investigation under this Title, the term also means the domestic producers of the principal raw agricultural product (determined on either a volume or value basis) which is included in the like domestic product, if those producers allege material injury, or threat of material injury, as a result of imports of such wine and grape products”.

“The Panel based the consideration of the case before it on Article 6 of the Code, in particular its paragraph 5, and footnote 18 to paragraph 1. It noted that Article 6:5 defines the term ‘domestic industry’ as the domestic producers as a whole of the like products (or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products). The Panel also noted that the term ‘like product’ is defined in footnote 18 to Article 6:1 of the Code, and it shared the view expressed by both parties to the dispute that, because of different physical characteristics, wine and grapes were not ‘like products’ in the sense of the Code. In view of the precise definition of ‘domestic industry’, the Panel considered that producers of the like products could be interpreted to comprise only producers of wine.

“The Panel then addressed the question whether, as a consequence of the close relationship between grape and wine production, the wine-grape growers could be regarded as part of the industry producing wine. It noted in this respect that both delegations had stated before the Panel that in the United States, the

¹⁰¹15S/24, 27; 26S/171, 175; 26S/56, 65.

¹⁰²Report to the Committee on Anti-dumping Practices and the Committee on Subsidies and Countervailing Measures, 28S/33, adopted 28-30 October 1981 by both Committees, 28S/47, 28S/28; Agreement on Implementation of Article VII, 26S/116.

structure of the industries was such that wineries did not normally grow their own grapes but bought them from the grape-growers for processing. In view of this situation, the Panel found that, irrespective of ownership, a separate identification of production of wine-grapes from wine in terms of Article 6:6 of the Code was possible and that therefore in fact two separate industries existed in the United States - the growers of wine-grapes on the one hand and the wineries on the other. Bearing in mind its terms of reference, the Panel did not consider it appropriate to examine the structure of the wine industry in other countries or the situation in other product sectors.

“The finding which the Panel reached was supported by the fact that in a previous countervailing duty investigation on wine imports, which had been conducted under the unamended version of Section 771(4)(a) of the US Tariff Act of 1930, the USITC had concluded that it was not appropriate to include grape growers within the scope of the domestic industry. The Panel noted the language of the Conference Report of the US Congress ... which states that producers of products being incorporated into a processed or manufactured article (i.e. intermediate goods or component parts) were generally not included in the scope of the domestic industry that the USITC analysed for the purposes of determining injury. In view of this fact it therefore appeared to the Panel that this had been a reason for the United States to amend the Trade and Tariff Act of 1984, in order to give wine-grape growers standing in countervailing duty proceedings involving wine imports. The Panel thus was of the opinion that it would not have been necessary to change the definition of ‘industry’ in the US Tariff Act of 1930 if wine-grape growers in the United States were part of the wine industry.”¹⁰³

See also the material on “like product” in the context of Article VI, at page 227 above.

(6) *Sub-paragraphs 6(b) and 6(c): Anti-dumping and countervailing duties based on material injury to the industry in a third country*

The first sentence of paragraph 6(b) was added during discussions at the Geneva session of the Preparatory Committee in 1947.¹⁰⁴ The second sentence of paragraph 6(b) and paragraph 6(c) were agreed during the 1954-55 Review Session, as noted in the Report of the Review Working Party on “Other Barriers to Trade”:

“The representatives of Australia and New Zealand originally proposed an extensive amendment to paragraph 6 which would have removed the requirement of prior approval by the CONTRACTING PARTIES before the imposition of a countervailing or anti-dumping measure designed to protect the industry of another exporting country. While this amendment did not receive wide support in its original form, a revised amendment proposed by those two delegations which is confined to countervailing duties, is recommended by the Working Party”.¹⁰⁵

Accordingly, the second sentence of paragraph 6(b) and paragraph 6(c), and the interpretative note to paragraph 6(b), were added to Article VI by the Protocol Amending the Preamble and Parts II and III of the General Agreement, which entered into force in 1957.

The same Working Party Report notes that “During the consideration of this subject by the Working Party, the Netherlands representative presented an oral proposal that the CONTRACTING PARTIES should be given the authority to require contracting parties to impose countervailing and anti-dumping duties against imports of a product from another country which, through the sale of the product concerned at a subsidized or dumping price, causes serious injury to other exporting contracting parties. This proposal was not accepted by the Working Party”.¹⁰⁶

The Second Report of the Group of Experts on Anti-dumping and Countervailing Duties noted the view of the Group that: “As regards the application of anti-dumping duties in the interests of third countries, the Group

¹⁰³SCM/71, adopted on 28 April 1992, 39S/436, 446-447, paras. 4.2-4.4. The legislative proviso regarding wine and grape products has since expired; see SCM/M/59 p. 29-31.

¹⁰⁴See EPCT/103.

¹⁰⁵3S/223-224; see proposal at W.9/214.

¹⁰⁶*Ibid.*, 3S/224, para. 11.

was of the opinion that the initiative should come from the third country involved".¹⁰⁷ Further on this subject, the Group's Second Report provides:

"The Group was of the opinion that the situation of third countries was fully dealt with in Article VI, paragraph 6, which related to cases where countries could levy an anti-dumping duty on behalf of third countries.

"In these circumstances, and contrary to one of the basic principles of Article VI, paragraph 6(a), the imposition of an anti-dumping duty was not contingent upon the existence of injury caused to an industry of the importing country, but upon injury caused or threatened to an industry of one or more third countries which were suppliers of the importing country.

"In order to avoid any misunderstanding, the Group wished to stress that a third country, in order to justify a request to an importing country to impose measures against another country, should produce evidence that the dumping engaged in by the other country was causing material injury to its domestic industry and not only to the exports of the industry of that third country. However, in cases where the importing country granted a request from a third country, anti-dumping measures should not be imposed until and unless the CONTRACTING PARTIES had approved the proposed measure (Article VI, paragraph 6). ...

"In any case, there was no doubt that the initiation of the procedures of resorting to the CONTRACTING PARTIES laid down in Article VI, paragraph 6, should be left to the discretion of the importing country. Consequently, the Group was of the opinion that where the importing country found it impossible or undesirable to grant the request from a third country which claimed injury, the third country had no right to retaliatory measures but could have resort to Articles XXII and XXIII of the General Agreement".¹⁰⁸

The provisions of sub-paragraph 6(b) and 6(c) have, so far, not been invoked and no waiver from the provisions of paragraph 6(a) has been requested.¹⁰⁹

The 1967 and 1979 Agreements on the Implementation of Article VI each include in Article 12 provisions on "Anti-dumping action on behalf of a third country".¹¹⁰

8. Paragraph 7

The Second Report of the Group of Experts on Anti-dumping and Countervailing Duties notes:

"The Group felt that the responsibility for ensuring the adequate implementation of international stabilization agreements affecting certain commodities should, in the first instance, be left to the bodies or institutions provided for in such agreements; this applied regardless of whether the agreements provided for floor or ceiling prices. ... Of course if while conforming with such an international agreement products were sold at a dumping price, recourse to the provisions of Article VI of GATT would be justified".¹¹¹

There is no record of Article VI:7 ever having been invoked formally in the GATT so far, although this may signify that the justification of its use by a contracting party has never been challenged during discussions with other interested contracting parties.¹¹²

¹⁰⁷L/1141, adopted on 27 May 1960, 9S/194, 195 para. 6.

¹⁰⁸*Ibid.*, 9S/198, paras. 21-23, 25.

¹⁰⁹C/W/420, p. 2.

¹¹⁰15S/24, 34; 26S/171, 183.

¹¹¹L/1141, adopted on 27 May 1960, 9S/194, 199, para. 30.

¹¹²CG.18/W/59, p. 16.

B. RELATIONSHIP BETWEEN ARTICLE VI AND OTHER GATT ARTICLES

1. Article I

The 1955 Panel Report on “Swedish Anti-Dumping Duties” examined Sweden’s application of a basic price scheme on imports of nylon stockings, in which any consignment with an invoice price higher than the basic price determined by the Swedish government was exempted from anti-dumping proceedings, and for other shipments dumping margins were related to the concept of normal value in Article VI. The Panel examined, *inter alia*, the claim by Italy that this scheme was inconsistent with Article I because it would exempt from anti-dumping proceedings imports from high-cost producers which were below normal value but above the basic price, and would deprive the low-cost producers of their competitive advantage to which they were entitled under the most-favoured-nation clause. The Panel Report notes as follows:

“The Panel considered that this argument was not entirely convincing. If the low-cost producer is actually resorting to dumping practices he foregoes the protection embodied in the most-favoured-nation clause. On the other hand, Article VI does not oblige an importing country to levy an anti-dumping duty whenever there is a case of dumping, or to treat in the same manner all suppliers who resort to such practices. The wording of paragraph 6 supports that view. The importing country is only entitled to levy an anti-dumping duty when there is material injury to a domestic industry or at least a threat of such an injury. If, therefore, the importing country considers that the imports above a certain price are not prejudicial to its domestic industry, the text of paragraph 6 does not oblige it to levy an anti-dumping duty on imports coming from high-cost suppliers, but, on the contrary, prevents it from doing so. On the other hand, if the price at which the imports of the low-cost producers are sold is prejudicial to the domestic industry, the levying of an anti-dumping duty is perfectly permissible, provided, of course, that the case of dumping is clearly established.

“The Panel recognized however that the basic price system would have a serious discriminatory effect if consignments of the goods exported by the low-cost producers had been delayed and subjected to uncertainties by the application of that system and the case for dumping were not established in the course of the enquiry. The fact that the low-cost producer would thus have been at a disadvantage whereas the high-cost producer would have been able to enter his goods freely even at dumping prices would clearly discriminate against the low-cost producer”.¹¹³

The Second Report of the Group of Experts on Anti-dumping and Countervailing Duties notes:

“In equity, and having regard to the most-favoured-nation principle the Group considered that where there was dumping to the same degree from more than one source and where that dumping caused or threatened material injury to the same extent, the importing country ought normally to be expected to levy anti-dumping duties equally on all the dumped imports”.¹¹⁴

See also Articles 8(b) and 8:2 of the 1967 and 1979 Agreements on the Implementation of Article VI¹¹⁵.

The Report of the Panel on “United States - Definition of Industry Concerning Wine and Grape Products”, established under the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement to examine a dispute regarding a provision of the United States anti-dumping and countervailing duty laws, notes that “the Panel held the view that Article VI of the GATT and the corresponding Code provision should, because they permitted action of a non-m.f.n. nature otherwise prohibited by Article I, be interpreted in a narrow way”.¹¹⁶

The 1991 Report of the Panel on “United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada” contains the following finding:

¹¹³L/328, adopted 26 February 1955, 3S/81, 83-84, paras. 8-9.

¹¹⁴L/1141, adopted on 27 May 1960, 9S/194, 198, para. 26.

¹¹⁵15S/24, 31; 26S/171, 180.

¹¹⁶SCM/71, adopted on 28 April 1992, 39S/436, 447, para. 4.5.

“... in conducting [its] examination, the Panel took into account that Article VI:3 is an exception to basic principles of the General Agreement, namely that ... charges of any kind imposed in connection with imports must meet the most-favoured-nation standard (Article I:1). The Panel also noted in this context that discriminatory trade measures may under the General Agreement only be taken in expressly defined circumstances (e.g. Article XXIII:2).”¹¹⁷

In the 1992 Panel Report on “United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil,” “The Panel considered that the rules and formalities applicable to countervailing duties, including those applicable to the revocation of countervailing duty orders, are rules and formalities imposed in connection with importation, within the meaning of Article I:1.”¹¹⁸

“The Panel noted that Article I would in principle permit a contracting party to have different countervailing duty laws and procedures for different categories of products, or even to exempt one category of products from countervailing duty laws altogether. The mere fact that one category of products is treated one way by the United States and another category of products is treated another is therefore in principle not inconsistent with the most-favoured-nation obligation of Article I:1. However, this provision clearly prohibits a contracting party from according an advantage to a product originating in another country while denying the same advantage to a *like product* originating in the territories of other contracting parties.”¹¹⁹

“The Panel found that the United States failed to grant, pursuant to Section 104(b) of the Trade Agreements Act of 1979, to products originating in contracting parties signatories to the Subsidies Agreement the advantage accorded in Section 331 of the Trade Act of 1974 to like products originating in countries beneficiaries of the United States GSP programme, that advantage being the automatic backdating of the revocation of countervailing duty orders issued without an injury determination to the date on which the United States assumed the obligation to provide an injury determination under Article VI:6(a). Accordingly, the Panel concludes that the United States acted inconsistently with Article I:1 of the General Agreement.”¹²⁰

2. Article II

In the 1962 Panel Report on “Exports of Potatoes to Canada”, the Panel examined a complaint by the United States concerning the imposition by Canada of an import charge on potatoes in addition to the bound specific duty, as a result of the application under the Canadian Customs Act of “values for duty” on potatoes imported below a certain price. The Panel found that “the imposition of an additional charge could not be justified by Article VI of the General Agreement, since the main requirement laid down in paragraph 1(a) of the Article was not satisfied” (see page 226 above).

“The Panel came to the conclusion that the measure introduced by the Canadian Government amounted to the imposition of an additional charge on potatoes which were imported at a price lower than Can.\$2.67 per 100 lbs. The Panel considered that this charge was in addition to the specific import duty which had been bound at a rate of Can.\$0.375 per 100 lbs. Since no provisions of the General Agreement had been brought forward for the justification of the imposition of an additional charge above the bound import duty, the Panel considered that the Canadian Government had failed to carry out its obligations under paragraph 1(a) of Article II.”¹²¹

¹¹⁷DS7/R, adopted 11 July 1991, 38S/30, 44, para. 4.4.

¹¹⁸DS18/R, adopted on 19 June 1992, 39S/128, 150, para. 6.8.

¹¹⁹*Ibid.*, 39S/151, para. 6.11.

¹²⁰*Ibid.*, 39S/154, para. 7.2.

¹²¹L/1927, adopted on 16 November 1962, 11S/88, 93, para. 18.

3. Article XVI

During discussions at London on Article 11 of the proposed Charter on anti-dumping and countervailing duties, it was stated that “Article 11 would permit countervailing duties to prevent injury, even though the subsidy granted by the exporting country was justified under provisions of the Charter”.¹²²

The Report of the 1954-55 Review Working Party on “Other Barriers to Trade”, which drafted the provisions of Section B of Article XVI, notes that the “Working Party ... agreed ... that nothing in the terms of Section B of Article XVI, relating to export subsidies, should be considered as limiting the scope of consultations envisaged under other provisions of the Agreement or as affecting in any way the right of a contracting party to impose countervailing and anti-dumping duties”.¹²³

The Second Report of the Group of Experts on Anti-Dumping and Countervailing Duties provides: “The fact that the granting of certain subsidies was authorized by the provisions of Article XVI of the General Agreement clearly did not debar importing countries from imposing, under the terms of Article VI, a countervailing duty on the products on which subsidies had been paid”.¹²⁴

The Panel Report on “United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada”

“... noted that the purposes of Article VI and Article XVI were fundamentally different: the former provision provides for a right to react unilaterally to subsidies while the latter sets out rules of conduct and procedures relating to subsidies. It is for these reasons not justified in the view of the Panel to conclude from the references to trade effects in Article XVI:1 that Article VI:3 permits contracting parties to offset the full trade effects caused by a subsidy granted to the producers of a product by levying countervailing duties without it having been determined that subsidies have been bestowed on these other products”.¹²⁵

The Panel on “United States - Definition of Industry Concerning Wine and Grape Products”, which was established under the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement to examine a dispute regarding a provision of the United States anti-dumping and countervailing duty laws, found, *inter alia*:

“The Panel ... considered the argument made by the US delegation that Article 9 of the Code was no less pertinent to the definition of ‘domestic industry’ that might be injured by subsidization than to the scope of producers whose exports might be subsidized. The Panel could see no relationship between Article 9 which prohibits the use of export subsidies on non-primary products, on the one hand, and Article 6:5 which contains the definition of ‘domestic industry’ for countervailing duty purposes, on the other. Quite apart from the fact that the two Code provisions in question had a different basis in the General Agreement itself, i.e. Article XVI in the case of Article 9 of the Code and Article VI in the case of Article 6:5 of the Code, the Panel was of the view that the definition of ‘certain primary products’ under Article 9 was made for different purposes than defining ‘domestic industry’ and that it could therefore not be used to interpret an otherwise explicit wording of Article 6:5. The processing permitted under the definition of ‘certain primary products’ could be, and in many instances was, a separate economic process identifiable in terms of Article 6:6 of the Code. Once such a separate identification was possible (e.g. because of the structure of the production), the economic interdependence between industries producing raw materials or components and industries producing the final product was not relevant for the purposes of the Code. There was therefore, in the Panel’s view, no basis for the contention that two products had to be considered as ‘like products’, and consequently the industries concerned to be one and the same, just because a primary product might continue to be considered a primary product even after processing ...”.¹²⁶

¹²²EPCT/C.II/48, p. 3.

¹²³L/334 and Addendum, adopted on 3 March 1955, 3S/222, 226, para. 20.

¹²⁴L/1141, adopted on 27 May 1960, 9S/194, 200, para. 32.

¹²⁵38S/44.

¹²⁶SCM/71, adopted on 28 April 1992, 39S/436, 447, para. 4.5.

4. Article XXIII

See under Article XXIII.

C. AGREEMENT ON IMPLEMENTATION OF ARTICLE VI AND AGREEMENT ON INTERPRETATION AND APPLICATION OF ARTICLES VI, XVI AND XXIII

1. Work done under the 1979 Agreements

The Agreement on Implementation of Article VI of the General Agreement was negotiated in the Kennedy Round of multilateral trade negotiations in the light of the decision of Ministers in 1963 that the Kennedy Round should “deal not only with tariffs but also with non-tariff barriers”.¹²⁷ This Agreement entered into force on 1 July 1968. In the Tokyo Round of multilateral trade negotiations revisions to the 1967 Agreement were proposed to take into account the draft text of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII; the 1979 Agreement on Implementation of Article VI entered into force on 1 January 1980.¹²⁸ Article 16:5 of the 1979 Agreement provides that “Acceptance of this Agreement shall carry denunciation of the Agreement on Implementation of Article VI, done at Geneva on 30 June 1967”. As of 31 December 1979 the 1967 Agreement had been accepted by twenty-five contracting parties including the ten EEC Member States, and by the European Economic Community. Two parties to the 1967 Agreement, Macau and Malta, have not accepted the 1979 Agreement. An updated list of acceptances of the 1979 Agreement appears in the Appendix.

Both the 1967 and 1979 Agreements on the Implementation of Article VI express in their respective preambles the desire of the parties to the Agreement “to interpret the provisions of Article VI of the General Agreement ... and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation”. Accordingly, the respective Articles 1 of both Agreements state: “The imposition of an anti-dumping duty is a measure to be taken only under the circumstances provided for in Article VI of the General Agreement and pursuant to investigations initiated and conducted in accordance with the provisions of this Code.” Article 14 of the 1979 Agreement establishes a Committee on Anti-Dumping Practices constituted of the Parties to the Agreement.

The Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement was negotiated in the Tokyo Round of multilateral trade negotiations, and entered into force on 1 January 1980.¹²⁹ An updated list of acceptances of the Agreement appears in the Appendix tables at the end of this book. In the preamble of this Agreement, the signatories express their desire “to apply fully and to interpret the provisions of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade only with respect to subsidies and countervailing measures ... and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation”. Accordingly, Article 1 of the Agreement states: “Signatories shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any signatory imported into the territory of another signatory is in accordance with the provisions of Article VI of the General Agreement and the terms of this Agreement”. Part I of the Agreement deals with countervailing duties; other provisions of the Agreement deal with subsidies. Article 16 of the Agreement establishes a Committee on Subsidies and Countervailing Measures constituted of the signatories to the Agreement.

The GATT Secretariat has periodically published a collection of legislation under the title of *Anti-Dumping Legislation*.¹³⁰ Legislation and regulations of parties to the Agreement on Implementation of

¹²⁷Decision of Ministers, 12S/47, para. 3; see Preamble of 1967 Agreement, 15S/24. The 1967 Agreement appears at 15S/24. For the drafting background of the 1967 Agreement, see the documents of the Sub-Committee on Non-Tariff Barriers and other Special Problems, TN.64/SR.1-3, TN.64/NTB/1-; documents of the Group on Anti-Dumping Duties, TN.64/NTB/38-41 and TN.64/NTB/W/1-21; and the draft Code tabled by the United Kingdom in Spec(65)86.

¹²⁸For drafting background on the 1979 Agreement, see documents MTN/NTM/W/232+Corr.1, Add.1/Rev.1, Add.2; MTN/W/241/Rev.1, MTN/NTM/W/232/Rev.1, MTN/NTM/W/248, MTN/NTM/W/258-259 and see generally minutes and documents of the Committee on Anti-Dumping Practices, 1968-1979, in the COM.AD/ series. The text of the 1979 Agreement is at 26S/171.

¹²⁹Text of the Agreement appears at 26S/56. On the drafting history, see documents listed in TA/INF/1/Rev.8, p. 45-50.

¹³⁰*Anti-Dumping Legislation*, published 1958, 1970, 1974, 1977; *Anti-dumping and Countervailing Measures Legislation*, published in loose-leaf format; current edition updated to March 1987.

Article VI and the Agreement on Interpretation and Application of Articles VI, XVI and XXIII are notified to the Committee on Anti-Dumping Practices and the Committee on Subsidies and Countervailing Measures.¹³¹

These two Committees have examined issues relating to administration of anti-dumping and countervailing duty proceedings, and have adopted certain recommendations “constituting an understanding on the manner in which Parties intended to implement certain provisions of the Code. The recommendations have not added new obligations nor have they detracted from the existing obligations under the Code.”¹³² The Committee on Anti-Dumping Practices has adopted the Recommendation concerning Transparency of Anti-dumping Procedures¹³³, the Recommendation concerning Procedures for an On-the-spot Investigation¹³⁴, the Recommendation concerning the Time-limits Given to Respondents to Anti-dumping Questionnaires¹³⁵ and the Recommendation concerning Best Information Available in terms of Article 6:8.¹³⁶ The Committee on Subsidies and Countervailing Measures has adopted Guidelines on Physical Incorporation,¹³⁷ it being stated that these guidelines constituted an understanding on the manner in which signatories intended to calculate the amount of certain subsidies;¹³⁸ Guidelines on Amortization and Depreciation;¹³⁹ and Guidelines in the Determination of Substitution Drawback Systems as Export Subsidies.¹⁴⁰ Both Committees adopted in 1981 the Report of a Group of Experts on the definition of the word “related”: see above at page 246.

2. Co-existence of the 1979 Agreements and the WTO Agreement

In the Uruguay Round of multilateral trade negotiations, two agreements were reached: the 1994 Agreement on Implementation of Article VI, and the Agreement on Subsidies and Countervailing Measures. These agreements are included in Annex 1A to the WTO Agreement and therefore bind all Members of the WTO. In late 1994, the Preparatory Committee for the WTO discussed arrangements for transition from the 1979 agreements to the 1994 agreements. The Preparatory Committee and the Committee on Anti-Dumping Practices each adopted the following decision on “Transitional Arrangements - Transitional Co-existence of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade and the Marrakesh Agreement Establishing the World Trade Organization”:

“The Parties to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (hereinafter referred to as ‘the Agreement’),

“*Noting* that not all Parties to the Agreement meeting the conditions for original membership in the World Trade Organization ... will be able to accept the Marrakesh Agreement Establishing the WTO ... as of its date of entry into force, and that the stability of multilateral trade relations would therefore be furthered if the Agreement and the WTO Agreement were to co-exist for a limited period of time;

“*Considering* that, during that period of co-existence, a Party to the Agreement which has become a Member of the WTO should have the right to act in accordance with the WTO Agreement notwithstanding its obligations under the Agreement;

“*Desiring* to end the period of co-existence on a date agreed in advance so as to provide predictability for policy makers and facilitate an orderly termination of the institutional framework of the Agreement;

“*Decide* as follows:

“1. The Parties to the Agreement that are Members of the WTO may, notwithstanding the provisions of the Agreement, maintain or adopt any measure consistent with the provisions of the WTO Agreement.

¹³¹See the ADP/1/Add. and SCM/1/Add. document series.

¹³²31S/287-288.

¹³³30S/24.

¹³⁴30S/28.

¹³⁵30S/30.

¹³⁶31S/283.

¹³⁷SCM/68, adopted on 24 October 1985, 32S/156ff.

¹³⁸31S/262 para. 12.

¹³⁹SCM/64, adopted on 25 April 1985, 32S/154ff.

¹⁴⁰31S/257.

“2. The dispute settlement provisions of the Agreement shall not apply:

“(a) to disputes brought against a Party to the Agreement which is a Member of the WTO if the dispute concerns a measure that is identified as a specific measure at issue in the request for the establishment of a panel made in accordance with Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes in Annex 2 of the WTO Agreement and the dispute settlement proceedings following that request are being pursued or are completed; and

“(b) in respect of measures covered by paragraph 1 above.

“3. The Agreement is herewith terminated one year after the date of entry into force of the WTO Agreement. In the light of unforeseen circumstances, the Parties may decide to postpone the date of termination by no more than one year.”¹⁴¹

On the same date, the Preparatory Committee and the Committee on Anti-Dumping Practices also adopted a decision on “Transitional Arrangements - Committee on Anti-Dumping Practices”:

“The Parties to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade ...

“*Recalling* the Ministerial Decision of 15 April 1994 on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes,

“*Further recalling* that Parties to the Agreement have the right to withdraw from the Agreement at any time, said withdrawal to take effect upon the expiration of sixty days from the day on which written notice is received by the Director-General to the CONTRACTING PARTIES to GATT 1947;

“*Agree* that, in the event of withdrawal by any Party from the Agreement taking effect on or after the date of entry into force for it of the Marrakesh Agreement Establishing the World Trade Organization ... or in case of termination of the Agreement while this Decision is in effect:

“(a) the Agreement shall continue to apply with respect to any anti-dumping investigation or review which is not subject to application of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 pursuant to the terms of Article 18:3 of that Agreement.

“(b) Parties that withdraw from the Agreement shall remain Members of the Committee on Anti-Dumping Practices exclusively for the purpose of dealing with any dispute arising out of any anti-dumping investigation or review identified in paragraph (a).

“(c) In case of termination of the Agreement during the period of validity of this Decision the Committee on Anti-Dumping Practices shall remain in operation for the purpose of dealing with any dispute arising out of any anti-dumping investigation or review identified in paragraph (a).

“(d) The rules and procedures for the settlement of disputes arising under the Agreement applicable immediately prior to the date of entry into force of the WTO Agreement shall apply to disputes arising out of any investigation or review identified in paragraph (a). With respect to such disputes for which consultations are requested after the date of this Decision, Parties and panels will be guided by Article 19 of the Understanding on Rules and Procedures Governing the Settlement of Disputes in Annex 2 of the WTO Agreement.

¹⁴¹PC/13, L/7584, ADP/131.

“(e) Parties will make their best efforts to expedite to the extent possible under their domestic legislation investigations and reviews referred to in paragraph (a), and to expedite procedures for the settlement of disputes so as to permit Committee consideration of such disputes within the period of validity of this Decision.

“This Decision shall remain in effect for a period of two years after the date of entry into force of the WTO Agreement. Any Party to the Agreement as of the date of this Decision may renounce this Decision. The renunciation shall take effect upon the expiration of sixty days from the day on which written notice of renunciation is received by the person who performs the depositary function of the Director-General to the CONTRACTING PARTIES to GATT 1947.”¹⁴²

On 8 December 1994 the Preparatory Committee and the Committee on Subsidies and Countervailing Measures also adopted two decisions paralleling those cited directly above, concerning coexistence of the WTO Agreement and the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade.¹⁴³

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

The corresponding Articles in the Havana Charter are Article 34, in the US proposals Chapter III-3, in the US Draft Article 11, in the New York Draft Article 17 and in the Geneva Draft Article 33.

Article VI in the General Agreement as agreed 30 October 1947 was identical to Article 33 of the Geneva Draft Charter except for the provisions corresponding to the paragraph 7 of the present Article VI. At Havana, this Article was further discussed and amended. After the close of the Havana Conference, the second session Working Party on “Modifications to the General Agreement” agreed to take the Havana Charter article into the General Agreement, entirely replacing the original Article VI. The Report of the Working Party notes in this regard:

“While agreeing that there is no substantive difference between Article VI of the General Agreement and Article 34 of the Charter, the working party recommends the replacement of that article, as the text adopted at Havana contains a useful indication of the principle governing the operation of that article and constitutes a clearer formulation of the rules laid down in that article”.¹⁴⁴

The replacement of Article VI was effected through the Protocol Modifying Part II and Article XXVI, which entered into force on 14 December 1948.

Further amendments to Article VI were considered in the Review Session of 1954-55, in the Working Party on “Other Barriers to Trade”. The Report of this Working Party notes that only two amendments were accepted: the amendments to paragraph 6 discussed on page 247 above, and the insertion of the second interpretative note to paragraph 1 discussed on page 228 above. The Review Session amendments to Article VI were effected through the Protocol Amending the Preamble and Parts II and III of the General Agreement, which entered into force 7 October 1957.

¹⁴²PC/14, L/7585, ADP/132. The Agreement on the Transfer of Assets, Liabilities, Records, Staff and Functions from the Interim Commission of the International Trade Organization (ICITO) and the GATT to the World Trade Organization, adopted on 8 and 9 December by the Preparatory Committee for the WTO, the GATT CONTRACTING PARTIES and the Executive Committee of ICITO, provides that “The Director-General of the WTO shall perform the depositary functions of the Director-General of the GATT 1947 after the date on which the legal instruments through which the contracting parties apply the GATT 1947 are terminated. On that date the records of the GATT 1947 shall be transferred to the WTO.” PC/9, L/7580, ICITO/39, para. 5.

¹⁴³Decisions on “Transitional Arrangements - Transitional Co-existence of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade and the Marrakesh Agreement Establishing the World Trade Organization”, PC/15, L/7586, SCM/186; “Transitional Arrangements - Committee on Subsidies and Countervailing Measures”, PC/16, L/7587, SCM/187.

¹⁴⁴GATT/CP.2/22/Rev.1, adopted 1-2 September 1948, II/39, 42 para. 12.

IV. RELEVANT DOCUMENTS

See below at the end of Article X.

ARTICLE VII

VALUATION FOR CUSTOMS PURPOSES

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I. TEXT OF ARTICLE VII AND INTERPRETATIVE NOTE AD ARTICLE VII

Article VII

Valuation for Customs Purposes

1. The contracting parties recognize the validity of the general principles of valuation set forth in the following paragraphs of this Article, and they undertake to give effect to such principles, in respect of all products subject to duties or other charges* or restrictions on importation and exportation based upon or regulated in any manner by value. Moreover, they shall, upon a request by another contracting party review the operation of any of their laws or regulations relating to value for customs purposes in the light of these principles. The CONTRACTING PARTIES may request from contracting parties reports on steps taken by them in pursuance of the provisions of this Article.

2. (a) The value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise on which duty is assessed, or of like merchandise, and should not be based on the value of merchandise of national origin or on arbitrary or fictitious values.*

(b) “Actual value” should be the price at which, at a time and place determined by the legislation of the country of importation, such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions. To the extent to which the price of such or like merchandise is governed by the quantity in a particular transaction, the price to be considered should uniformly be related to either (i) comparable quantities, or (ii) quantities not less favourable to importers than those in which the greater volume of the merchandise is sold in the trade between the countries of exportation and importation.*

(c) When the actual value is not ascertainable in accordance with sub-paragraph (b) of this paragraph, the value for customs purposes should be based on the nearest ascertainable equivalent of such value.*

3. The value for customs purposes of any imported product should not include the amount of any internal tax, applicable within the country of origin or export, from which the imported product has been exempted or has been or will be relieved by means of refund.

4. (a) Except as otherwise provided for in this paragraph, where it is necessary for the purposes of paragraph 2 of this Article for a contracting party to convert into its own currency a price expressed in the currency of another country, the conversion rate of exchange to be used shall be based, for each currency involved, on the par value as established pursuant to the Articles of Agreement of the International Monetary Fund or on the rate of exchange recognized by the Fund, or on the par value established in accordance with a special exchange agreement entered into pursuant to Article XV of this Agreement.

(b) Where no such established par value and no such recognized rate of exchange exist, the conversion rate shall reflect effectively the current value of such currency in commercial transactions.

(c) The CONTRACTING PARTIES, in agreement with the International Monetary Fund, shall formulate rules governing the conversion by contracting parties of any foreign currency in respect of which multiple rates of exchange are maintained consistently with the Articles of Agreement of the International Monetary Fund. Any contracting party may apply such rules in respect of such foreign currencies for the purposes of paragraph 2 of this Article as an alternative to the use of par values. Until such rules are adopted by the CONTRACTING PARTIES, any contracting party may employ, in respect of any such foreign currency, rules of conversion for the purposes of paragraph 2 of this Article which are designed to reflect effectively the value of such foreign currency in commercial transactions.

(d) Nothing in this paragraph shall be construed to require any contracting party to alter the method of converting currencies for customs purposes which is applicable in its territory on the date of this Agreement, if such alteration would have the effect of increasing generally the amounts of duty payable.

5. The bases and methods for determining the value of products subject to duties or other charges or restrictions based upon or regulated in any manner by value should be stable and should be given sufficient publicity to enable traders to estimate, with a reasonable degree of certainty, the value for customs purposes.

Interpretative Note *Ad* Article VII from Annex I

Paragraph 1

The expression “or other charges” is not to be regarded as including internal taxes or equivalent charges imposed on or in connexion with imported products.

Paragraph 2

1. It would be in conformity with Article VII to presume that “actual value” may be represented by the invoice price, plus any non-included charges for legitimate costs which are proper elements of “actual value” and plus any abnormal discount or other reduction from the ordinary competitive price.

2. It would be in conformity with Article VII, paragraph 2 (b), for a contracting party to construe the phrase “in the ordinary course of trade ... under fully competitive conditions”, as excluding any transaction wherein the buyer and seller are not independent of each other and price is not the sole consideration.

3. The standard of “fully competitive conditions” permits a contracting party to exclude from consideration prices involving special discounts limited to exclusive agents.

4. The wording of sub-paragraphs (a) and (b) permits a contracting party to determine the value for customs purposes uniformly either (1) on the basis of a particular exporter's prices of the imported merchandise, or (2) on the basis of the general price level of like merchandise.

I. INTERPRETATION AND APPLICATION OF ARTICLE VII

A. SCOPE AND APPLICATION OF ARTICLE VII

1. Paragraph 1

(1) “to give effect”

Until the Review Session of 1954-55, the undertaking in the first sentence of Article VII was qualified by the phrase “at the earliest practicable date” and an interpretative note to that phrase. The Review Session Working Party on “Schedules and Customs Administration” recommended deletion of this phrase and its note, “on the assumption that a general provision will be made allowing time for governments to bring their legislation into conformity with the rules”.¹

(2) “or other charges”

The Review Working Party also recommended the addition of the present Note *Ad* Paragraph 1 stating that “The expression ‘or other charges’ is not to be regarded as including internal taxes or equivalent charges imposed on or in connexion with imported products”. The Working Party report notes:

“The new interpretative note to paragraph 1, concerning the words ‘or other charges’, is intended to make it clearly understood that the wording does not require internal taxes (or their equivalents) which are charged on imported goods to be assessed on the same basis as that established for the purpose of charging customs duties. While some countries assess internal taxes on imported goods on the customs value or the customs value inclusive of duty, certain countries establish the value on which such internal taxes are charged on a different basis, being the same basis as is adopted for the charge of such internal taxes on domestically produced goods. Moreover, Article VII cannot be held to impose any commitment in relation to internal taxes, over and above those contained in Articles I and III”.²

(3) “laws or regulations”

During the Ninth (Review) Session in 1954-55, a Technical Working Party also examined laws and regulations of contracting parties concerning customs valuation. Its Report, “Comparative Study of Methods of Valuation for Customs Purposes,”³ describes the main systems of customs valuation at the time in the perspective of the criteria in Article VII, and presents a summary table of replies submitted by governments to a questionnaire.

See also the Agreement Relating Principally to Chemicals, supplementary to the Geneva (1967) Protocol to the General Agreement⁴ which was concluded in the Kennedy Round but did not enter into force.

Customs valuation laws and regulations of parties to the Agreement on the Implementation of Article VII, discussed at page 263 below, are reviewed in the Committee on Customs Valuation.

¹L/329, adopted 26 February 1955, 3S/205, 211-212, para. 12. As part of the results of the Review Session it was envisaged that the General Agreement would be brought into force on a definitive basis and in that connection a blanket reservation on acceptance for pre-existing inconsistent legislation was agreed to; see discussion of this reservation in the chapter on Article XXVI.

²3S/212, para. 13.

³G/88, adopted 2 March 1955, 3S/103; see also the 1953 interim report on Valuation for Customs Purposes (G/57, 2S/52).

⁴15S/8.

2. Paragraph 2

(1) “actual value” versus “arbitrary or fictitious values”

See Interpretative Notes 1 and 4 *Ad* Paragraph 2.

The Report of the Working Party on the “Accession of El Salvador” discusses customs valuation as follows:

“Some members noted that Article VII of the General Agreement which set a basic GATT obligation prohibited the use of indicative, normal or official prices for the valuation of imports and requested that El Salvador commit to apply, in practice, and from the date of accession, the provisions of Articles VII and X in its customs practices and procedures, including customs valuation. In the view of these members, if this was not the case, El Salvador’s request for accession might be premature. These members added that ... El Salvador should also state clearly that its customs officials will give first priority in determining customs value to the “actual value” of imports, as provided for in Article VII:2 of the General Agreement, and will avoid the use of administratively determined or constructed prices for customs valuation purposes ...”

“The representative of El Salvador ... confirmed ... that his Government would give first priority in determining customs value to the ‘actual value’ of imports, as provided for in Article VII:2 of the General Agreement, and would avoid the use of administratively determined or constructed prices for customs valuation purposes”.⁵

The Panel Report on “Exports of Potatoes to Canada” examined the application of a “value for duty” on potatoes under the Canadian Customs Act on 16 October 1962, at a level equal to the amount determined to be the average value, weighted as to quantity, at which potatoes were imported during the three-year period immediately preceding the date of shipment to Canada. Under this Act the difference between the lower export value and the “value for duty” would be levied by the Canadian customs authorities as “dumping duty”. The United States claimed that this determination of the value for duties of fresh potatoes constituted a “determination based on arbitrary or fictitious value” inconsistent with the provisions of Article VII:2(a).

“The Panel, having heard the points of view of the parties concerned, considered that the concept of value for duty as applied presently on imports of potatoes under the Canadian Customs Act was different from the concept of value for customs purposes, which the CONTRACTING PARTIES had in mind in drafting the provisions of Article VII. The Panel, therefore, did not consider that the provisions of Article VII were relevant in the context of its examination”.⁶

The Panel also found that the requirements of Article VI were not fulfilled, and concluded that the measure introduced by Canada amounted to the imposition of an additional charge above the bound import duty inconsistent with Article II:1(a).⁷

(a) *Government contracts*

The Charter text corresponding to the first Interpretative Note to Article VII:2 was amended during the Havana Conference “so as to provide expressly for the presumption that contract prices may represent the basis for establishing ‘actual values’ in the case of government contracts in respect of primary products”.⁸ This amendment was not brought into the General Agreement.

⁵L/6771, adopted on 12 December 1990, 37S/9, 15, paras. 19-20.

⁶L/1927, adopted on 16 November 1962, 11S/88, 93, para. 16.

⁷*Ibid.* para. 18. See also the material on this dispute under Article VI. See also the table of Article XIX actions for an invocation by Canada of Article XIX with regard to a later imposition of “values for duty” in respect of imports of potatoes into Western Canada.

⁸Havana Reports, p. 76, para. 32.

(b) Valuation according to fixed values

During discussions at the Havana Conference on Article 35 of the Charter (corresponding to GATT Article VII), “it was revealed that in certain countries it had been the practice to apply *ad valorem* tariffs to established values of goods which remain fixed for various periods of time. It was agreed that, in such cases, the *ad valorem* rates are, in practical result, the equivalent of specific duties so long as the established values of goods are not changed. It was agreed that a note recognizing this fact should be appended to paragraph 3 [corresponding to Article VII:2]. However, it was agreed ... that it would not, and should not, be compatible with the letter or spirit of the Article to accept the principle of variable schedules of ‘fixed values’ for products subject to *ad valorem* rates of duty”.⁹ The text of the note added was as follows:

“If on the date of this Charter a Member has in force a system under which *ad valorem* duties are levied on the basis of fixed values the provisions of paragraph 3 of Article 35 shall not apply:

- “1. in the case of values not subject to periodical revision in regard to a particular product, as long as the value established for that product remains unchanged;
- “2. in the case of values subject to periodical revision, on condition that the revision is based on the average ‘actual value’ established by reference to an immediately preceding period of not more than twelve months and that such revision is made at any time at the request of the parties concerned or of Members. The revision shall apply to the importation or importations in respect of which the specific request for revision was made, and the revised value so established shall remain in force pending further revision”.¹⁰

This note was not brought into the General Agreement. It was also noted in the summary record of the discussions at Havana that the system of tariff valuation in force in India “for non-ordinary products was in order insofar as the actual value could not be really ascertained under paragraph 3(b) [GATT VII:2(b)] and that paragraph 3(c) [GATT VII:2(c)] met the problem of India in respect of those particular products for which they found it necessary periodically to fix a value”.¹¹

The 1955 Report of the Technical Working Party on “Comparative Study of Methods of Valuation for Customs Purposes” notes concerning the system of fixed values: “This question was also discussed in the Working Party on Valuation at the eighth session of the CONTRACTING PARTIES in October 1953. The discussion in that Working Party showed that the system of fixed values as operated by India and Pakistan was not inconsistent with the principles of paragraph 2(c) of Article VII”.¹²

During the Review Session of 1954-55, the idea of inserting an interpretative note similar to that annexed to the Havana Charter was again examined in the Review Working Party on Schedules and Customs Administration. The suggestion was rejected because of the difficulties of drafting a suitable provision and also because contracting parties then using the fixed values system had not suffered any disability from the absence of such an interpretative Note: the Working Party Report stated that “... the systems practised in Chile, India and Pakistan have been closely examined on a number of occasions and ... it is recognized that they are not inconsistent with the General Agreement”.¹³

(2) “in the ordinary course of trade ... under fully competitive conditions”

See Interpretative Notes 2 and 3 to paragraph 2.

⁹Havana Reports, pp. 75-76, para. 31.

¹⁰Havana Charter, Interpretative Note *Ad* Article 35 .

¹¹E/CONF.2/C.3/SR.30, p.7.

¹²G/88, adopted on 2 March 1955, 3S/103, 109, para. 3.

¹³L/329, adopted on 26 February 1955, 3S/205, 212-213, para. 15; see also discussion of these valuation systems in the Report of the Technical Working Party on “Comparative Study of Methods of Valuation for Customs Purposes” in G/88, adopted on 2 March 1955, 3S/103, 108-109, para. 3.

3. Paragraph 3: “any internal tax”

The Report of the Review Working Party on “Schedules and Customs Administration” records that the Technical Group on Customs Administration agreed

“that the words ‘internal tax’ read in conjunction with the words ‘from which the imported product has been exempted or has been or will be relieved by means of refund’ mean only (i) internal taxes of the kind which are levied directly on the goods exported (or directly on the materials going into the manufacture of such goods), as distinct from (ii) other taxes (income tax, etc.). It follows that the obligation contained in paragraph 3, is limited to internal taxes of the kind mentioned in (i) above; so far as concerns taxes of the kind falling within (ii) above, there is no obligation upon contracting parties and, equally, there is nothing to prevent them from giving imported goods the benefit of more liberal provisions”.¹⁴

See also Articles II:2(a), VI:4 and the Interpretative Note to Article XVI of the General Agreement.

4. Paragraph 4

(1) *Par values and conversion rates of exchange*

In discussions at the Geneva session of the Preparatory Committee it was agreed that “cases in which an alteration in the rate of exchange, with or without par value, is introduced are adequately covered by paragraphs 4(a) and (b)”.¹⁵

Article IV of the original Articles of Agreement of the International Monetary Fund required each member of the Fund to state a par value for its currency in terms of either gold or U.S. dollars of a fixed gold value, as part of a system of fixed exchange rates. A change in the par value of a member's currency could be made only after consultation with the Fund. As revised in 1978, Article IV no longer requires the stating of par values and instead provides that “each member undertakes to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates”.¹⁶

The present text of paragraph 4 was agreed during the Review Session of 1954-55. The Report of the Review Working Party on “Schedules and Customs Administration” notes in this connection that:

“The amendments to paragraph 4(a) and (b), to use the words ‘par value as established’ and ‘rate of exchange recognized’ by the Fund, are intended to cover certain exchange situations which are likely to arise in practice and which are not provided for in the present text. For example, in the case of Canada the established par value accepted by the Fund is no longer the effective rate, and the Fund recognizes the fluctuating rate for its own accounting purposes. This type of exchange situation will be covered by the amended text”.¹⁷

Article IV of the IMF Articles, as revised in 1978, does not refer to “recognition” of a Fund member's rate of exchange. However, Article VII:4(b) of the General Agreement provides that “Where no such established par value and no such recognized rate of exchange exist, the conversion rate shall reflect effectively the current value of such currency in commercial transactions”.

¹⁴L/329, adopted on 26 February 1955, 3S/205, 213-214, para. 17.

¹⁵EPCT/A/SR.40(2), p. 16; EPCT/154, p. 25 (note to para. 5).

¹⁶Section 4 of Article IV as revised provides that “The Fund may determine, by an 85 per cent majority of the total voting power, that international economic conditions permit the introduction of a widespread system of exchange arrangements based on stable but adjustable par values. ... Upon making such determination, the Fund shall notify members that the provisions of Schedule C [on Par Values] apply”. Articles of Agreement of the International Monetary Fund, 2 UNTS 39 (1947) as amended April 1, 1978.

¹⁷L/329, adopted on 26 February 1955, 3S/205, 214, para. 18.

See also the material on Article II:6 in this Index. Concerning exchange matters, special exchange agreements, and relations with the Fund, see Article XV.¹⁸

(2) “date of this Agreement”

Article XXVI:1 provides that “The date of this Agreement shall be 30 October 1947”. This date applies for the obligations under Article VII:4(d) of the original contracting parties; of the former territories of the original contracting parties which, after attaining independence or commercial autonomy, succeeded to contracting party status under Article XXVI:5(c); and of Chile. When the modalities of accession to the General Agreement were first considered, at the Third Session in Annecy in 1949, the Working Party which drafted the Annecy Protocol of Terms of Accession decided to use instead the date of the Havana Final Act, 24 March 1948, and this approach was followed for the next group of accessions in the Torquay Protocol of 1951.¹⁹ Since the next accession thereafter, which was the accession of Japan in 1955, the standard terms in accession protocols have provided that the “date of this Agreement” for the purposes of Article VII:4(d) shall be the date of the protocol of accession or (where the acceding government had previously acceded provisionally) the date of the declaration on provisional accession.²⁰

5. Paragraph 5

(1) “The bases and methods ... should be stable”

During the Review Session, the Review Working Party on Schedules and Customs Administration considered a proposal to replace the words “the bases ... should be stable” by the words “the system ... should not constitute an obstacle to the rapid clearance of merchandise, should protect honest importers from unfair competition in the field concerned, should as far as possible be based on trade documents ...”. The Report of the Working Party notes that members “expressed sympathy with the ideas underlying this proposal, but did not find it practicable to recommend the amendment. It was desired particularly to retain the requirement that valuation systems shall be stable”.²¹

(2) “sufficient publicity”

See also Article X.

B. RELATIONSHIP BETWEEN ARTICLE VII AND OTHER ARTICLES

1. Article II

See the Panel Report on “Exports of Potatoes to Canada” above at page 260.

2. Article XV

See Article VII:4.

C. AGREEMENT ON IMPLEMENTATION OF ARTICLE VII

The Agreement on Implementation of Article VII of the General Agreement, negotiated during the Tokyo Round of multilateral trade negotiations, was signed on 12 April 1979²² and entered into force on 1 January 1981. The Protocol to the Agreement on Implementation of Article VII (“Customs Valuation

¹⁸Concerning multiple rates of exchange, see the 19 December 1947 Memorandum on decisions by the Executive Board of the Fund on “Multiple Currency Practices”, reprinted as an addendum to the Report of the Review Working Party on “Quantitative Restrictions,” L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 200-205.

¹⁹Annecy Protocol, I/81, para. 5(b); Torquay Protocol, dated 21 April 1951, I/86, 88, para. 5(b).

²⁰E.g. Protocol for the Accession of Bolivia, L/6562, 37S/5.

²¹L/329, adopted on 26 February 1955, 3S/205, 214, para. 19.

²²On the drafting history, see documents listed in TA/INF/1/Rev.8, p. 61-68. The text of the Agreement and the Protocol appear at 26S/116.

Protocol”), done on 1 November 1979, provided that upon entry into force of the Agreement the provisions of the Protocol would be deemed to be part of the Agreement.

The Agreement sets out five valuation methods, which are ranked in a hierarchical order to be followed by customs administrations of parties to the Agreement. The primary basis for customs value under the Agreement is “transaction value” as defined in Article 1: “the price actually paid or payable for the goods when sold for export to the country of importation”, subject to certain specified adjustments. When the customs value cannot be determined under the provisions of Article 1, there should normally be a process of consultation between the customs administration and the importer with a view to arriving at a basis of value under Article 2 (transaction value of identical goods) or Article 3 (transaction value of similar goods). When the customs value cannot be determined on this basis, resort may be made to deductive value (Article 5) or computed value (Article 6). Article 7 provides a fall-back method:

“1. If the customs value of the imported goods cannot be determined under the provisions of Articles 1 to 6, inclusive, the customs value shall be determined using reasonable means consistent with the principles and general provisions of this Agreement and of Article VII of the General Agreement and on the basis of data available in the country of importation.

“2. No customs value shall be determined under the provisions of this Article on the basis of:

- “(a) the selling price in the country of importation of goods produced in such country;
- “(b) a system which provides for the acceptance for customs purposes of the higher of two alternative values;
- “(c) the price of goods on the domestic market of the country of exportation;
- “(d) the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of Article 6;
- “(e) the price of the goods for export to a country other than the country of importation;
- “(f) minimum customs values; or
- “(g) arbitrary or fictitious values”.

Annex I to the Agreement provided extensive interpretative notes to its provisions. The Protocol to the Agreement provides for the possibility of reservations by developing countries to certain provisions of the Agreement; a number of acceptances have been accompanied by such reservations. Article 21 of the Agreement permitted a developing country party to the Agreement to delay application of its provisions for five years from the date of entry into force of the Agreement with respect to it; the Protocol provided for the possibility of further extension of this period of delay. Article 21 also permitted developing country parties a further delay of three years in application of certain provisions of the Agreement. A list of acceptances of the Agreement appears in the Appendix at the end of this book, and indicates those acceptances accompanied by reservations.

Article 18 of the Agreement established two committees: a Committee on Customs Valuation composed of representatives of the parties, and serviced by the GATT Secretariat, and a Technical Committee on Customs Valuation under the auspices of the Customs Co-operation Council. The Committee has discussed the implementation and application of the Agreement by its parties, including difficulties encountered by developing countries in implementation, the use of preshipment inspection companies in customs valuation, and the shifting of the burden of proof in cases where customs administrations have reasons to doubt the truth or accuracy of the declared value.²³ The Committee has made a number of decisions regarding its working procedures and the administration of the Agreement.²⁴

²³On preshipment inspection, see VAL/W/41-44, VAL/M/17, VAL/M/19-22; on the burden of proof see statement of India at

The Committee adopted two decisions in 1984 regarding the interpretation of the Agreement: decisions in 1984 on “Treatment of Interest Charges in the Customs Value of Imported Goods”²⁵ and on “Valuation of Carrier Media Bearing Software for Data Processing Equipment”.²⁶ The Committee has also adopted agreed interpretations of the word “undertaken” used in Article 8.1(b)(iv) of the Agreement;²⁷ the terms “development” in English, “travaux d’étude” in French and “creación y perfeccionamiento” in Spanish in Article 8.1(b);²⁸ and has agreed to rectify the French text of paragraph 1 of the Note to Article 2 and the Note to Article 3.²⁹ The Committee has also discussed the linguistic consistency of the three authentic language texts of the Agreement. Concerning the Committee’s activities, see its Annual Reports and the Secretariat Background Documents for the annual reviews of the implementation and operation of the Agreement.³⁰

The Technical Committee’s terms of reference in Annex II of the Agreement provide for it to, *inter alia*, “examine specific technical problems arising in the day-to-day administration of the customs valuation systems of Parties and to give advisory opinions on appropriate solutions based upon the facts presented; to study, as requested, valuation laws, procedures and practices as they relate to this Agreement and to prepare reports on the results of such studies; to prepare and circulate annual reports on the technical aspects of the operation and status of this Agreement; to furnish such information and advice on any matters concerning the valuation of imported goods for customs purposes as may be requested by any Party or the Committee. Such information and advice may take the form of advisory opinions, commentaries or explanatory notes”. The Technical Committee has issued many instruments setting out information and advice (including advisory opinions, commentaries, explanatory notes, case studies or studies).³¹ The Technical Committee has also issued reports on national practices with regard to, *inter alia*, treatment of interest for deferred payment,³² and treatment of valuation of computer software.³³

The negotiation of the Agreement on Implementation of Article VII followed substantial previous work in this area. In the Kennedy Round of multilateral trade negotiations, the Agreement Relating Principally to Chemicals, supplementary to the Geneva (1967) Protocol to the General Agreement, was negotiated, and included certain provisions on valuation.³⁴ However, this Agreement was not implemented.

The WTO Agreement includes in its Annex 1A a new Agreement on Implementation of Article VII, which constitutes essentially a rectified text of the 1979 Agreement and the Customs Valuation Protocol. The Final Act of the Uruguay Round also includes two Decisions relating to customs valuation: the Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value, and the Decision on Texts Relating to Minimum Values and Imports by Sole Agents, Sole Distributors and Sole Concessionnaires.

VAL/W/51, VAL/M/21, VAL/M/22, and Secretariat Note at MTN.GNG/NG8/W/19.

²⁴For a complete list of the decisions of the Committee, see G/VAL/W/1, “Decisions Adopted by the Tokyo Round Committee on Customs Valuation”, dated 28 April 1995.

²⁵VAL/6/Rev.1, adopted on 26 April 1984, 31S/273 (rectified (French and Spanish only) on 24 Committee 1984, VAL/M/10); see also VAL/9+Add. 1-6. See also VAL/M/9, VAL/M/10, VAL/W/8, VAL/W/10, VAL/W/13+Revs. 1-3, VAL/W/16, VAL/W/34+Revs.1-5.

²⁶VAL/8, adopted on 24 September 1984, 31S/274; see also VAL/8/Add.1, Chairman’s statement in connection with this decision, reprinted at 30S/274; see also VAL/M/10, VAL/W/7, VAL/W/11, VAL/W/14+Rev.1, VAL/W/16, VAL/11+Add.1-7..

²⁷VAL/M/6, adopted on 3 March 1983, 30S/22.

²⁸Interpretation adopted on 9-10 May 1985, VAL/M/13, paras. 37-41; see also VAL/M/8, para. 4, VAL/M/9, paras. 30-37, VAL/M/11, paras. 37-41, VAL/W/24, VAL/W/24/Rev.1

²⁹VAL/M/26, para. 24, VAL/W/49/Add. 4.

³⁰See Reports at 28S/40, 29S/55, 30S/56, 31S/275, 32S/174, 33S/216, 34S/208, 35S/362, 36S/440, 37S/302, 38S/89, 39S/396; background documents at VAL/W/4/Rev.1, VAL/W/12/Rev.1, VAL/W/21/Rev.1, VAL/13, VAL/19, VAL/28, VAL/35, VAL/37, VAL/39, VAL/40, VAL/43, VAL/44.

³¹See list of instruments issued to 1984 in VAL/10, p. 8-9; subsequent instruments are listed in the Secretariat Background Documents for the annual review.

³²VAL/W/10.

³³VAL/W/11.

³⁴15S/8. See also documents from the Kennedy Round Group on Assessment of Duties, TN.64/30, TN.64/NTB/19, 21, 25, 26, 28, 32, 34, and Secretariat background notes of 12 June 1972, COM.IND/W/79+Add.1, and 29 April 1975, MTN/NTM/W/7.

III. PREPARATORY WORK

Provisions corresponding to Article VII appear in Chapter III-4 of the US-UK *Proposals*, in Article 12 of the US Draft Charter, in Article 18 of the New York Draft Charter, and in Article 34 of the Geneva Draft Charter.

The subject of customs valuation was further discussed at the Havana Conference and a number of amendments were made, including the addition of a new paragraph 1, providing for co-operation toward standardization of definitions of value and of procedures for determining customs value. In paragraph 2 of the Charter article the words “directly affected” are inserted after “upon a request by another Member”.³⁵ Sub-paragraph (d) of paragraph 4 became in the Havana Charter a separate paragraph (6) in order to avoid any misunderstanding of the concept of paragraph 4. Accordingly, the word “paragraph” was replaced by the word “article” in the Havana text.³⁶ The Working Party on Modifications to the General Agreement, which met at the Second Session in September 1948, did not decide to bring these changes into the General Agreement.

During the early years of the GATT, work was pursued on valuation and other issues relating to customs administration (see also Article VIII). During the Review Session of 1954-55, a number of amendments to Article VII were agreed. The Protocol Amending the Preamble and Parts II and III of the General Agreement, which was done on 10 March 1955 and entered into force on 7 October 1957, deleted the words “at the earliest practicable date” in paragraph 1, amended paragraphs 2(b), 4(a) and (b), and amended the interpretative notes in Annex I relating to Article VII. The amendments are commented upon in the Working Party Report on “Schedules and Customs Administration” adopted on 26 February 1955.³⁷

IV. RELEVANT DOCUMENTS

See below at the end of Article X.

³⁵Havana Reports, p.75, para.30.

³⁶Havana Reports, p.76, para.34.

³⁷3S/205, 211-214.

ARTICLE VIII

FEES AND FORMALITIES CONNECTED WITH IMPORTATION AND EXPORTATION

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I. TEXT OF ARTICLE VIII AND INTERPRETATIVE NOTE AD ARTICLE VIII

Article VIII

*Fees and Formalities connected with Importation and Exportation**

1. (a) All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by contracting parties on or in connexion with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.

(b) The contracting parties recognize the need for reducing the number and diversity of fees and charges referred to in sub-paragraph (a).

(c) The contracting parties also recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.*

2. A contracting party shall, upon request by another contracting party or by the CONTRACTING PARTIES, review the operation of its laws and regulations in the light of the provisions of this Article.

3. No contracting party shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning.

4. The provisions of this Article shall extend to fees, charges, formalities and requirements imposed by governmental authorities in connexion with importation and exportation, including those relating to:

- (a) consular transactions, such as consular invoices and certificates;
- (b) quantitative restrictions;
- (c) licensing;
- (d) exchange control;
- (e) statistical services;
- (f) documents, documentation and certification;
- (g) analysis and inspection; and
- (h) quarantine, sanitation and fumigation.

Interpretative Note *Ad* Article VIII from Annex I

1. While Article VIII does not cover the use of multiple rates of exchange as such, paragraphs 1 and 4 condemn the use of exchange taxes or fees as a device for implementing multiple currency practices; if, however, a contracting party is using multiple currency exchange fees for balance of payments reasons with the approval of the International Monetary Fund, the provisions of paragraph 9 (a) of Article XV fully safeguard its position.

2. It would be consistent with paragraph 1 if, on the importation of products from the territory of a contracting party into the territory of another contracting party, the production of certificates of origin should only be required to the extent that is strictly indispensable.

II. INTERPRETATION AND APPLICATION OF ARTICLE VIII

A. SCOPE AND APPLICATION OF ARTICLE VIII

1. Paragraph 1

The Panel on “United States - Customs User Fee” examined complaints by Canada and the EC concerning the “merchandise processing fee” levied by the United States Customs Service. This *ad valorem* charge was imposed for the processing of commercial merchandise entering the United States, and receipts from the fee were used to fund certain “commercial operations” of the Customs Service. The Panel findings note the following generally regarding Article VIII:1.

“... 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 to 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’.¹

(1) “All fees and charges ... on or in connexion with importation or exportation”

In discussions at the Havana Conference it was agreed that “this Article relates to all payments of any character required by a Member on or in connexion with importation or exportation, other than import and export duties, and other than taxes within the purview of Article 18 [III] of the Geneva draft”.²

The Panel Report on “United States - Customs User Fee” notes in its findings, regarding the nature of the fees covered by Article VIII:1(a):

“... 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).

“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 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”.³

(a) Customs processing fees

See generally the Panel Report on “United States - Customs User Fee”.

¹L/6264, adopted on 2 February 1988, 35S/245, 273 para. 69.

²Havana Reports, p. 76, para. 35. See also discussion below of preliminary work and subsequent modifications of Article VIII.

³L/6264, adopted on 2 February 1988, 35S/245, 275-276, paras. 76-77.

In the 1990 Report of the Working Party on the “Accession of Venezuela”, one member noted that “Article VIII of the General Agreement covered all fees and charges imposed by governmental authorities in connection with importation and exportation” and said that “in the view of her Government, the 5 per cent fee on imports, the 2 per cent postal import fee established in Article 37 of the Regulations of the Customs Law, and the 1 per cent fee on imports into the free trade zones, consistent with a 1987 panel recommendation concerning customs user fees, are customs charges which should conform to Article VIII of the General Agreement”.⁴

(b) *Consular fees*

See the 1948 Chairman’s ruling on consular taxes excerpted below on page 282, and the discussion beginning on page 278 regarding work in the GATT on consular fees and formalities.

(c) *Minimum import prices and associated security systems*

In the 1978 Panel Report on “EEC - Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables”, the Panel examined the EEC system under which the issue of an import certificate for the goods in question was conditional on the lodging of a security to guarantee that imports would take place during the period of validity of the certificate.

“The Panel noted the argument by the United States representative that, when a security was forfeited because importation did not take place within the seventy-five day validity of the certificate, this forfeiture should be considered as a ‘charge in connexion with importation’ in violation of Article VIII:1(a), since the importation would likely take place later under a new licence. The Panel further noted the argument by the United States representative that the forfeiture of all or part of this security imposed ‘substantial penalties for minor breaches of customs regulations or procedural requirements’ in violation of Article VIII:3. The Panel considered that such a forfeiture could not logically be accepted as a charge ‘in connection with importation’ within the meaning of Article VIII:1(a), since no importation had occurred, but only as a penalty to the importer for not fulfilling his obligation to complete the importation within the seventy-five day time-limit. The Panel further considered that such a penalty should be considered as part of an enforcement mechanism and not as a fee or formality ‘in connexion with importation’ within the purview of Article VIII. As a result, the Panel considered that Article VIII was not relevant, and therefore concluded that the provision for the forfeiture of the security associated with the import certificate could not be inconsistent with the obligations of the Community under Article VIII.

“... The Panel noted that the importer, when applying for the certificate, must agree to complete the importation within the seventy-five day validity limit of the certificate and to import the quantity stated on the certificate plus or minus 5 per cent. The Panel further noted that the importer was not required to obtain an import certificate when a contract was signed, but could wait until the product was approaching the Community frontier. The Panel ... considered that these obligations, which had to be assumed by the importer, were not onerous enough to violate Article VIII.”⁵

The same Panel also examined the aspects of the EEC programme which provided for a minimum import price, and enforced this price by making the issuance of an import certificate conditional on the lodging of an additional security to guarantee that the duty-paid c.i.f. price of the goods would be greater than or equal to the minimum price; the security would be forfeited in proportion to quantities imported below the minimum price. The Panel concluded that the minimum import price and associated additional security system for tomato concentrates was inconsistent with Article XI⁶ and concluded that the interest charges and costs associated with the lodging of the additional security associated with the minimum import price for tomato concentrate were inconsistent with Article II:1(b).⁷

⁴L/6696, adopted on 11 July 1990, 37S/43, para. 24.

⁵L/4687, adopted on 18 October 1978, 25S/68, 96-97, paras. 4.3-4.4.

⁶*Ibid.*, 25S/103, para. 4.14.

⁷*Ibid.*, 25S/103, para. 4.15.

“The Panel ... examined the status of the interest charges and costs associated with the lodging of the additional security which enforced the minimum import price for tomato concentrates ... The Panel noted the complaint by the representative of the United States that the interest charges and costs associated with the lodging of the additional security were imposed as protection for domestic products contrary to the provisions of Article VIII:1(a). The Panel recalled its earlier conclusions with regard to Article XI and Article II. As a result of these previous conclusions, the Panel considered that this minimum import price and associated additional security system could not also be considered merely as an administrative formality or fee falling under the purview of Article VIII. As a result, the Panel considered that Article VIII was not relevant, and therefore concluded that the interest charges and costs associated with the lodging of the additional security could not be inconsistent with the obligations of the Community under Article VIII.

“The Panel next examined the provision for the forfeiture of all or part of the additional security associated with the minimum import price for tomato concentrates in relation to the obligations of the Community under Article VIII. The Panel noted the argument by the representative of the United States that such a forfeiture, if importation took place at a price below the minimum, imposed a substantial penalty for minor breaches of customs regulations or procedural requirements in violation of Article VIII:3. The Panel noted that the forfeiture of the additional security was a penalty imposed on the importer for not fulfilling an obligation which he had undertaken when he applied for the import certificate. The Panel considered that such a penalty should be considered as part of an enforcement mechanism and not as a fee or formality ‘in connexion with importation’ within the purview of Article VIII. As a result, the Panel considered that Article VIII was not relevant, and therefore concluded that the provision for the forfeiture of all or part of the additional security associated with the minimum import price for tomato concentrates could not be inconsistent with the obligations of the Community under Article VIII.”⁸

See also in this connection the unadopted panel report on “EEC - Import Régime for Bananas”.⁹

(d) *Multiple exchange rates*

See paragraph 1 of the Interpretative Note *Ad* Article VIII.

(2) ***“shall be limited in amount to the approximate cost of services rendered”***

(a) *General: the ‘cost of services’ limitation in Article VIII:1(a)*

In the Panel Report on “United States - Customs User Fee”:

“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 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.

“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

⁸*Ibid.* 25S/104-105, paras. 4.17-4.18.

⁹DS38/R, dated 11 February 1994, para. 150.

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.

“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.

“The United States interpretation, by contrast, presented serious problems. 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.

“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. ...

“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) ... 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.

“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.”¹⁰

¹⁰L/6264, adopted on 2 February 1988, 35S/245, 276-279, paras. 78-82, 84-86.

b) “Services rendered”

The Panel Report on “United States - Customs User Fee” further notes:

“... the Panel ... 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.

“(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. ...

“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.

“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. ... 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.

“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.

“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. ...

*"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."*¹¹

*"(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. ... In the Panel's view ... 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. The Panel concluded that processing exempted imports could not be considered as 'services rendered' to the commercial importers paying the merchandise processing fee."*¹²

*"(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. ... 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."*¹³

In discussions in the Council in 1991, the representative of the United States stated "that its customs user fee had been revised to address the Panel's findings and recommendations ... and ... met the criteria of Article VIII ... The United States also hoped that other contracting parties currently applying customs fees substantially identical to the US fee, as it had been prior to the changes mentioned, would also alter their own fees to bring them into conformity with Article VIII".¹⁴

(c) *Ad valorem fees*

The Panel Report on "United States - Customs User Fee" further notes as follows with regard to *ad valorem* fees.

"In reaching this conclusion [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 the cost of the customs processing for the individual entry in question] 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.

"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.

"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

¹¹*Ibid.*, 35S/283-286, paras. 95-106.

¹²*Ibid.*, 35S/286, paras. 107-109.

¹³*Ibid.*, 35S/287, para. 111.

¹⁴C/M/248, p. 8. See also L/6741 (US notification of "a revision of the U.S. customs user fee, in response to the panel report adopted on February 2, 1988").

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. 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 Protocol of Provisional Application. ...

"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.'

"The Panel found five cases in which individual *ad valorem* service fees had been investigated by the CONTRACTING PARTIES. 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 was immune from legal attack on that issue, or because the government imposing the fee had promptly agreed to remove it for other reasons.¹⁵ 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.¹⁶ In the fifth case, the legal consistency of the *ad valorem* method had been expressly questioned.

"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 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). The reply of the United States delegation was as follows:

¹⁵A footnote to this sentence provides as follows: "In 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.)"

¹⁶A footnote to this sentence provides as follows: "A 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)."

'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)

"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.

"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."¹⁷

The 1990 Report of the Working Party on the "Accession of Venezuela" contains, inter alia, a discussion of Venezuela's 5 per cent *ad valorem* customs service fee. The representative of Venezuela stated that this fee "corresponded to the services rendered by the Customs Administration ... With reference to Article VIII:1(a) of the General Agreement, and the 1988 Panel Report on Customs User Fee, the representative of Venezuela indicated that recent experience had shown that the application of any system other than an *ad valorem* fee would be extremely complex and bring in an element of administrative discretion which might lead to undesirable delays or obstacles to imports. Moreover, the administrative cost of operating a transaction-based fee would be very high".¹⁸

The 1990 Report of the Working Party on the "Accession of Tunisia" contains, inter alia, a discussion of Tunisia's "customs formalities tax".

"A member noted that Article VIII of the General Agreement provides that fees and charges on or in connection with importation and exportation shall be limited in amount to the approximate cost of services rendered. In his view, the customs formalities tax should be levied at a fixed rate. This member reserved his position on the conformity of the 5 per cent customs formalities tax with the General Agreement. The representative of Tunisia said that in the light of the objectives of the VII National Development Plan, the Tunisian authorities had decided to incorporate the customs formalities tax into the customs tariff rates under the framework of the Finance Law of 1988 that will enter into force on 1 January 1988."¹⁹

¹⁷L/6264, adopted on 2 February 1988, 35S/245, 279-282, para. 87-94.

¹⁸L/6696, adopted on 11 July 1990, 37S/43, 49, para. 22.

¹⁹L/6277, adopted on 12 December 1990, 37S/30, 35, para. 21.

(d) Various charges

In a complaint brought against France in 1952, the United States maintained that the French “statistical and customs control” tax on imports and exports infringed Article VIII:1 since the proceeds of this tax were also used for funding social security benefits to farmers.²⁰ France acknowledged the infringement and subsequently abolished the tax.²¹

In another complaint brought against France in 1955, the United States contended that the French stamp tax violated both Articles II:1 and VIII:1 since proceeds from this tax were used for financing agricultural family allowance and exceeded the “approximate cost of services rendered”.²² The stamp tax was subsequently reduced.²³

The 1971 Report of the Working Party on the accession of the Democratic Republic of the Congo (now known as Zaire) notes that “Members of the Working Party pointed out that the statistical tax of 3 per cent *ad valorem* applied by the Congolese authorities on imports was not commensurate with the service rendered and was contrary to the provisions of Article VIII:1(a). The representative of the Congo recognized that this tax exceeded the cost of the service, and explained that the surplus revenue from the tax would be employed toward improving the service. His authorities were prepared to consider the adjustment of the statistical tax, in the light of the provisions of Article VIII as soon as they would be in a position to afford it”.²⁴

In the 1978 Panel Report on “EEC - Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables”, the Panel examined the argument that the interest charges and costs associated with the lodging of the security were imposed as protection for domestic products contrary to the provisions of Article VIII:1(a). “The Panel also noted the contention by the Community representative that the incidence of these charges did not exceed 0.005 per cent. The Panel considered that these interest charges and costs were limited in amount to the approximate costs of administration. The Panel further considered that the term ‘cost of services rendered’ in Article VIII:1(a) would include these costs of administration. Therefore, the Panel concluded that the interest charges and costs associated with the lodging of the security were not inconsistent with the Community’s obligations under Article VIII:1(a).”²⁵

The 1990 Report of the Working Party on the “Accession of El Salvador” contains, *inter alia*, a discussion of the tax system for imports. In response to questions the representative of El Salvador

“said that these charges which related to services rendered by the customs administration were modest, would have no effect on the agreed bound levels, did not constitute severe sanctions, and were consistent with Article VIII of the General Agreement. He added that the 30 per cent surcharge contemplated in the San José Protocol was not applicable. A member stated that, in his opinion, these charges are not related to the cost of services rendered, and therefore may be inconsistent with the provisions of Article VIII. This member urged El Salvador to state clearly that its customs penalties and charges applied to imports will be applied in accordance with Article VIII from the date of accession and reserved its rights on this point, in light of the findings and recommendations of a GATT panel that examined United States practices in this area”.²⁶

See also various references to charges on imports in accession Working Party reports;²⁷ references to *ad valorem* charges for preshipment inspection;²⁸ and examination of various charges under Article XXIV:8(a) in working party reports on agreements under Article XXIV:8(a).²⁹

²⁰L/238, SR.8/7, SR.8/10.

²¹SR.9/28.

²²L/410, L/569, L/720.

²³L/1412.

²⁴L/3541, adopted on 29 June 1971, 18S/89, para. 5.

²⁵L/4687, adopted on 18 October 1978, 25S/68, 95-96, para. 4.2.

²⁶L/6771, adopted on 12 December 1990, 37S/9, 17, para. 23.

²⁷See, e.g., report on “Provisional Accession of the United Arab Republic”, L/1876, adopted on 13 November 1962, 11S/75, 77, para. 7.

²⁸L/7170, dated 28 Jan 1993, memorandum on foreign trade of Zaire.

²⁹See the reports cited in this work under Article XXIV:8(a).

(3) “an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes”

In the Panel Report on “United States - Customs User Fee”

“... 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).

“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.

“The only specific issue raised by the parties under the second criterion was whether the 0.22 and 0.17 per cent *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”.³⁰

See also the discussion of the Panel Report on “EEC - Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables”, on page 271 above, concerning the claim that the interest charges and costs associated with the lodging of the additional security which enforced the minimum import price for tomato concentrates were imposed as protection for domestic products contrary to Article VIII:1(a).

(4) “The contracting parties also recognize the need for minimizing the incidence and complexity of import formalities and for decreasing and simplifying import and export documentation requirements”

In the early years of the GATT, work was undertaken on matters relating to customs formalities, including documentary requirements, temporary admission for samples, and certification of origin. This work, which built on the work that had been carried out under the auspices of the League of Nations in the interwar years, included the drafting of recommendations for adoption by the CONTRACTING PARTIES and of Conventions on certain of these subjects. See, for instance, the 1951 Report on “Customs Treatment of Samples and Advertising Material, Documentary Requirements for the Importation of Goods, and Consular Formalities: Resolutions of the International Chamber of Commerce”,³¹ and the 1952 Report on “Documentary Requirements for Imports, Consular Formalities, Valuation for Customs Purposes, Nationality of Imported Goods and Formalities connected with Quantitative Restrictions”.³²

See also in this connection the unadopted 1994 panel report on “EEC - Import Régime for Bananas”.³³

(a) Origin of imported goods and requirement of certificates of origin

During the second session of the Preparatory Committee in 1947, a Sub-Committee studying this issue considered “it to be clear that it is within the province of each importing member country to determine, in accordance with the provisions of its law, for the purposes of applying the most-favoured-nation provision whether goods do in fact originate in a particular country”.³⁴

Concerning consideration in the early years of the GATT of proposals on harmonization of origin rules, see the 1951 and 1952 Reports cited directly above, and the 1953 Report of a Working Party in the Eighth Session of

³⁰L/6264, adopted on 2 February 1988, 35S/245, 289, paras. 118-120.

³¹GATT/CP.6/36, adopted 24 October 1951, II/210.

³²G/28, adopted 7 November 1952, 1S/100.

³³DS38/R, dated 11 Feb. 1994, para. 151.

³⁴EPCT/174, p. 3-4.

the CONTRACTING PARTIES on “Nationality of Imported Goods”,³⁵ which examined both the definition of origin and proof of origin. The Report also includes Recommendations regarding proof of origin, and includes as an annex Article 11 on Certificates of Origin of the 1923 International Convention Relating to the Simplification of Customs Formalities. These Recommendations were amended in 1956; see the Report of the Working Party on “Certificates of Origin, Marks of Origin and Consular Formalities”³⁶ and the Recommendation on “Certificates of Origin” as amended.³⁷

The Report of a Working Party in the Ninth Session on “Definition of Origin” presents the views of governments regarding a proposed definition submitted to governments by the CONTRACTING PARTIES for review and study.³⁸ Interpretative Note 2 to Article VIII, which deals with the production of certificates of origin, was added as a result of the Review conducted during the Ninth Session.

Rules of origin for the purpose of eligibility for preferential treatment have been extensively discussed in the context of agreements under Article XXIV: see the material on this subject under Article XXIV in this Index. Such rules of origin were also discussed in the context of the Protocol Relating to Trade Negotiations Among Developing Countries, which contains provisions dealing with this issue,³⁹ and in the context of discussions of the implementation of the Generalized System of Preferences. A 1981 Note by the Secretariat summarizes the concept and main criteria of rules of origin which form part of trade agreements and arrangements where it is essential to establish the preferential (or non-preferential) origin of goods.⁴⁰

Rules of origin have also been discussed in the context of the administration of textile agreements.⁴¹

The November 1982 Ministerial Declaration requests the Council “to make arrangements for studies of dual-pricing practices and rules of origin; and to consider what further action may be necessary with regard to these matters when the results of these studies are available.”⁴²

A 1988 Note by the Secretariat on “Rules of Origin” discusses the administration of rules of origin, related provisions of the General Agreement and past discussions on the subject in the GATT.⁴³

See generally the Agreement on Rules of Origin reached in the Uruguay Round.

(b) Documentary requirements for importation of goods

The Working Party in the Seventh Session on “Documentary Requirements for Imports, Consular Formalities, Valuation for Customs Purposes, Nationality of Imported Goods and Formalities connected with Quantitative Restrictions” drew up a Code of Standard Practices for Documentary Requirements for the Importation of Goods, which was adopted by the CONTRACTING PARTIES.⁴⁴

See also the various Secretariat Notes prepared in the Tokyo Round on this and related subjects.⁴⁵

³⁵G/61 adopted on 23 October 1953, 2S/53-59.

³⁶L/595, adopted 17 November 1956, 5S/102-103.

³⁷Recommendation of 23 October 1953 as amended by the Recommendation of 17 November 1956, 5S/33.

³⁸G/92 adopted on 2 March 1955, 3S/94-99.

³⁹18S/11, Annex A at 18S/17. Information concerning certification of origin in developing countries participating in the Protocol is circulated in CPC/10 and Addenda thereto.

⁴⁰CG.18/W/48, dated 6 March 1981, and Suppl.1; see also discussion at CG.18/13, CG.18/14.

⁴¹See 31S/324-339, C/M/181.

⁴²L/5424, Declaration adopted by Ministers 29 November 1982, 29S/9, 21; see follow-up discussion at C/M/165.

⁴³MTN.GNG/NG2/W/12, dated 21 June 1988. This Note also states that detailed information on the rules of origin maintained by a number of countries can be found in the Customs Co-operation Council’s “Compendium of Origin of Goods” and, for the GSP, the “Digest of Rules of Origin” prepared by UNCTAD and UNDP.

⁴⁴G/28, Report adopted 7 November 1952, 1S/100-101; Decision of 7 November 1952, 1S/23.

⁴⁵“Part 2 of the Inventory of Non-Tariff Measures - Customs and administrative entry procedures”, MTN/3B/2; “Import documentation (Task 14 of MTN/2)”, MTN/3B/8; “Import documentation - Information required by Countries for Customs Entry Purposes”, MTN/3B/13; “Import Documentation - Note on the Work being carried out by other International Organizations”, MTN/3B/14; Note on Meeting of May 1974, MTN/3B/11; “Customs Matters background note by the Secretariat”, MTN/NTM/W/7; Note on import documentation requirements from various contracting parties, MTN/NTM/W/22+Rev.1+Add.1; “Aligned invoice layout key for international trade”, MTN/NTM/W/34; “Import documentation and customs procedures - work of the international organizations”, MTN/NTM/W/60; “Customs Co-operation Council”, MTN/NTM/W/238.

(c) *Formalities associated with administration of quantitative restrictions*

During their fifth session at Torquay in 1950, the CONTRACTING PARTIES adopted a Code of Standard Practices for the Administration of Import and Export Restrictions and Exchange Controls; concerning this Code see under Article XIII.⁴⁶

In the Tokyo Round of trade negotiations the Agreement on Import Licensing Procedures was negotiated, the preamble of which refers *inter alia* to the desire “to simplify, and bring transparency to, the administrative procedures and practices used in international trade, and to ensure the fair and equitable application and administration of such procedures and practices”.⁴⁷ Further concerning this Agreement, see under Article XIII.

(d) *Abolition of consular formalities*

The Report of the Working Party in the Seventh Session on “Documentary Requirements for Imports, Consular Formalities, Valuation for Customs Purposes, Nationality of Imported Goods and Formalities connected with Quantitative Restrictions” also proposed a “Recommendation on the Abolition of Consular Formalities”, providing for abolition of consular invoices and consular visas not later than 31 December 1956; annexed to this Recommendation is a Code of Standard Practices for Consular Formalities.⁴⁸ Later working parties from 1953 through 1962 examined reports from contracting parties on steps taken towards the abolition of consular formalities, and resulted in Decisions on “Consular Formalities” reaffirming the 1952 Recommendation.⁴⁹ See the discussion of the 1952 Recommendation and these reports in the Panel Report on “United States - Customs User Fee”, excerpted above at page 276.⁵⁰

The 1971 Report of the Committee on Trade in Industrial Products discusses, *inter alia*, possible solutions for the further liberalization of consular formalities and documentation.⁵¹ See also a Secretariat Note from the Tokyo Round on “Consular formalities and fees”.⁵²

(e) *Customs conventions*

In 1951, a proposal of the International Chamber of Commerce for a convention to facilitate importation of commercial samples and advertising material was referred to the CONTRACTING PARTIES by the United Nations Economic and Social Council, and was examined by a working party in the Sixth Session.⁵³ A working party in the Seventh Session then redrafted the text of the Convention, entitled the International Convention to Facilitate the Importation of Commercial Samples and Advertising Material; the Convention was adopted by the CONTRACTING PARTIES on 7 November 1952⁵⁴ and entered into force on 20 November 1955.⁵⁵

A Group of Experts in 1960 examined and amended a Draft Customs Convention on the Temporary Importation of Packings as transmitted by the Customs Co-operation Council (CCC). The CCC accepted all of the suggestions of the GATT group, together with a series of agreed interpretations, and opened the Convention as amended for signature.⁵⁶ The Group of Experts in 1960-1961 also examined and amended Draft Customs

⁴⁶GATT/CP.5/30/Rev.1; see also supplementary recommendation regarding contract sanctity at 1S/105-106.

⁴⁷26S/154.

⁴⁸G/28, Report adopted 7 November 1952, 1S/100, 101-102; Recommendation of 7 November 1952, 1S/25.

⁴⁹Reports at 2S/59, 3S/91, 5S/108, 11S/214; Decisions or Recommendations at 5S/33, 6S/25, 11S/59.

⁵⁰L/6264, adopted on 2 February 1988, 35S/245, 282, para. 93.

⁵¹L/3496, adopted on 22 February 1971, pp. 43-46; see also COM.IND/W/79 + Add.1, Background Note by the Secretariat (1972).

⁵²MTN/NTM/W/36 and Rev.1, Corr.1-2 and Add.1-3.

⁵³GATT/CP.6/36, adopted on 24 October 1951, II/210; ECOSOC proposal appears in resolution 347(XII) of 7 March 1951, E/1987, p. 7.

⁵⁴G/33, Report on “International Convention to Facilitate the Importation of Commercial Samples and Advertising Material”, adopted 7 November 1952, 1S/94. For later GATT work on interpretation of this Convention, see L/466, SR.10/11 p. 119, SR.10/16 p. 175, and L/601.

⁵⁵Text of Convention at 221 UNTS 255. As of November 1994, the Convention was in force in 61 countries: see list in L/7538, dated 8 November 1994, and list of acceptances and reservations in yearly editions of *Multilateral Treaties Deposited with the Secretary-General*, United Nations Publication ST/LEG/SER.E/11 (1993).

⁵⁶L/1208, adopted 2 June 1960, 9S/201; text of Convention and agreed interpretations at 9S/205ff.

Conventions on the Temporary Importation of Professional Equipment, and on the ATA Carnet for the Temporary Admission of Goods, as transmitted by the CCC, and arrived at agreed interpretations of these Conventions.⁵⁷

(f) *Facilitation of trade in cultural or health-related products*

During the Third Session, the United Nations Educational, Scientific and Cultural Organization (UNESCO) submitted a number of proposals for facilitating international trade in books, newspapers and periodicals.⁵⁸ A Working Party during the Annecy trade negotiations drafted an international Agreement on the Importation of Educational, Scientific and Cultural Materials and communicated the text to UNESCO for sponsorship.⁵⁹ The Agreement was subsequently adopted and opened for signature by the Fourth Session of the General Conference of UNESCO at Florence, and entered into force on 21 May 1952.⁶⁰

During the Fifth Session, the World Health Organization requested the assistance of the CONTRACTING PARTIES with respect to a draft agreement reducing trade barriers to basic insecticides and apparatus and materials necessary for campaigns against insects carriers of human diseases. While the Working Party drafted an agreement, its Report concluded that views were divided as to the utility of such an approach; one problem cited was the difficulty of limiting the duty-free treatment to be provided, since equipment used in making insecticides was usable for other purposes.⁶¹

(g) *Preshipment inspection*

Notes by the Secretariat of 1988 and 1989 on “Preshipment Inspection” provide background on the subject, summarize relevant discussions in various GATT bodies, and outline relevant provisions in the GATT and other international agreements.⁶²

See generally the Agreement on Preshipment Inspection reached in the Uruguay Round.

(h) *Testing fees for imported products*

Article 5.1.3 of the Agreement on Technical Barriers to Trade provides that

“Parties shall ensure that, in cases where a positive assurance is required that products conform with technical regulations or standards ... any fees imposed for testing imported products shall be equitable in relation to any fees chargeable for testing like products of national origin or originating in any other country”.⁶³

2. Paragraph 2

The Report of the Balance-of-Payments Committee on its work in the period 1970-1974 notes: “Without specifically referring to Article VIII:2 the Committee, in its conclusions in a large number of cases, urged the consulting country to reduce the complexity of its import procedures. In one case (1973, India) the Committee suggested the adoption of a uniform nomenclature for import control and tariff purposes”.⁶⁴

⁵⁷Draft Convention on Temporary Importation of Professional Equipment: L/1366, Report adopted 18 November 1960 including draft text, 9S/212; L/1476, Report adopted 17 May 1961, 10S/211, including interpretations at 10S/212ff, revised text as opened for signature by CCC at 10S/216ff. Draft Convention on the ATA Carnet for the Temporary Admission of Goods, L/1476, Report adopted 17 May 1961, 10S/211, including interpretations at 10S/214ff, text as opened for signature by the CCC at 10S/226ff.

⁵⁸UNESCO Memorandum and list of items for consideration in negotiations, GATT/CP/12 and Add.1; Draft Agreement submitted by UNESCO, GATT/CP/12/Add.2 and Rev.1; UNESCO Notes on relevant practices in various countries, GATT/CP/12/Add.3-14.

⁵⁹Working Party papers, GATT/TN.1/C/1; Working Party Report, GATT/TN.1/27 and Corr.1.

⁶⁰Letter from Director-General of UNESCO concerning draft Agreement, GATT/TN.1/34, GATT/CP.4/19; discussion, GATT/CP.4/SR.4, 17; letter from UNESCO regarding adoption and signature of Agreement, GATT/CP/81 and Add.1-2; letter on entry into force, L/137.

⁶¹Letter at GATT/CP/79; Report of WP “D” on the Request of the WHO concerning Insecticides GATT/CP.5/47 and Amend.1; discussion at GATT/CP.5/SR.5 p. 3-5, SR.6 p. 2-3, SR.23 p. 3-4, SR.24 p. 1.

⁶²MTN.GNG/NG2/W/11 dated 20 April 1988 and Add.1 dated 19 October 1989.

⁶³26S/8, 13, 14.

⁶⁴L/4200, para. 48.

3. Paragraph 3: penalty charges

See the discussion of paragraph 3 in the 1978 Panel Report on “EEC - Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables”, on page 271 above.

The 1990 Report of the Working Party on the “Accession of Venezuela” contains, *inter alia*, a discussion of *ad valorem* storage charges levied by Venezuelan customs authorities. “A member said that having regard to the fee structure described in the Regulation to the Customs Law no distinction could be made in practice between the *ad valorem* warehouse charges and the penalties applied for non-expeditious customs clearance; both charges were customs charges and should conform to Article VIII of the General Agreement concerning correspondence with the approximate cost of services rendered. Furthermore, in setting the level of penalty charges, the provisions of Article VIII:3 concerning substantial penalties should be observed.”⁶⁵

4. Paragraph 4

During discussions of this provision at the Geneva session of the Preparatory Committee in 1947, it was agreed that the provisions of sub-paragraph 4(d) were “without prejudice to the provisions of the Charter relating to safeguarding balance of payments and to exchange control”.⁶⁶

B. RELATIONSHIP BETWEEN ARTICLE VIII AND OTHER ARTICLES

1. Article I

During the Second Session of the CONTRACTING PARTIES in 1948, in response to a request for an interpretation of the phrase “charges of any kind” in Article I:1 with respect to consular fees, “The Chairman ruled that consular taxes would be included in ‘charges of any kind’; Article VIII merely dealt with the magnitude of such taxes in relation to the cost of services rendered, whereas Article I embodies the principle of non-discrimination”.⁶⁷

See also the discussion in paragraphs 121-124 of the Panel Report on “United States - Customs User Fee” concerning the question of whether the exemptions from the US merchandise processing fee granted to imports from certain countries were inconsistent with the MFN obligation of Article I:1.⁶⁸

2. Article II:2(c)

The 1988 Panel Report on “United States - Customs User Fee” notes as follows:

“... the Panel ... 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’.

⁶⁵L/6696, adopted on 11 July 1990, 37S/43, 50, paras. 25-26.

⁶⁶EPCT/103, p. 25.

⁶⁷GATT/CP.2/SR.11 p. 7, reprinted in abridged form at II/12; see GATT/CP.2/9 for request for ruling.

⁶⁸L/6264, adopted on 2 February 1988, 35S/245, 289-290.

“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’.

“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. ...⁶⁹ [See discussion excerpted below on page 284]

“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 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 sometime later (E/PC/T/201).

“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) ...”.⁷⁰ [See discussion above, page 269.]

3. Article III

In the 1994 panel report on “United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco”, the panel examined a fee charged for inspection of tobacco:

“The Panel ... noted that Article VIII does not apply to taxes within the purview of Article III. The Panel then recalled that no party to the dispute had requested the Panel to examine the consistency of these inspection fees with Article III. Indeed, all parties had argued that the Section 1106(c) inspection fees should be examined in the light of Article VIII. The Panel noted that the consistency of Section 1106(c) could present itself differently under Article III in that the focus of the examination would then be on the inspection fees as internal charges and on whether or not national treatment was accorded in respect of such charges. However, in view of the fact that the parties to the dispute had argued the Section 1106(c) inspection fees in terms of Article VIII, the Panel proceeded to examine this legislative provision under that Article.”⁷¹

C. EXCEPTIONS AND DEROGATIONS

The 1988 Panel Report on “United States - Customs User Fee” further notes:

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

⁶⁹*Ibid.*, 35S/273, paras. 69-71.

⁷⁰*Ibid.*, 35S/275, paras. 75-76.

⁷¹DS44/R, adopted on 4 October 1994, para. 117.

‘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].’⁷²

See also the Interpretative Note *Ad* Article VIII.

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

Differences between the General Agreement and the Havana Charter: The corresponding provisions in the Havana Charter are contained in Article 36; in the US Proposals in Chapter III-5; in the US Draft in Article 13; in the New York Draft in Article 19; and in the Geneva Draft in Article 35.

In discussions at the Havana Conference on Article 36, “It was ... agreed that paragraph 1 should be revised and care should be taken in the translation to show definitively that this Article relates to all payments of any character required by a Member on or in connexion with importation or exportation, other than import and export duties, and other than taxes within the purview of Article 18 [III] of the Geneva draft”.⁷³ Accordingly paragraph 1 was revised to include the phrase, “all fees and charges of whatever character (other than import and export duties, and other than taxes within the purview of Article 18)”. This wording was later brought into the General Agreement in the Review Session amendments; see below.

Paragraph 2 was amended in Havana to provide that a Member need respond to a request to undertake the review of its laws and regulations only if such a request were made by another Member “directly affected”; this change was not retained in the General Agreement. Paragraph 4 provided for studies by the ITO on measures to simplify and standardize customs formalities, and was not included in the General Agreement, as it related to functions of the ITO. Paragraph 6 of the Charter article relating to tariff discrimination based on the use of regional or geographical names in tariff descriptions is not included in the General Agreement as it did not appear in the Geneva draft. The order of the paragraphs was changed at Havana.⁷⁴ The Interpretative Note in the Charter reads “not inconsistent with the Articles of Agreement of the International Monetary Fund”, instead of “with the approval of the International Monetary Fund”; the change was made because “the express approval of the Fund was not required in all cases covered by the Note”.⁷⁵

Antecedents and drafting history: The Panel Report on “United States - Customs User Fee” includes the following discussion of the antecedents and drafting history of Articles VIII:1 and II:2(c).

“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 1923⁷⁶. 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 travellers] 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

⁷²*Ibid.*, 35S/280, para. 89, referring to the Declaration of 15 November 1957 (6S/13) stating that Review Session amendments to Part II of the General Agreement are subject to the reservation for existing mandatory legislation in the Protocol of Provisional Application or applicable protocols of accession; see discussion of this Declaration in the chapter of this Index on provisional application.

⁷³Havana Reports, p. 76, para. 35.

⁷⁴Havana Reports, pp. 77-78, paras. 43-45.

⁷⁵Havana Reports, p. 77, para. 41.

⁷⁶A footnote to this sentence provides: “League 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”.

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’.⁷⁷

“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:1(c).

“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.⁷⁸ The criteria stated in the initial draft texts submitted to the negotiating conference⁷⁹ 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.

“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.”⁸⁰

The Report of the Review Working Party on Schedules and Customs Administration, which recommended the Review Session amendments to Article VIII, provided the following explanation of the changes.

“Paragraphs 1 and 2 have been redrafted in order (i) to separate the provisions relating to fees and charges from those relating to formalities, (ii) to make it clear that the expression ‘fees and charges’ does not pertain to import and export duties or to taxes which fall within the purview of Article III, and (iii) to render the provisions of paragraph 1(a) obligatory by changing the word ‘should’ to ‘shall’ and by deleting the qualification that contracting parties need take action in accordance with the principles and objectives of that sub-paragraph only ‘at the earliest practicable date’. These amendments are recommended on the assumption that the Agreement will contain a general provision allowing time for governments to bring their legislation into conformity with the rules and on condition that the amendment proposed to the interpretative note is adopted.”⁸¹

These changes, including changes to the title and paragraphs 1 and 2 of Article VIII, were implemented by the Protocol Amending the Preamble and Parts II and III of the General Agreement, and entered into effect on 7 October 1957.

IV. RELEVANT DOCUMENTS

See below at the end of Article X.

⁷⁷ A footnote to this sentence provides: “League of Nations Document C.356.M.129.1927.II, paragraph 5(1)”.

⁷⁸ A footnote to this sentence provides: “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”.

⁷⁹ A footnote to this word provides: “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”.

⁸⁰ L/6264, adopted on 2 February 1988, 35S/245, 273-274, paras. 71-74.

⁸¹ L/329, adopted 26 February 1955, 3S/205, 214, para. 20.

ARTICLE IX

MARKS OF ORIGIN

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I. TEXT OF ARTICLE IX

Article IX

Marks of Origin

1. Each contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country.

2. The contracting parties recognize that, in adopting and enforcing laws and regulations relating to marks of origin, the difficulties and inconveniences which such measures may cause to the commerce and industry of exporting countries should be reduced to a minimum, due regard being had to the necessity of protecting consumers against fraudulent or misleading indications.

3. Whenever it is administratively practicable to do so, contracting parties should permit required marks of origin to be affixed at the time of importation.

4. The laws and regulations of contracting parties relating to the marking of imported products shall be such as to permit compliance without seriously damaging the products, or materially reducing their value, or unreasonably increasing their cost.

5. As a general rule, no special duty or penalty should be imposed by any contracting party for failure to comply with marking requirements prior to importation unless corrective marking is unreasonably delayed or deceptive marks have been affixed or the required marking has been intentionally omitted.

6. The contracting parties shall co-operate with each other with a view to preventing the use of trade names in such manner as to misrepresent the true origin of a product, to the detriment of such distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation. Each contracting party shall accord full and sympathetic consideration to such requests or representations as may be made by any other contracting party regarding the application of the undertaking set forth in the preceding sentence to names of products which have been communicated to it by the other contracting party.

II. INTERPRETATION AND APPLICATION OF ARTICLE IX

A. SCOPE AND APPLICATION OF ARTICLE IX

Article IX deals with marking of origin. Concerning the work undertaken in the GATT on rules for determining the origin of goods, and on customs formalities such as certificates of origin or other documentary requirements for the importation of goods, see Article VIII. Concerning marking of products for other characteristics than origin, see Article III:4 (national treatment) and Article I:1 (most-favoured-nation treatment for all matters referred to in Article III:4).

1. Paragraph 1

The 1991 Panel Report on “United States - Restrictions on Imports of Tuna,” which has not been adopted, considered a claim by Mexico that the provisions of the Dolphin Protection Consumer Information Act (DPCIA) of the United States, restricting the use on tuna products of the label “Dolphin Safe,” was inconsistent with Article IX:1.

“The Panel noted that the title of Article IX is ‘Marks of Origin’ and its text refers to marking of origin of imported products. The Panel further noted that Article IX does not contain a national-treatment but only a most-favoured-nation requirement, which indicates that this provision was intended to regulate marking of origin of imported products but not marking of products generally. The Panel therefore found that the labelling provisions of the DPCIA did not fall under Article IX:1.”¹

2. Paragraph 2

The addition of Article IX:2 was agreed during the Review Session of 1954-55. The Report of the Review Working Party on “Schedules and Customs Administration” notes that “A new paragraph is proposed for insertion in Article IX whereby the contracting parties will recognize that measures relating to marks of origin should not cause difficulties and inconveniences for other governments”.²

In 1956 and 1958, two working parties examined proposals of the International Chamber of Commerce regarding, *inter alia*, principles for consideration as a basis for a Recommendation on marks of origin. The Report of the 1956 Working Party on “Certificates of Origin, Marks of Origin and Consular Formalities” notes that “any such recommendation would have to be considered as an elaboration of the principles laid down in Article IX and in other Articles of GATT, and would have to be worded in such a way as to make clear that it does not prevent the application of more liberal regulations”.³ The 1958 Working Party reached agreement on the text of a Recommendation, adopted on 21 November 1958 by the CONTRACTING PARTIES, which sets out “certain rules which would further reduce the difficulties and inconveniences which marking regulations may cause to the commerce and industry of the exporting country”.⁴ The Recommendation also invites contracting parties to report, before 1 September each year, changes in their legislation, rules and regulations concerning marks of origin. A number of contracting parties complied with this invitation, but since 1961 no further submissions have been received.⁵

¹DS21/R, 3 September 1991, 39S/155, 203, para. 5.41.

²L/329, adopted 26 February 1955, 3S/205, 215, para. 21.

³L/595, adopted 17 November 1956, 5S/102, 104 para. 4.

⁴Recommendation on Marks of Origin, 7S/30; Working Party Report on “Marks of Origin”, L/912/Rev.1, adopted 21 November 1958, 7S/117.

⁵C/W/420/Rev.1, p. 15; for notifications regarding origin marking see L/478 of 27 March 1956 and addenda 1-20 dated from 17 May 1956 to 26 October 1960.

(1) Marks of origin and other marks

The Report of the 1956 Working Party on “Certificates of Origin, Marks of Origin and Consular Formalities” notes as follows.

“The Working Party considered that the question of additional marking requirements, such as an obligation to add the name of the producer or the place of origin or the formula of the product, should not be brought within the scope of any recommendation dealing with the problem of marks of origin. The point was stressed that requirements going beyond the obligation to indicate origin would not be consistent with the requirements of Article III, if the same requirements did not apply to domestic producers of like products.”⁶

Paragraph 4 of the 1958 Recommendation states that “The national provisions concerning marks of origin should not contain any other obligation than the obligation to indicate the origin of the imported product”. The 1958 Report of the Working Party on “Marks of Origin” states that “In particular it was remarked that [paragraph 4] has to be interpreted so as to invite countries to keep such requirements separate from requirements introduced for other purposes, e.g. to protect the health of the population, etc. In this connection, attention was drawn to Article III of the General Agreement which requires contracting parties to give to imported and domestic products the same treatment and that this obligation, being in Part II of the General Agreement, is governed by the terms of the Protocol of Provisional Application”.⁷

(2) Truth in marking

The New York Draft of the ITO Charter noted, with regard to the Charter provision corresponding to Article IX, that “... the right of each country to prohibit the import, export and transit of foreign goods falsely marked as being produced in the country in question was considered to be covered primarily by the words ‘deceptive practices’” [in Article XX:(d)].⁸ The 1958 Recommendation provides that “The CONTRACTING PARTIES ... *Understand* that no country shall be obliged to alter: (a) any provision protecting the ‘truth’ of marks, including trade marks and trade descriptions, aiming to ensure that the content of such marks is in conformity with the real situation”.⁹

3. Paragraph 4

In Council discussions of the United States Trade and Tariff Act of 1984, the EEC noted that it had requested consultations under Article XXII:1 concerning section 207 of that Act on country of origin marking for certain metal pipes and tubes. A number of delegations expressed the view that in some cases it was impossible to mark the products as this law required without damaging them, and stated that such marking requirements were inconsistent with Article IX:4.¹⁰

4. Paragraph 6

When the Charter article corresponding to Article IX was discussed at the Havana Conference,

“... it was agreed that the text of paragraph 7 [GATT Article IX:6] should not have the effect of prejudicing the present situation as regards certain distinctive names of products, provided always that the names affixed to the products cannot misrepresent their true origin. This is particularly the case when the name of the producing country is clearly indicated. It will rest with the governments concerned to proceed to a joint examination of particular cases which might arise if disputes occur as a result of the use of distinctive names of products which may have lost their original significance through constant use permitted by law in the country where they are used”.¹¹

⁶L/595, adopted on 17 November 1956, 5S/102, 105-106, para. 13.

⁷L/912/Rev.1, adopted on 21 November 1958, 7S/117, para. 2.

⁸Drafting Committee Report, p.16, para.6(b).

⁹7S/33.

¹⁰C/M/183, p. 89-90.

¹¹Havana Reports, p. 79, para. 48.

The Panel Report on “Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages” examined, *inter alia*, the claim by the European Communities that wines and alcoholic beverages imported into Japan did not enjoy adequate protection as regards origin marking and that Japan had failed to carry out its obligation under GATT Article IX:6 to “cooperate ... with a view to preventing the use of trade names in such manner as to misrepresent the true origin of a product, to the detriment of such distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation,” and to “accord full and sympathetic consideration to such requests or representations as may be made by any other contracting party regarding the application of the undertaking set forth in the preceding sentence to names of products which have been communicated to it by the other contracting party”.

“The Panel noted from the drafting history relating to Article IX:6 that it had been agreed that the text of Article IX:6

‘should not have the effect of prejudicing the present situation as regards certain distinctive names of products, provided always that the names affixed to the products cannot misrepresent their true origin. This is particularly the case when the name of the producing country is clearly indicated. It will rest with the governments concerned to proceed to a joint examination of particular cases which might arise if disputes occur as a result of the use of distinctive names of products which may have lost their original significance through constant use permitted by law in the country where they are used’. [Havana Reports, p. 79].

“The Panel noted that the Japanese Law and Cabinet Order concerning Liquor Business Association and Measures for Securing Revenue of Liquor Tax stipulated that ‘Any manufacturer of liquors must indicate, at a legible location of the container of liquors ... which are shipped out from the manufacturing premise ..., the name of the manufacturer, the place of the manufacturing premise ..., the capacity of the container ..., the category of liquors ..., the grade of liquors and the following matters according to the category of liquors, in a conspicuous manner’, including the alcohol content in the case of wine, whisky, brandy, spirits and liqueurs. The Panel examined a large number of labels, photos, wine bottles and packages submitted by the EEC as evidence. The Panel found that this evidence seemed to confirm the Japanese submission to the Panel that the labels on liquor bottles manufactured in Japan indicated their Japanese origin.

“The Panel examined the view of the European Community that the use of French words, French names, of other European languages and European label styles or symbols by Japanese manufacturers continued to mislead Japanese consumers as to the origin of the liquors, and that the indication of a Japanese manufacturer did not clarify his precise activities because, for instance, wines bottled in Japan could contain as much as 95% imported bulk wine. The Panel inferred from the wording of Article IX:6 that it was confined to an obligation to ‘cooperate with each other with a view to preventing the use of trade names in such manner as to misrepresent the true origin of a product, to the detriment of such distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation’. The Panel noted that there was no definition of a ‘trade name’ in the General Agreement, and that there were differences in the laws of various countries as to what might constitute a trade name. The Panel did not consider it necessary to define the term ‘trade name’ in this case for the following reasons: Article IX:6 was designed to protect ‘distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation’. The Panel did not dispose of evidence and was unable to find that the use by Japanese manufacturers of labels written partly in English (in the case of whisky and brandy) or in French (in the case of wine), the use of the names of varieties of grapes (such as ‘Riesling’ or ‘Semillon’), or the use of foreign terms to describe Japanese spirits (‘whisky’, ‘brandy’) or Japanese wines (‘chateau’, ‘reserve’, ‘vin rose’) had actually been to the detriment of ‘distinctive regional or geographical names of products’ produced and legally protected in the EEC. Nor could the Panel find that Japan - given, for example, its participation in the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods and its internal laws and regulations on labelling and on the protection of distinctive regional or geographical names (such as

'Armagnac' or 'Chianti') - had failed to meet its obligation to cooperate pursuant to GATT Article IX:6.¹²

B. RELATIONSHIP BETWEEN ARTICLE IX AND OTHER ARTICLES

See the citation from the 1991 Panel Report on "United States - Restrictions on Imports of Tuna" at page 288 above, and the discussion on marks of origin versus other marking requirements on page 289 above.

C. RELATIONSHIP BETWEEN ARTICLE IX AND OTHER AGREEMENTS

The 1994 Annual Report of the Committee on Technical Barriers to Trade to the CONTRACTING PARTIES, concerning developments in the implementation and operation of the Agreement on Technical Barriers to Trade (1979) ("TBT Agreement") notes that "Discussions at the TBT Committee's meetings in 1994 indicated that there is a general understanding among signatories of the TBT Agreement that mandatory marking requirements applied in the context of marking the origin of products are covered by the provisions of the Agreement, but one signatory could not join a consensus on this issue and continues to question the applicability of the provisions of the Agreement to marks-of-origin requirements. These discussions have suggested that there may be value in clarifying the coverage of the provisions of the TBT Agreement with respect to mandatory marking requirements applied in the context of marking the origin of products."¹³

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

Article IX corresponds to Article 37 in the Havana Charter. The US-UK *Proposals* deal with marks of origin in Chapter III-6 and the U.S. Draft in Article 14. Both were largely based on recommendations of the Economic Committee of the League of Nations in its Report to the Council on the Work of the 35th Session of the Economic Committee held at Geneva on 18-22 June 1931. The corresponding article in the New York Draft Charter is Article 20, and in the Geneva Draft is Article 36.

Article 37 of the Charter included the material in Article IX of the General Agreement, with the addition of paragraph 1, corresponding to the present Article IX:2, a paragraph 5 establishing a work programme on the elimination of unnecessary marking requirements, and a provision in the paragraph corresponding to Article IX:6 permitting the ITO to convene a conference on the protection of appellations of origin. These provisions were not brought into the text of the General Agreement after the Havana Conference. At the Review Session of 1954-55, it was agreed to add paragraph 1 of the Charter Article to Article IX of the General Agreement as the present paragraph 2. This amendment was effected through the Protocol Amending the Preamble and Parts II and III of the General Agreement, which entered into force on 7 October 1957.

IV. RELEVANT DOCUMENTS

See below at the end of Article X.

¹²L/6216, adopted on 10 November 1987, 34S/83, 125-126, paras. 5.14-5.15.

¹³L/7558, dated 30 November 1994; see also the discussion in TBT/M/45, TBT/M/46, and statement by Korea in TBT/W/176.

ARTICLE X

PUBLICATION AND ADMINISTRATION OF TRADE REGULATIONS

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I. TEXT OF ARTICLE X

Article X

Publication and Administration of Trade Regulations

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.

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

(b) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

(c) The provisions of sub-paragraph (b) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any contracting party employing such procedures shall, upon request, furnish the CONTRACTING PARTIES with full information thereon in order that they may determine whether such procedures conform to the requirements of this sub-paragraph.

II. INTERPRETATION AND APPLICATION OF ARTICLE X

A. SCOPE AND APPLICATION OF ARTICLE X

1. Paragraph 1

(1) “*Laws, regulations, judicial decisions and administrative rulings of general application*”

The Panel Report of 1988 on “Japan - Trade in Semiconductors” examined, *inter alia*, a claim by the EEC that lack of information on a monitoring scheme for export prices to third-country markets, and lack of information concerning conditions for improved access to the Japanese market, contravened Article X. The Panel findings provide as follows.

“The Panel considered the contention of the EEC that the measures applied to exports of semi-conductors to third countries and the measures to improve access to the Japanese market lacked transparency and therefore contravened Article X. The Panel felt, however, that the present case did not call for a decision on that point. The measures under examination had been found to be inconsistent with Article XI. At issue was thus their elimination or bringing them into conformity with GATT, not their publication.

“As for the measures to improve access to the Japanese market, the Panel, on the basis of the evidence analysed in paragraphs 125 and 126 above, was unable to identify any measure constituting a requirement, restriction or prohibition on imports required to be published by Article X.”¹

The 1988 Panel Report on “Canada - Import, Distribution and Sale of Alcoholic Drinks by Provincial Marketing Agencies” examined the operation of provincial liquor monopolies in Canada, and found, *inter alia*, as follows:

“... The Panel considered that Canada had the right to use import monopolies to raise revenue for the provinces, consistently with the relevant provisions of the General Agreement. ... It ... asked itself whether the fiscal elements of mark-ups, which produced revenue for the provinces, could also be justified as ‘internal taxes conforming to the provisions of Article III’, noting that Article III:2 itself referred, not only to internal taxes, but also to ‘other internal charges’. The Panel was of the view that to be so considered, the fiscal element of mark-ups must of course meet the requirements of Article III. ... The Panel also considered it important that, if fiscal elements were to be considered as internal taxes, mark-ups would also

¹L/6309, adopted on 4 May 1988, 35S/116, 161 paras. 128-129.

have to be administered in conformity with other provisions of the General Agreement, in particular Article X dealing with the Publication and Administration of Trade Regulations”.²

(2) ***“published promptly in such a manner as to enable governments and traders to become acquainted with them”***

The Panel Report of 1989 on “EEC - Restrictions on Imports of Dessert Apples, Complaint by Chile” examined, *inter alia*, the claim by Chile that the licensing and deposit system on dessert apple imports introduced by the EEC on 6 February 1988 and administrative arrangements by the member states putting this into effect were not published promptly in such a manner as to enable governments and traders to become acquainted with them as required under Article X:1 (first sentence).

“The Panel first examined the EEC’s system of restrictive licensing applied to imports of apples from April through August 1988 under Article XI, as consistency with this Article was the primary determinant of the conformity of the EEC’s system with the General Agreement, before proceeding to consider the measures under Articles XIII and X and Part IV of the Agreement. ...

“The Panel found that the EEC had observed the requirement of Article X:1 to publish the measures under examination ‘promptly in such a manner as to enable governments and traders to become acquainted with them’ through their publication in the Official Journal of the European Communities. It noted that no time limit or delay between publication and entry into force was specified by this provision. However it interpreted the requirements of this provision as clearly prohibiting the use of back-dated quotas, whose use by the EEC in the case of Chile had already been the subject of a finding under Article XIII (above)”.³

The 1989 Panel Report on “EEC - Restrictions on Imports of Apples, Complaint by the United States” examined claims by the United States regarding the same EEC measure, including a claim that the publication of notice by the EEC on 21 April 1988 of the imposition of quotas for the period of 15 February to 31 August 1988 was inconsistent with Articles XI:2, X:1 and XIII:3(b). The EEC denied that it had violated any notification or publication requirements or applied a quota retroactively.

“The Panel first examined the EEC’s system of restrictive licensing applied to imports of apples from April through August 1988 under Article XI, as consistency with this Article was the primary determinant of the conformity of the EEC’s system with the General Agreement, before proceeding to consider the measures under Articles XIII and X of the Agreement. ...

“The Panel recognized that, given its finding that the EEC measures were a violation of Article XI:1 and not justified by Article XI:2(c)(i) or (ii), no further examination of the administration of the measure would normally be required. Nonetheless, and even though the Panel was concerned with measures which had already been eliminated, it considered it appropriate to examine the administration of the EEC measures in respect of [Articles XI:2(c) (last paragraph), X:1 and XIII:3(c)], in view of the questions of great practical interest which had been raised by both parties.

“The Panel found that the EEC had observed the requirement of Article X:1 to publish the measures under examination ‘promptly in such a manner as to enable governments and traders to become acquainted with them’ through their publication in the Official Journal of the European Communities. It noted that no lapse of time between publication and entry into force was specified by this provision.

“The Panel noted that EEC Commission Regulation 1040/88 of 20 April 1988 published, *inter alia*, a quota allocation of 17,600 tons for ‘other countries’, including the United States, for the period up to 31 August that year. Use of this quota allocation was measured in terms of applications for import licences. However, licensing of imports had been in effect since 14 February 1988 (Reg. 346/88). Therefore, utilisation of the quota published in April was counted as from 14 February. The quota allocation

²L/6304, adopted on 22 March 1988, 35S/37, 88-89, para. 4.20.

³L/6491, adopted on 22 June 1989, 36S/93; arguments 36S/115-116, paras. 6.1-6.2, findings 36S/133, paras. 12.1, 12.29.

announced on 20 April 1988 thus covered a quota period which began on 14 February 1988 and ended on 31 August 1988.

“... The Panel therefore considered that the allocation of back-dated quotas did not conform to the requirements of Article XIII:3(b) and (c). It also interpreted the requirements of Article X:1 as likewise prohibiting back-dated quotas. It therefore found that the EEC had been in breach of these requirements since it had given public notice of the quota allocation only about two months after the quota period had begun”.⁴

The Panel concluded that “The operation of a back-dated import restriction in respect of ‘other countries’, including the United States, was inconsistent with Article[s] X and XIII”.⁵

The 1992 Panel Report on “Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies” examined an argument regarding Article X:

“The Panel noted that the United States had claimed that the liquor board of British Colombia had shared with domestic brewers information relating to pricing policy before that information was available to the United States’ authorities, that in the province of Ontario, an announcement of a new pricing policy for beer had been made in the legislature only five days before it entered into effect, and that both these practices were inconsistent with Article X of the General Agreement. The Panel noted that Article X imposed requirements relating to the prompt publication of trade regulations but that this provision did not require contracting parties to make information affecting trade available to domestic and foreign suppliers at the same time, nor did it require contracting parties to publish trade regulations in advance of their entry into force. The Panel, therefore, *found* that the measures were not inconsistent with Article X of the General Agreement. The Panel noted that the United States did not claim inconsistency of these measures with any other provision of the General Agreement”.⁶

In a number of other instances in which a panel examining a quantitative restriction has found that restriction to be inconsistent with Article XI, the panel has declined to make findings with respect to subsidiary arguments raised concerning the consistency with Article X of the administration of the quantitative restriction, stating, for instance, that Article X “dealt with the administration of quotas that may be applied consistently with the General Agreement”.⁷ See below at page 298 *et seq.*

The publication of laws and regulations concerning trade, tariffs and customs has been addressed in recent working parties on accession, such as those concerning the accession of Costa Rica⁸, El Salvador,⁹ Venezuela,¹⁰ and Guatemala.¹¹

(3) “Agreements affecting international trade policy”

The 1982 Report of the Working Party on the fourth review under the Protocol of Accession on “Trade with Hungary” notes the requests of members of the working party, referring to Article X, for publication of the lists of products annexed to the trade agreements between Hungary and other CMEA member countries, which “having been signed at the governmental level, conferred intergovernmental authority on contracts concluded between foreign-trade enterprises”.¹²

⁴L/6513, adopted on 22 June 1989, 36S/135, 166-167, paras. 5-20-5.23.

⁵*Ibid.*, 36S/167, para. 5.26.

⁶DS17/R, adopted on 18 February 1992, 39S/27, 85-86, para. 5.34.

⁷Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”, L/6253, adopted on 2 February 1988, 35S/163, 242, para. 5.4.2.

⁸L/6589, adopted on 7 November 1989, 36S/26, 42 para. 60.

⁹L/6771, adopted on 12 December 1990, 37S/9, 16, para. 21.

¹⁰L/6696, adopted on 11 July 1990, 37S/43, 52 para. 32.

¹¹L/6770, adopted on 6 February 1991, 38S/3, 6 para. 11.

¹²L/5303, adopted on 31 March 1982, 29S/129, paras. 31, 41, 47, 49.

(4) “confidential information”

During the fourth review under the Protocol of Accession on “Trade with Hungary,” the representative of Hungary noted, in response to the inquiry by the EEC referred to above, that the lists attached to the governmental trade agreements “resulted from private negotiations among enterprises in Hungary and in the other countries in question. In view of the latter circumstance, in accordance with the relevant provisions of Article X of the General Agreement, the Hungarian authorities could not be required to disclose information which would prejudice the legitimate commercial interests of particular enterprises, public or private ... in many cases there was only one company involved with the production of a particular product and thus, if the lists were published, they would disclose commercial information which could damage the firm’s bargaining position”.¹³

The Report of the Working Party on the seventh review under the Protocol of Accession on “Trade with Hungary” records that “The Community and Hungary had further agreed to ensure the publication of comprehensive commercial and financial data as well as information in accordance with Article X of the GATT and to maintain and further improve favourable business regulations and facilities for each other’s companies on their respective markets”.¹⁴

2. Paragraph 2

See also Article XIII:3(b).

3. Paragraph 3**(1) “a uniform, impartial and reasonable manner”**

A Note by the Director-General, dated 29 November 1968, on the applicability of Article I of the General Agreement to the Agreement on Implementation of Article VI includes the following reference to Article X:

“Paragraph 3(a) of [Article X] provides that all laws, regulations, judicial decisions and administrative rulings pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges shall be administered in ‘a uniform, impartial and reasonable manner’. These last words would not permit, in the treatment accorded to imported goods, discrimination based on country of origin, nor would they permit the application of one set of regulations and procedures with respect to some contracting parties and a different set with respect to the others”.¹⁵

The 1984 Panel Report on “Japanese Measures on Imports of Leather” notes that the argument was made in this dispute that the import quotas for leather were not administered in a “reasonable manner,” as a result of, *inter alia*, allocation of import licences to competing domestic producers; see the finding of this panel below at page 298.

The Panel Report on “EEC - Restrictions on Imports of Dessert Apples, Complaint by Chile” examined, *inter alia*, the claim by Chile that differences among the ten member states of the EEC as to the requirements imposed for applications for licences for imports of dessert apples, such as refusal by one member state to accept a licence issued by another, meant that the requirements for licence issue were not “uniform” throughout the Community in terms of Article X:3(a); that the import licensing system was not uniform over time; that the one-month validity period of the import licences was too short, and hence “unreasonable” in terms of Article X:3(a); and that the timing of the scheme was not “impartial” in relation to supplying countries. The EEC noted that the import licensing scheme was administered through an EEC Regulation which, under Article 189 of the Treaty of Rome, had general scope, was binding in its entirety, and was directly applicable in all member States. It was the regulation and the regulation alone which established the legal situation for all persons; the internal administrative provisions which certain member States may have found necessary could not validly modify the rights and obligations of persons. Furthermore, these internal administrative provisions did not have to

¹³*Ibid.*, 29S/139-40, paras. 32, 34.

¹⁴L/6535, adopted on 19 July 1989, 36S/416 para. 39.

¹⁵L/3149; see also reference to this passage in “EEC - Restrictions on Imports of Apples, Complaint by Chile”, 36S/93, para. 6.5.

be published and were not usually brought to the attention of the Commission. The fact that Chilean exporters were the first to send apples to the Community was not proof of discriminatory, non-uniform, partial or unreasonable administration, but simply an objective fact due to the climatic differences among exporting countries. In response, the Panel found as follows:

“The Panel further noted that the EEC Commission Regulations in question were directly applicable in all of the ten Member States concerned in a substantially uniform manner, although there were some minor administrative variations, e.g. concerning the form in which licence applications could be made and the requirement of pro-forma invoices. The Panel found that these differences were minimal and did not in themselves establish a breach of Article X:3. The Panel therefore did not consider it necessary to examine the question whether the requirement of ‘uniform’ administration of trade regulations was applicable to the Community as a whole or to each of its Member States individually”.¹⁶

(2) “date of this Agreement”

Article XXVI:1 provides that “The date of this Agreement shall be 30 October 1947”. This date applies for the obligations under Article X:3 of the original contracting parties; of the former territories of the original contracting parties which, after attaining independence or commercial autonomy, succeeded to contracting party status under Article XXVI:5(c); and of Chile. When the modalities of accession to the General Agreement were first considered, at the Third Session in Annecy in 1949, the Working Party which drafted the Annecy Protocol of Terms of Accession decided to use instead the date of the Havana Final Act, 24 March 1948, and this approach was followed for the next group of accessions in the Torquay Protocol of 1951.¹⁷ Since the next accession thereafter, which was the accession of Japan in 1955, the standard terms in accession protocols have provided that the “date of this Agreement” for the purposes of Article X:3 shall be the date of the protocol of accession or (where the acceding government had previously acceded provisionally) the date of the declaration on provisional accession.¹⁸

B. RELATIONSHIP BETWEEN ARTICLE X AND OTHER ARTICLES

See Articles XI:2 and XIII:3.

In a number of instances where consistency with Article X was raised as a subsidiary argument in relation to quantitative restrictions, panels have declined to make findings with respect to this issue when they have found that the quantitative restriction was inconsistent with Article XI.

The 1984 Panel Report concerning the dispute on “Japanese Measures on Imports of Leather” notes that the argument was made, *inter alia*, that the alleged lack of publication of the size of the global quotas for leather, the names of licence holders, the quantity of their licences, and the size of unfilled quota balances contravened Article X:1.

“The Panel noted that the United States had, as a subsidiary matter, argued that Japan had also nullified or impaired benefits under Articles II, X:1, X:3 and XIII:3. In view of the findings set out in the paragraphs above [that the import quotas were inconsistent with Article XI], the Panel found that it was not necessary for it to make a finding on these matters.”¹⁹

The Panel Report concerning the dispute on “Japan - Restrictions on Imports of Certain Agricultural Products” examined, *inter alia*, the argument that the lack of publication of certain information regarding import restrictions was inconsistent with Articles X and XIII.

“The Panel noted that the United States had, as a subsidiary matter, argued that Japan had also nullified or impaired benefits under Articles X:1, X:3 and XIII:3. Since these provisions dealt with the administration of quotas that may be applied consistently with the General Agreement, the Panel decided

¹⁶L/6491, adopted on 22 June 1989, 36S/93; arguments p. 116-17 paras. 6.3-6.6, findings p. 133 para. 12.30.

¹⁷Annecy Protocol, I/81, para. 5(b); Torquay Protocol, dated 21 April 1951, I/86, 88, para. 5(b).

¹⁸E.g. Protocol for the Accession of Bolivia, L/6562, 37S/5.

¹⁹L/5623, adopted on 15/16 May 1984, 31S/94, 114; arguments at 31S/97-98 paras. 26-27; findings at 31S/114 para. 57.

that it was not necessary for it to make a finding on these matters with regard to quantitative restrictions maintained contrary to that Agreement.”²⁰

In the three parallel Panel Reports on “Republic of Korea - Restrictions on Imports of Beef,” Complaints by Australia²¹, New Zealand²², and the United States²³ the Panel examined the subsidiary claim by the complainants that Korea had not met its obligations under Articles X and XIII by not providing proper public notice of the import restrictions. The Panel found:

“The Panel noted that [Australia/New Zealand/the United States] had, as a subsidiary matter, claimed that Korea had not met its obligations under Articles X and XIII by not providing proper public notice of the import restrictions. It also noted that Korea had stated that the withdrawal of the measures imposed in 1984/85 and the import levels in 1988 had been widely publicized. In view of the Panel’s determinations as concerned the consistency of the Korean measures with Articles II and XI, the Panel did not find it necessary to address these subsidiary issues. The Panel noted, however, the requirement in Article X:1 that ‘laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to ... rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports ..., shall be published promptly in such a manner as to enable governments and traders to become acquainted with them’. It also noted the provision in Article XIII:3(b) that ‘[i]n the case of import restrictions involving the fixing of quotas, the contracting party applying the restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any change in such quantity or value’.”²⁴

The Panel Report on “Canada - Import Restrictions on Ice Cream and Yoghurt” examined, *inter alia* the claim by the United States that in administering its import restrictions Canada had failed to observe the procedural obligations of Article X:1 and Article X:2 which, it was contended, created distinct obligations in addition to the requirement of public notification arising under Article XI:2(c).

“The Panel observed that the remaining provisions of Article XI:2(c), as concerned public notice and the level of imports, as well as those contained in Articles X and XIII, concerned the operation of the quota. As the Panel had found that the Canadian import quotas for ice cream and yoghurt could not be justified under Article XI:2(c)(i), it did not consider it necessary to examine whether the administration of these quotas was in conformity with the General Agreement.”²⁵

The Panel Report on “EEC - Regulation on Imports of Parts and Components” examined, *inter alia*, the claim of Japan that while the conditions under which anti-dumping duties could be imposed under the “anti-circumvention” legislation of the EEC were defined in the text of that legislation, the criteria for acceptance of offers of undertakings had not been published and that this was inconsistent with Article X:1. The Panel found as follows:

“The Panel considered the argument of Japan that, in the administration of the anti-circumvention provision, the EEC violated its obligations under Article X:1 and X:3 of the General Agreement, in particular in respect of the criteria for the acceptance of undertakings and the methodology for determining the origin of imported parts and components. Given that the Panel found the anti-circumvention duties and the acceptance of parts undertakings to be inconsistent with Article III:2 and 4, and not justifiable under Article XX(d), and that any further imposition of such duties or acceptance of related undertakings would therefore be inconsistent with the General Agreement, the issue of whether the administration of the anti-circumvention provision is consistent with Article X is no longer relevant.”²⁶

²⁰L/6253, adopted on 2 February 1988, 35S/163; arguments at paras. 3.5.1-3.5.3; findings at 35S/242, para. 5.4.2.

²¹L/6504, adopted on 7 November 1989, 36S/202.

²²L/6505, adopted on 7 November 1989, 36S/234.

²³L/6503, adopted on 7 November 1989, 36S/268.

²⁴Same three panel reports referred to above, at 36S/230, 267, 306, paras. 108, 124, 130 respectively.

²⁵L/6568, adopted on 5 December 1989, 36S/68, 92, para. 82.

²⁶L/6657, adopted on 16 May 1990, 37S/132, 199, para. 5.27.

C. NOTIFICATION IN GATT

At various times since 1947 notes have been prepared by the Secretariat summarizing the notification obligations of contracting parties under the General Agreement.²⁷ The question of improvement and streamlining of notification procedures has also been raised at various times in the Council and was also discussed in the Senior Officials' Group and the Preparatory Committee in advance of the Uruguay Round.²⁸ The 15 April 1994 Final Act of the Uruguay Round includes a Decision on Notification Procedures; see under section D below.

1. General understandings

In March 1964, the CONTRACTING PARTIES adopted two Reports on "Trade Information and Trade Promotion Advisory Service" as well as a Recommendation on "Co-operation in the Field of Trade Information and Trade Promotion".²⁹ The Recommendation provides, *inter alia*, that "The CONTRACTING PARTIES recommend that contracting parties should forward promptly to the secretariat copies of the laws, regulations, decisions, rulings and agreements of the kind described in paragraph 1 of Article X, together with such other information as they consider relevant to the objectives of this Recommendation".

An "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance" was adopted on 28 November 1979 at the close of the Tokyo Round. Paragraphs 2 and 3 of this Understanding, on "Notification", provide as follows:

"Contracting parties reaffirm their commitment to existing obligations under the General Agreement regarding publication and notification.

"Contracting parties moreover undertake, to the maximum extent possible, to notify the CONTRACTING PARTIES of their adoption of trade measures affecting the operation of the General Agreement, it being understood that such notification would be without prejudice to views on the consistency of measures with or their relevance to obligations under the General Agreement. Contracting parties should endeavour to notify such measures in advance of implementation. In other cases, where prior notification has not been possible, such measures should be notified promptly *ex post facto*. Contracting parties which have reason to believe that such trade measures have been adopted by another contracting party may seek information on such measures bilaterally, from the contracting party concerned".³⁰

The text of this Understanding appears in full under Article XXIII. On 26 March 1980 a Proposal by the Director-General on "Notification and Surveillance" was adopted, including a number of suggestions relating to action necessary to implement paragraphs 2 and 3 of the Understanding above. It was suggested that the Council draw the attention of all contracting parties to paragraph 2 of the Understanding, and invite contracting parties to submit notifications in accordance with a calendar set out in an annex. "The attention of contracting parties should be drawn to paragraph 3 of the Understanding. Contracting parties should be invited to submit notifications under this paragraph, in particular when notifications covering the measures are not made under other GATT procedures".³¹ The proposal also called for semiannual reviews of developments in the trading system to be conducted by the Council at sessions specially held for that purpose.

²⁷"Provisions of the Agreement which contemplate submission of information to the CONTRACTING PARTIES," Note of 2 February 1950, GATT/CP.4/16; "Notification requirements in GATT," Annex to the Report by the Group of Experts on Trade Information and Trade Promotion Advisory Services, adopted on 19 March 1964, COM.III/128, 12S/138, 146; "Notifications required from contracting parties," Note by the Secretariat, MTN/FR/W/17; Lists on notification requirements (1) applying to all contracting parties, (2) applying to some government or governments, and list of dates on which regular notifications fall due, attached to the Director-General's proposal for Procedures for the Review of Developments in the Trading System, adopted on 26 March 1980, C/III, 27S/20 (attachments not reproduced in BISD); Notes prepared for semi-annual reviews on developments in the trading system (see below), e.g. C/W/437, C/W/446, C/W/471; tabular presentation of all periodic and ad hoc notifications required under the General Agreement, MTN Agreements, MFA, 1979 Understanding and 1982 Work Programme, PREP.COM(86)W/31/Add.1; "Notification procedures in GATT," Note dated 10 March 1988, MTN.GNG/NG14/W/18.

²⁸See Notes from 1984 (C/W/446) and 1985 (C/W/471), C/M/182 and C/M/189; also SR.SOG/10 and 11; Secretariat Note, PREP.COM(86)W/31/Add.1; PREP.COM(86)SR/4, SR/6 and SR/7.

²⁹Reports at COM.III/128, 12S/138, and L/2181, Part A, 12S/148; Recommendation at 12S/49.

³⁰L/4907, adopted on 28 November 1979, 26S/210, paras. 2-3.

³¹C/III, adopted on 26 March 1980, 27S/20, 22, para. 6.

The Decisions of 12 April 1989 on “Functioning of the GATT System” include a decision to establish an “Overview of Developments in the International Trading Environment,” providing that “Such an overview should be undertaken by the Council. It should be assisted by an annual report by the Director-General setting out major GATT activities and highlighting significant policy issues affecting the trading system ... It is understood that this overview by the Council, together with the trade policy review mechanism, would replace the existing reviews in special Council meetings established under paragraph 24 of the 1979 Understanding ...”.³² See also the material below on the Trade Policy Review Mechanism.

2. Notifications provided for by specific provisions of the General Agreement or decisions of the CONTRACTING PARTIES

The following table presents the provisions of the General Agreement, or decisions of the CONTRACTING PARTIES, which provide for notification of measures, either as such or in connection with requests made to the CONTRACTING PARTIES.

Tariffs

Proposal on Introduction of a Loose-Leaf System for the Schedules of Tariff Concessions ³³	Submission of consolidated schedules of tariff concessions
Decision on Integrated Data Base ³⁴	Contracting parties should submit annually to the secretariat, by tariff line, tariff data for unbound items and import data for all bound and unbound tariff items, in accordance with the IDB agreed format
Article II:6(a)	Notification of adjustment of specific duties
Article XVIII:A	Notification of modification or withdrawal of concessions pursuant to Article XVIII:7(a)
Article XXVII	Notification of withholding or withdrawal of concessions initially negotiated with a government that has not become, or has ceased to be, a contracting party
Article XXVIII:1	Notification of modification or withdrawal of a concession to take place during “open season” (not earlier than six months nor later than three months before the termination date of a preceding three-year period as referred to in Article XXVIII:1)
Article XXVIII:4	Request for authorization by CONTRACTING PARTIES to enter into negotiations for modification or withdrawal of a concession at any time in special circumstances
Article XXVIII:5	Notification during Article XXVIII:1 “open season” reserving the right to modify or withdraw concessions during the subsequent three-year period

³²L/6490, Decisions of 12 April 1989 arising from action by the Trade Negotiations Committee, 36S/403, 405-406 para. F.

³³Proposal by the Director-General adopted on 26 March 1980, C./107/Rev.1, 27S/22.

³⁴Decision of 10 November 1987, L/6290, 34S/66, para. 3. See also IDB User Reference Manual dated 19 April 1994, IDB/URM/1.

Quantitative restrictions and other measures affecting trade

Articles XII:4 and XVIII:12 ³⁵	Notification of introduction or intensification of all measures taken for balance-of-payments purposes
Questionnaire on Import Licensing Procedures (L/5640) ³⁶	Notification of import licensing and similar administrative procedures maintained in and applied with respect to imports into the customs territories to which GATT applies
Data base on quantitative restrictions and other non-tariff measures ³⁷	Biennial complete notification of quantitative restrictions; notification of details of changes in quantitative restrictions as and when these changes occur
Inventory of Non-Tariff Measures ³⁸	Notification by contracting parties of measures maintained by other contracting parties which affect their trade
Border tax adjustments ³⁹	Notification of major changes in tax adjustment legislation and practices involving international trade
Marks of origin ⁴⁰	Notification of changes in legislation, rules or regulations concerning marks of origin
Ministerial Decision on Export of Domestically Prohibited Goods ⁴¹	Notification by contracting parties, to the maximum extent feasible, of any goods produced and exported by them but banned by their national authorities for sale on their domestic markets on grounds of human health and safety (circulated in DPG/NOTIF/- series)
Streamlined Mechanism for Reconciling the Interests of Contracting Parties in the Event of Trade-Damaging Acts ⁴²	Notification by importing contracting parties of measures restricting trade for the purpose of protecting human, animal or plant life or health
Decision concerning Article XXI of the General Agreement ⁴³	Notification of trade measures taken under Article XXI

³⁵As interpreted by 1979 Declaration on Trade Measures Taken for Balance-of-payments Purposes, 26S/205.

³⁶Agreed at the Twenty-eighth Session of the CONTRACTING PARTIES; see Report of the Committee on Trade in Industrial Products, L/3756, para. 76; SR.28/6. The questionnaire and responses now appear in L/5640 and addenda issued thereto, and were formerly under COM.IND/W/55-COM.AG/W/72. The Annual Reports of the Committee on Import Licensing include a list of responses to this questionnaire (see, e.g., L/7313, dated 19 November 1993).

³⁷Recommended in para. 44 of L/5713, Report (1984) of the Group on Quantitative Restrictions and other Non-Tariff Barriers, adopted on 30 November 1984, 31S/211, 222; see also 31S/12. Concerning this inventory and other GATT work on quantitative restrictions, see the material at the end of the chapter on Article XI in this volume.

³⁸Procedures established 1980, 27S/18; further format for notifications adopted as part of Report (1985) of the Group on Quantitative Restrictions and Other Non-Tariff Measures, adopted on 28 November 1985, 32S/93.

³⁹Procedures recommended in Report of the Working Party on "Border Tax Adjustments" adopted on 2 December 1970, L/3464, 18S/97, 108 para. 40.

⁴⁰Recommendation of 21 November 1958 on "Marks of Origin", 7S/30, 33.

⁴¹Ministerial Declaration adopted on 29 November 1982, 29S/19.

⁴²C/M/236, p. 6-7; 36S/67; for text see under Article XX(b).

⁴³L/5426, 29S/23; for text of decision see under Article XXI.

Programme of Work of Committee on Trade in Agriculture ⁴⁴	Notification of measures and policies affecting trade in agriculture (circulated in AG/FOR/REV/- series)
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Exchange arrangements

Article XV:8	Notification by contracting parties not members of the International Monetary Fund of national trade and financial data within the scope of Article VIII:5 of the IMF Articles of Agreement
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Subsidies

Article XVI:1 ⁴⁵	Notification of any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, the territory of a contracting party. Full notification (response to questionnaire) every three years; annual notifications of changes in intervening years
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State trading

Article XVII:4 ⁴⁶	Notification of products imported into or exported from territories of contracting parties by State-trading enterprises or other enterprises which enjoy exclusive or special privileges. Full notification (response to questionnaire) every three years; annual notifications of changes in intervening years
Liquidation of strategic stocks ⁴⁷	Advance notification by any contracting party holding stocks of primary products accumulated as part of a national strategic stockpile for purposes of national defense and intending to liquidate a substantial quantity of such stocks

Governmental assistance to economic development (Article XVIII:C and D)

Article XVIII:C ⁴⁸	Notification of special difficulties which a contracting party falling under Article XVIII:4(a) meets in achieving the objective in Article XVIII:13; indication of specific measure which it proposes to introduce in order to remedy these difficulties
Article XVIII:D ⁴⁹	Application to the CONTRACTING PARTIES for approval of a measure described in Article XVIII:13, by a contracting party falling under Article XVIII:4(b)

⁴⁴L/5563, 30S/100, 102.

⁴⁵Questionnaire at 9S/193; see also 11S/59.

⁴⁶Procedures for notifications established 1957, modified 1960 (6S/23, 9S/184). Questionnaire established 11S/58.

⁴⁷Resolution of 4 March 1955 on "Liquidation of Strategic Stocks," 3S/51; see, e.g. notifications by Australia at L/3373, L/3432, L/4018.

⁴⁸As modified by the Decision of 28 November 1979 on Safeguard Action for Development Purposes, 26S/209.

⁴⁹Questionnaire for guidance established 1958, 7S/85.

Emergency action on imports of particular products

Article XIX:2 Notice in writing to the CONTRACTING PARTIES as far in advance of action as may be practicable; however, in critical circumstances action may be taken provisionally without prior consultation

Consultations and dispute settlement

Article XXII⁵⁰ Notification of any request for consultations under Article XXII

Article XXIII⁵¹ Notification of any request for consultations under Article XXIII:1 or request for establishment of a panel under Article XXIII:2

Other institutional and final provisions

Article XXV:5⁵² Notification of request for waivers of obligations

Article XXXI Notice of withdrawal from the General Agreement (see also references to notice of intent to withdraw in Articles XVIII:12(e) and XXIII:2).

Protocol of
Provisional Application Notice of withdrawal of provisional application of the General Agreement

Customs unions and free-trade areas; regional agreements

Article XXIV:7(a)⁵³ Notification by any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area

Article XXIV:7(c) Communication of any substantial change in a plan or schedule included in an interim agreement for the formation of a customs union or free-trade area

Decision of
26 November 1971⁵⁴ Biennial reporting on regional agreements

Trade and development

Article XXXVII:2⁵⁵ Reports by contracting parties whenever it is considered that effect is not being given to the provisions of Article XXXVII:1

⁵⁰“Procedures under Article XXII on Questions Affecting the Interests of a Number of Contracting Parties” adopted on 1958, 7S/24; Decision on “Improvements to the GATT Dispute Settlement Rules and Procedures” adopted on 12 April 1989, L/6489, 36S/61. See also under Article XXII.

⁵¹Decision on “Improvements to the GATT Dispute Settlement Rules and Procedures” adopted on 12 April 1989, L/6489, 36S/61.

⁵²See also “Article XXV - Guiding Principles to be Followed by the CONTRACTING PARTIES in Considering Applications for Waivers from Part I or Other Important Obligations of the General Agreement”, adopted on 1 November 1956, L/532, 5S/25 (thirty-day advance notice requirement).

⁵³Council Decision of 25 October 1972 on “Procedures” for customs unions and free-trade areas, C/M/81 p. 16, 19S/13.

⁵⁴Programme of Work adopted at 27th Session, L/3641, 18S/37, 38, para. 4(c).

⁵⁵Procedures adopted on 25 March 1965, 13S/78-80.

Decision on
Differential and More
Favourable Treatment,
Reciprocity and Fuller
Participation of
Developing Countries⁵⁶

Notification by any contracting party taking action to introduce, modify or withdraw differential and more favourable treatment specified in the Decision; notifications include, *inter alia*, notifications concerning changes in GSP schemes

D. TRADE POLICY REVIEW MECHANISM

On 12 April 1989 the Council adopted the following Decision creating a Trade Policy Review Mechanism ("TPRM"):

"The CONTRACTING PARTIES *decide* to establish a trade policy review mechanism, as follows:

"A. *Objectives*

"(i) The purpose of the mechanism is to contribute to improved adherence by all contracting parties to GATT rules, disciplines and commitments, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of contracting parties. Accordingly, the review mechanism will enable the regular collective appreciation and evaluation by the CONTRACTING PARTIES of the full range of individual contracting parties' trade policies and practices and their impact on the functioning of the multilateral trading system. It is not, however, intended to serve as a basis for the enforcement of specific GATT obligations or for dispute settlement procedures, or to impose new policy commitments on contracting parties.

"(ii) The assessment to be carried out under the review mechanism will, to the extent relevant, take place against the background of the wider economic and developmental needs, policies and objectives of the contracting party concerned, as well as of its external environment. However, the function of the review mechanism is to examine the impact of a contracting party's trade policies and practices on the multilateral trading system.

"B. *Reporting*

"(i) In order to achieve the fullest possible degree of transparency, each contracting party shall report regularly to the CONTRACTING PARTIES. Initial full reports shall be submitted in the year when the contracting party is first subject to review; however, in no case shall the initial report be submitted later than four years after the introduction of the mechanism. Subsequently, full reports shall be provided in years when the contracting party is due for review. Full reports will describe the trade policies and practices pursued by the contracting party or parties concerned, based on an agreed format to be decided upon by the Council. This format may be revised by the Council in the light of experience. Between reviews, contracting parties will provide brief reports when there are any significant changes in their trade policies; an annual update of statistical information will be provided according to the agreed format. Particular account will be taken of difficulties presented to least-developed contracting parties in compiling their reports. The Secretariat shall make available technical assistance on request to less-developed contracting parties, and in particular to the least-developed contracting parties. Information contained in country reports should to the greatest extent possible be coordinated with notifications made under GATT provisions.

"C. *Frequency of Review*

"(i) The trade policies and practices of all contracting parties will be subject to periodic review. Their impact on the functioning of the multilateral trading system, defined in terms of share of world

⁵⁶L/4903, Decision of 28 November 1979, 26S/203, 204 para. 4.

trade in a recent representative period, will be the determining factor in deciding on the frequency of reviews. The first four trading entities so identified (counting the European Communities as one) will be subject to review every two years. The next sixteen will be reviewed every four years. Other contracting parties will be reviewed every six years, except that a longer period may be fixed for least-developed countries. It is understood that the review of entities having a common external policy covering more than one contracting party shall cover all components of policy affecting trade including relevant policies and practices of the individual contracting parties. Exceptionally, in the event of changes in a contracting party's trade policies or practices which may have a significant impact on its trading partners, the contracting party concerned may be requested by the Council after consultation to bring forward its next review.

“(ii) Contracting parties recognize the need to minimize the burden for governments also subject to full consultations under the GATT balance-of-payments provisions. To this end, the Chairman of the Council shall, in consultation with the contracting party or parties concerned, and with the Chairman of the Committee on Balance-of-Payments Restrictions, devise administrative arrangements which would harmonize the normal rhythm of the trade policy reviews with the time-table for balance-of-payments consultations but would not postpone the trade policy review by more than 12 months.

“D. *Review Body*

“(i) Trade policy reviews will be carried out by the Council at periodic special meetings.

“(ii) In the light of the objectives set out in A above, discussions in the meetings of the Council will, to the extent relevant, take place against the background of the wider economic and developmental needs, policies and objectives of the contracting party concerned, as well as of its external environment. The focus of these discussions will be on the contracting party's trade policies and practices which are the subject of the assessment under the review mechanism.

“(iii) The Council will establish a basic plan for the conduct of the reviews. It may also discuss and take note of update reports from contracting parties. The Council will establish a programme of reviews for each year in consultation with the contracting parties directly concerned. In consultation with the contracting party or parties under review, the Chairman may choose discussants who, in their personal capacity, will introduce the discussions in the review body.

“(iv) The Council will base its work on the following documentation:

“(a) The full report, referred to in paragraph B(i) above, supplied by the contracting party or parties under review.

“(b) A report, to be drawn up by the Secretariat on its own responsibility, based on the information available to it and that provided by the contracting party or parties concerned. The Secretariat should seek clarification from the contracting party or parties concerned of their trade policies and practices.

“(v) The reports by the contracting party under review and by the Secretariat, together with the minutes of the respective meeting of the Council, will be published promptly after the review.

“(vi) These documents will be forwarded to the next regular Session of the CONTRACTING PARTIES, which will take note of them.

“E. *Implementation and Reappraisal of the Mechanism*

“The trade policy review mechanism will be implemented on a provisional basis from the date of the adoption of this Decision by the CONTRACTING PARTIES. In the light of the experience gained from its

operation, the CONTRACTING PARTIES will review, and if necessary modify, these arrangements at the end of the Uruguay Round.”⁵⁷

On 19 July 1989, the Council agreed on an outline format for country reports to be submitted under the TPRM, including a list of matters to be dealt with in country reports and of statistical and tabular data to be submitted.⁵⁸ In 1993, the Council agreed to clarified procedures dealing with such matters as timing of review meetings, rôle of discussants, statements in the Council and replies by countries under review.⁵⁹

At the Forty-Ninth Session in December 1994, the CONTRACTING PARTIES agreed that informal consultations should be held on issues relating to the operation of the TPRM. On 10 May 1994, the Council agreed to the following decision on arrangements for continued operation of the TPRM:

“1. The Trade Policy Review Mechanism shall continue in operation until its successor mechanism established in Annex 3 of the Agreement establishing the World Trade Organization (WTO) comes into effect.

“2. Contracting parties agree that a report by the Government of the contracting party or by the entity under review remains a central element of the review process. However, in order to avoid duplication of the material contained in the Secretariat report, and to lighten the burden on delegations, Government reports shall be in the form of policy statements. It would essentially be for the contracting parties and entities concerned to decide on the form and length of such statements, although the Council, or the Trade Policy Review Body to be established under the WTO Agreement, may decide on new guidelines for Government reports.

“3. Contracting parties agree that the principal focus of Secretariat reports should be on the trade policies and practices of the contracting party or entity under review. Contracting parties recognize that trade policies must, to the extent necessary, be seen in the context of overall macro-economic and structural policies.

“4. The existing cycle of reviews shall be maintained, but with a general degree of flexibility of up to six months, if and as may be necessary. Schedules of subsequent reviews shall be established by counting from the date of the previous review meeting.

“5. Documentation relating to each review meeting shall be provided to Council members at the latest four weeks before the date of the review meeting.

“6. Contracting parties recognize that the changes in the procedures for review meetings introduced in 1993 (L/7208) have facilitated a more lively debate. All parties subject to review should co-operate in enabling these procedures to function effectively. Contracting parties also recognize that the rôle of discussants is crucial, especially in triggering the debate on the second day of a review meeting. Delegations are reminded that, where possible, written questions should be submitted to the party under review at least one week before the review meeting, to allow time to prepare replies.

“7. Press arrangements for trade policy reviews should ensure sufficiently complete coverage of the proceedings of review meetings. In the light of suggestions made by individual contracting parties, notably regarding the timing and delivery of documentation to the press, participation in press briefings, and other related questions, the Secretariat is requested to consult further on ways in which this can be achieved, and to make proposals to the Council before the next trade policy review to be held.

“8. Contracting parties agree that the understandings in paragraphs 2 to 6 shall be communicated to the Preparatory Committee for the World Trade Organization for its consideration, with a view to their introduction on the entry into force of the WTO Agreement.”⁶⁰

⁵⁷L/6490, adopted on 12 April 1989, 36S/403.

⁵⁸L/6552, 36S/406.

⁵⁹L/7208, Communication from the Council Chairman, dated 30 April 1993.

⁶⁰L/7458, Decision of 10 May 1994; see also SR.49/1, p. 8-9.

E. NOTIFICATION PROCEDURES DURING THE TRANSITION TO THE WORLD TRADE ORGANIZATION

The 15 April 1994 Final Act of the Uruguay Round includes a Decision on Notification Procedures, which calls for a Central Registry of Notifications to be established, and for a review of notification obligations and procedures to be carried out by a working group under the WTO Council on Trade in Goods. The Decision was adopted by Ministers at Marrakesh, and it was further adopted, and the Central Registry was established, by the WTO General Council at its first meeting on 31 January 1995.

On 8 December 1994 the CONTRACTING PARTIES and the Preparatory Committee for the World Trade Organization adopted a Decision on "Transitional Arrangements - Avoidance of Procedural and Institutional Duplication", which provides *inter alia* that the Preparatory Committee:

"Noting that the General Agreement on Tariffs and Trade (hereinafter referred to as "GATT 1947") and the Marrakesh Agreement Establishing the World Trade Organization (hereinafter referred to as "WTO Agreement") are legally distinct and that Members of the WTO may therefore remain contracting parties to the GATT 1947;

"Considering that contracting parties to the GATT 1947 and parties to the Tokyo Round Agreements that are also Members of the WTO should not be subjected to the inconvenience of having to notify and consult on their measures and policies twice;

"Desiring, therefore, that the bodies established under the GATT 1947, the Tokyo Round Agreements and the WTO Agreement coordinate their activities to the extent that their functions overlap;

"Decides to propose the following procedures for adoption by the CONTRACTING PARTIES to the GATT 1947, the Committees established under the Tokyo Round Agreements and the General Council of the WTO:

"In the period between the date of entry into force of the WTO Agreement and the date of the termination of the legal instruments through which the contracting parties apply the GATT 1947 and of the Tokyo Round Agreements the following notification and coordination procedures shall apply under the GATT 1947, the Tokyo Round Agreements and the WTO Agreement:

"1. If a measure is subject to a notification obligation both under the WTO Agreement and under the GATT 1947 or a Tokyo Round Agreement, the notification of such a measure to a WTO body shall, unless otherwise indicated in the notification, be deemed to be also a notification of that measure under the GATT 1947 or the Tokyo Round Agreement. Any such notification shall be circulated by the WTO Secretariat simultaneously to the Members of the WTO and to the contracting parties to the GATT 1947 and/or the parties to the Tokyo Round Agreement. These procedures are without prejudice to any notification procedures applicable in specific areas.

"2. The coordination procedures set out in paragraphs 3 and 4 below shall apply in the relations between the bodies referred to in sub-paragraphs (a) to (d) below: ...

"(d) The GATT 1947 Council of Representatives shall coordinate its trade policy reviews with those of the WTO Trade Policy Review Body.

...

"5. The CONTRACTING PARTIES to the GATT 1947, the Committees established under the Tokyo Round Agreements and the General Council of the WTO may decide independently to terminate the application of the provisions set out in paragraphs 1 to 4 above.⁶¹

⁶¹PC/11, L/7582.

III. PREPARATORY WORK

The preparatory work states that Article X was partially based on Articles 4 and 6 of the 1923 International Convention Relating to the Simplification of Customs Formalities.⁶² Corresponding provisions in the Havana Charter were in Article 38; in the US Proposals, Chapter III-8; in the US Draft, Article 15; in the New York Draft, Article 21; and in the Geneva Draft, Article 37.

Article X has the same text as Article 37 of the Geneva Draft Charter, except that a provision in paragraph 1 requiring governments to furnish copies of their laws, regulations and agreements to the Organization was not included in the General Agreement. At the Havana Conference, this Article of the Charter was amended as follows, to become Article 38 of the Havana Charter:

- In Article 38:2 the prohibition on enforcing certain measures of general application “before such measure has been officially published” was changed by substituting “made public” for the word “published” in the Charter article. It was agreed that the text “did not require the prior public issue of an official document, but that the effect could also be accomplished by an official announcement made in the legislature of the country concerned”.⁶³
- Article 38:3(a) as amended provided that “suitable facilities shall be afforded or traders directly affected by any of those matters [the various laws and regulations] to consult with the appropriate governmental authorities”.

However, these changes were not brought into the General Agreement.

⁶²See EPCT/C.II/W.41, EPCT/C.II/54/Rev.1 p. 29.

⁶³Havana Reports, p. 79, para. 52.

IV. RELEVANT DOCUMENTS (FOR ARTICLES V-X)

London (Arts. V-X)

Discussion: EPCT/C.II/QR/PV/5
 Reports: EPCT/C.II/42, 46, 48, 49, 50, 54/Rev.1, 55, 56
 Other: EPCT/C.II/W.5, 31

New York (Arts. V-X)

Discussion: EPCT/C.6/7, 8, 16, 18, 22, 30, 33, 36, 41, 58, 64, 84, 90.
 Reports: EPCT/C.6/55/Rev.1, 97/Rev.1

Geneva

Articles V-X:

Discussion: see below: also:
 EPCT/TAC/PV/10-11, 26-28
 Reports: EPCT/103, 109, 135, 142+Corr. 1, 154, 180, 186, 189, 196, 212, 214/Add.1/Rev.1
 Other: EPCT/W/97, 100, 103, 166, 180, 272, 301, 313, 318

Article V:

Discussion: EPCT/EC/SR.2/3, PV.2/22
 EPCT/A/SR/20, 33, 34
 EPCT/WP.1/SR/6, 7, 9, 10
 EPCT/WP.1/AC.1/SR.1+Corr.1
 Reports: see above
 Other: EPCT/109
 EPCT/W/23, 28, 29, 31, 32, 33, 55, 63, 89

Article VI:

Discussion: EPCT/EC/SR.2/3, 22
 EPCT/A/SR/20, 24, 32, 34
 EPCT/WP.1/SR/8, 9, 11
 Reports: see above
 Other: EPCT/W/23, 28, 29, 34, 35+Corr.1, 53, 66, 68, 84, 91, 97

Article VII:

Discussion: EPCT/EC/SR/3, 22
 EPCT/A/SR/31, 32, 34+Corr.1, 40(2)
 EPCT/WP.1/SR/9, 11
 Reports: see above;
 also EPCT/W/166, 180
 Other: EPCT/W/23, 24, 28, 36, 37+Corr.1, 57, 58, 78, 90, 100, 104, 134, 152, 158, 247, 251,
 262, 283

Article VIII:

Discussion: EPCT/EC/SR.2/3, 22
 EPCT/A/SR/24, 25, 34
 EPCT/WP.1/SR/1, 6, 7, 11
 Reports: see above
 Other: EPCT/W/23, 28, 38, 39, 50, 67, 77, 88, 103

Article IX:

Discussion: EPCT/EC/SR.2/3, 22
 EPCT/A/SR/24, 34, 40(2)
 EPCT/WP.1/SR/1-3, 6-7, 8+Corr.1-2
 Reports: see above
 Other: EPCT/109
 EPCT/W/23, 28, 29, 40, 52, 80

Article X:

Discussion: EPCT/EC/SR.2/3, 22
 EPCT/A/SR/24, 25, 30, 34, 40(2)
 EPCT/WP.1/SR/3, 4, 8, 11
 EPCT/WP.1/AC/SR/2, 3
 Reports: see above
 Other: EPCT/109
 EPCT/W/23, 24+Add.1, 28, 41, 42, 43, 51

Havana

(Charter Articles corresponding to Articles V-X)

Discussion: E/CONF.2/C.3/SR.15, 30-32
 Reports: E/CONF.2/C.3/10, 41
 Other: E/CONF.2/C.3/C/W.5

CONTRACTING PARTIES

(Articles V-X)

Reports: GATT/CP.2/22/Rev.1 (II/43)

Review Session

Article V

Reports: W.9/155, 217
 Other: L/189, 273, 275, 276
 W.9/46
 Spec/40/55

Article VI

Discussion: SR.9/17, 24, 41, 47
Reports: W.9/122+Corr.1, 217, 220, 231, 236/Add.1;
L/334; 3S/222
Other: L/189, 261/Add.1, 270/Add.1, 273, 275, 276
W.9/20/Add.1, 28, 41, 46, 68, 86+Rev.1, 214
Spec/70/55, 93/55, 106/55, 109/55, 111/55

Article VII

Discussion: SR.9/17, 20, 47
Reports: W.9/155, 191, 199, 212, 217+Corr.1, 236/Add.1;
L/329; 3S/205
Other: L/189, 261/Add.1, 272, 273, 275, 276
W.9/46, 54+Add.1, 61, 141, 152, 169/Rev.1, 172
Spec/40/55

Article VIII

Discussion: SR.9/18, 47
Reports: W.9/155, 191, 199, 212, 217, 236/Add.1;
L/329; 3S/205
Other: L/189, 261/Add.1
W.9/46, 69, 120, 125, 168, 172
Spec/40/55

Article IX

Reports: W.9/155, 191, 212, 217, 236/Add.1;
L/329; 3S/205
Other: L/189, 261/Add.1, 273, 275, 276
W.9/46, 87, 172
Spec/40/55

Article X

Report: L/327, 3S/234-235
Other: L/189, 261/Add.1
W.9/46, 217
Spec/47/55

ARTICLE XI

GENERAL ELIMINATION OF QUANTITATIVE RESTRICTIONS

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I. TEXT OF ARTICLE XI AND RELEVANT INTERPRETATIVE NOTES

Article XI*

General Elimination of Quantitative Restrictions

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

2. The provisions of paragraph 1 of this Article shall not extend to the following:

- (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;
- (b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;
- (c) Import restrictions on any agricultural or fisheries product, imported in any form,* necessary to the enforcement of governmental measures which operate:
 - (i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or
 - (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or
 - (iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

Any contracting party applying restrictions on the importation of any product pursuant to sub-paragraph (c) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors* which may have affected or may be affecting the trade in the product concerned.

Interpretative Notes from Annex I

*Ad Article XI**Paragraph 2 (c)*

The term “in any form” in this paragraph covers the same products when in an early stage of processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective.

Paragraph 2, last sub-paragraph

The term “special factors” includes changes in relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement.

Ad Articles XI, XII, XIII, XIV and XVIII

Throughout Articles XI, XII, XIII, XIV and XVIII, the terms “import restrictions” or “export restrictions” include restrictions made effective through state-trading operations.

II. INTERPRETATION AND APPLICATION OF ARTICLE XI**A. SCOPE AND APPLICATION OF ARTICLE XI****1. Paragraph 1****(1) “prohibitions or restrictions other than duties, taxes or other charges”****(a) Measures under Article XI:1**

The 1988 Panel Report on “Japan - Trade in Semi-conductors” examined *inter alia*, “administrative guidance” by the Japanese government and its status as a “restriction” under Article XI.

“The Panel examined the parties’ contentions in the light of Article XI:1 ... [text of Article XI:1 omitted] The Panel noted that this wording was comprehensive: it applied to all measures instituted or maintained by a contracting party prohibiting or restricting the importation, exportation or sale for export of products other than measures that take the form of duties, taxes or other charges. ...

“The Panel then examined the contention of the Japanese Government that the measures complained of were not restrictions in the sense of Article XI because they were not legally binding or mandatory. In this respect the Panel noted that Article XI:1, unlike other provisions of the General Agreement, did not refer to laws or regulations but more broadly to measures. This wording indicated clearly that any measure instituted or maintained by a contracting party which restricted the exportation or sale for export of products was covered by this provision, irrespective of the legal status of the measure.

“Having reached this finding on the basis of the wording and purpose of the provision, the Panel looked for precedents that might be of further assistance to it on this point. [The Panel discussed the Panel Report on ‘Japan - Restrictions on Imports of Certain Agricultural Products’ (see below, page 339)] The Panel recognized the differences between Article XI:1 and Article XI:2(c) and the fact that the previous case was not the same in all respects as the case before it, but noted that the earlier case supported its finding that it was not necessarily the legal status of the measure which was decisive in determining whether or not it fell under Article XI:1.

“The Panel recognized that not all non-mandatory requests could be regarded as measures within the meaning of Article XI:1. Government-industry relations varied from country to country, from industry to industry, and from case to case and were influenced by many factors. There was thus a wide spectrum of government involvement ranging from, for instance, direct government orders to occasional government

consultations with advisory committees. The task of the Panel was to determine whether the measures taken in this case would be such as to constitute a contravention of Article XI.

“In order to determine this, the Panel considered that it needed to be satisfied on two essential criteria. First, there were reasonable grounds to believe that sufficient incentives or disincentives existed for non-mandatory measures to take effect. Second, the operation of the measures to restrict export of semi-conductors at prices below company-specific costs was essentially dependent on Government action or intervention. The Panel considered each of these two criteria in turn. The Panel considered that if these two criteria were met, the measures would be operating in a manner equivalent to mandatory requirements such that the difference between the measures and mandatory requirements was only one of form and not of substance, and that there could be therefore no doubt that they fell within the range of measures covered by Article XI:1 ...¹

“All these factors [discussed in paragraphs 110-116 of the Report] led the Panel to conclude that an administrative structure had been created by the Government of Japan which operated to exert maximum possible pressure on the private sector to cease exporting at prices below company-specific costs. This was exercised through such measures as repeated direct requests by MITI, combined with the statutory requirement for exporters to submit information on export prices, the systematic monitoring of company and product-specific costs and export prices and the institution of the supply and demand forecasts mechanism and its utilization in a manner to directly influence the behaviour of private companies. These measures operated furthermore to facilitate strong peer pressure to comply with requests by MITI and at the same time to foster a climate of uncertainty as to the circumstances under which their exports could take place. The Panel considered that the complex of measures exhibited the rationale as well as the essential elements of a formal system of export control. The only distinction in this case was the absence of formal legally binding obligations in respect of exportation or sale for export of semi-conductors. However, the Panel concluded that this amounted to a difference in form rather than substance because the measures were operated in a manner equivalent to mandatory requirements. The Panel concluded that the complex of measures constituted a coherent system restricting the sale for export of monitored semi-conductors at prices below company-specific costs to markets other than the United States, inconsistent with Article XI:1.”²

See also the material on “mandatory versus discretionary legislation” under “general scope” in the chapter on Article III, and the material on “measures” and “discretionary legislation” under “scope” in the chapter on Article XXIII.

(b) *Relevance of trade effects*

The 1962 Report of the Panel on the “Uruguayan Recourse to Article XXIII” concluded that the maintenance of import permit requirements justified an assumption of “nullification or impairment” of benefits accruing under the General Agreement insofar as it had not been established that these measures were being applied consistently with the provisions of the General Agreement.³

The 1984 Report of the “Panel on Japanese Measures on Imports of Leather” found that restrictions on imports of leather constituted a *prima facie* case of nullification or impairment:

“The Panel noted that its terms of reference explicitly required it ‘to make findings on the question of nullification or impairment’. It noted that since a *prima facie* case had been established, according to established GATT practice it was up to Japan to rebut the presumption that nullification or impairment had actually occurred.

“Against this background the Panel considered Japan’s argument that the existence of the quotas themselves did not necessarily mean that nullification or impairment of benefits accruing to the United

¹L/6309, adopted on 4 May 1988, 35S/116, 153-155, paras. 104-109.

²*Ibid.* 35S/157-158, para. 117.

³L/1923, adopted on 16 November 1962, 11S/95, 105, 108, 123.

States had actually been caused, but that this depended solely upon whether or not the allocation system and its implementation functioned so as to hinder United States' trade. ...

"... the Panel could not escape the conclusion that the import restrictions were maintained in order to restrict imports ...

"In any event, the Panel wished to stress that the existence of a quantitative restriction should be presumed to cause nullification or impairment not only because of any effect it had had on the volume of trade but also for other reasons e.g., it would lead to increased transaction costs and would create uncertainties which could affect investment plans".⁴

The 1990 Panel Report on "European Economic Community - Payments and Subsidies to Processors and Producers of Oilseeds and Related Animal-Feed Proteins" observes that "the CONTRACTING PARTIES have consistently interpreted the basic provisions of the General Agreement on restrictive trade measures as provisions establishing conditions of competition. Thus they decided that an import quota constitutes an import restriction within the meaning of Article XI:1 whether or not it actually impeded imports".⁵

(2) "made effective through quotas"

(a) Import quotas

Import quotas have been examined by Panels on a number of occasions. For instance, the 1962 Panel on "French Import Restrictions"⁶ examined import quotas maintained by France; the 1988 Panel Report on "Japan - Restrictions on Imports of Certain Agricultural Products"⁷ examined import quotas maintained by Japan; and the 1989 Panel Report on "United States - Restrictions on Imports of Sugar"⁸ and the 1991 Panel Report on "United States - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions"⁹ examined the United States import quota on sugar.

See also the material on import licensing below.

(b) Residual restrictions

The Review Working Party on "Quantitative Restrictions" "considered in detail the type of problems which some contracting parties may have in connection with the elimination of the import restrictions which they have been applying for a number of years for balance-of-payments reasons. The Working Party concluded that it would be undesirable to deal with such problems which are essentially of a temporary nature by means of an amendment to the provisions of the Agreement, even in the form of transitional measures".¹⁰ The Working Party proposed instead adoption of the "Hard-core Waiver" decision on "Problems Raised for Contracting Parties in Eliminating Import Restrictions Maintained During a Period of Balance-of-Payments Difficulties", providing for a temporary waiver of obligations under Article XI (subject to concurrence by the CONTRACTING PARTIES) for contracting parties which would apply for such a waiver.¹¹ Waivers were granted under this Decision to Belgium and Luxembourg.¹²

In 1960, procedures were approved for dealing with residual import restrictions; contracting parties were invited to notify lists of import restrictions which they were applying contrary to the provisions of the General

⁴L/5623, adopted on 15/16 May 1984, 31S/94, 112-113, paras. 47-48, 53, 55.

⁵L/6627, adopted on 25 January 1990, 37S/86, 130, para. 150, referring to Panel Report on Japanese Measures on Imports of Leather, adopted on 15/16 May 1984, 31S/113.

⁶L/1921, adopted on 14 November 1962, 11S/94.

⁷L/6253, adopted on 2 February 1988, 35S/163.

⁸L/6514, adopted on 22 June 1989, 36S/331, 343, para. 5.6.

⁹L/6631, adopted on 7 November 1990, 37S/228, 262, para. 6.

¹⁰L/332/Rev.1 + Adds., adopted on 2, 4 and 5 March 1955, 3S/170, 191, para. 75.

¹¹Decision of 5 March 1955, 3S/38; see also material on interpretation of this Decision at 3S/191-195.

¹²S/22, S/27; see table of waivers following chapter on Article XXV.

Agreement, and to notify changes to those lists. The procedures provided for bilateral consultations upon request under Article XXII:1, and if necessary, resort either to Article XXII:2 or Article XXIII:2.¹³ In 1962, a Panel appointed by the CONTRACTING PARTIES examined the adequacy of these notifications and put forward certain suggestions on the type of information that should be included in notifications.¹⁴

The 1962 Panel on “French Import Restrictions” examined certain restrictions, formerly maintained by France under Article XII, which France had disinvoked in 1960. The Panel Report notes that the French government did not contest that the restrictions under consideration were contrary to Article XI:1, and did not invoke any other provisions of the General Agreement in justification of their maintenance.

“The Panel agreed that the maintenance by a contracting party of restrictions inconsistent with Article XI after the contracting party concerned had ceased to be entitled to have recourse to Article XII constituted nullification or impairment of benefits to which other contracting parties were entitled under GATT and the effects of such nullification or impairment were aggravated if such maintenance of restrictions continued for an extended period of time.”¹⁵

The 1983 Panel Report on “EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong” examined restrictions maintained by France *de jure* since 1944 on eight product categories. The EEC stated that all of the restrictions in question were “residual restrictions”, i.e. measures for which liberalization had not been possible in the OEEC programme of liberalization of the 1950s, and stated that social and economic factors must be taken into account. The EEC also argued that Article XI did not constitute an absolute prohibition on all residual restrictions, and that the discussions in the GATT on quantitative restrictions showed that they had come to be accepted as negotiable.

“The Panel considered the arguments put forward by the European Community regarding the social and economic conditions which prevailed in the various product categories under examination. The European Community did not claim any corresponding GATT provision in justification for these arguments. The Panel was of the opinion that such matters did not come within the purview of Articles XI and XIII of the GATT, and in this instance concluded that they lay outside its consideration.

“With regard to Article XI ... the Panel acknowledged that there exist quantitative restrictions which are maintained for other than balance-of-payments reasons. It recognized that restrictions had been in existence for a long time without Article XXIII ever having been invoked by Hong Kong in regard to the products concerned, but concluded that this did not alter the obligations which contracting parties had accepted under GATT provisions. Furthermore the Panel considered it would be erroneous to interpret the fact that a measure had not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties. In fact, contracting parties and in particular Hong Kong have made it clear that the discussions on quantitative restrictions which have taken place in the GATT over the years were without prejudice to the legal status of the measures or the rights and obligations of GATT contracting parties. ...

“The Panel considered the argument put forward by the European Community that the principle referred to as ‘the law-creating force derived from circumstances’ could be relevant in the absence of law. It found, however, that in the present case such a situation did not exist, and the matter was to be considered strictly in the light of the provisions of the General Agreement.”¹⁶

The 1984 Panel Report on “Japanese Measures on Imports of Leather” likewise examined restrictions maintained after disinvocation of Article XII.

“... The Panel considered that the special historical, cultural and socio-economic circumstances referred to by Japan could not be taken into account by it in this context since its terms of reference were to examine

¹³Procedures approved 16 November 1960, 9S/18-20.

¹⁴11S/206, 210.

¹⁵L/1921, adopted on 14 November 1962, 11S/94, para. 4.

¹⁶L/5511, adopted on 12 July 1983, 30S/129, 138-139, paras. 27-29.

the matter ‘in the light of the relevant GATT provisions’ and these provisions did not provide such a justification for import restrictions ... [Referring to the preceding Panel Report] The Panel therefore found that the Japanese import restrictions at issue, maintained through quotas and import licenses, contravened Article XI:1.

“The Panel noted that Japan had ceased to invoke Article XII regarding balance-of-payment difficulties in 1963. It noted that the Panel Report referred to above had also concluded that the fact that ‘restrictions had been in place a long time ... did not alter the obligations which contracting parties had accepted under GATT provisions.’ The Panel found this to be valid also in the present case.”¹⁷

See also the discussion below at pages 350-352 of work in the GATT on quantitative restrictions.

(3) “import or export licences”

In 1950, the CONTRACTING PARTIES granted a release for certain aspects of the operation of the Haitian tobacco monopoly under Article XVIII:12 (which at that time provided for notification and concurrence with regard to certain measures affecting imports which were not otherwise permitted by the General Agreement). The Report of the Working Party on “Notification by Haiti under Article XVIII” noted that “After examination the working party was satisfied, and the Haitian representative agreed, that in so far as the law establishing the *Régie* provided that the importation of *tobacco, cigars and cigarettes* should be subject to licences issued by a government authority and that licences should be issued at the discretion of that authority in the light of market requirements, there was an element of restriction in the measure which was contrary to Article XI of the General Agreement”.¹⁸ A re-examination of the same measure by the Working Party on “The Haitian Tobacco Monopoly” in 1955 found as follows: “With regard to cigars, cigarettes and other tobacco, the representative of Haiti informed the Working Party that importers act as agents of the *Régie* and that import licences represent in effect orders by the *Régie*; further, that the *Régie* only determines the extent of the market demand and the Law requires that licences be issued to the full extent of such demand. The Working Party considered that under these circumstances there would be no infringement of the provisions of Article XI”.¹⁹

The 1978 Panel Report on “EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables” found with regard to the import certificate and associated security system at issue:

“The Panel ... noted that, without prejudice to the application of safeguard measures, import certificates were to be issued on the fifth working day following that on which the application was lodged and that import certificates were to be valid for seventy-five days. The Panel considered that, pending results concerning automatic licensing in the Multilateral Trade Negotiations, this system did not depart from systems which other contracting parties claimed were justified as automatic licensing. The Panel also considered that automatic licensing did not constitute a restriction of the type meant to fall under the purview of Article XI:1. Therefore, the Panel concluded that the import certificate and associated security system operated by the Community was not inconsistent with the Community’s obligations under Article XI:1”.²⁰

See also the discussion of import licensing and tariff quotas in the unadopted 1994 panel report on “EEC - Import Régime for Bananas”.²¹

See also the material under “Administration of import licensing” in Article XIII.

¹⁷L/5623, adopted on 15/16 May 1984, 31S/94, III, para. 45.

¹⁸GATT/CP.5/25, adopted on 27 November 1950, II/87; Decision of the same date, II/27.

¹⁹L/454, adopted on 22 November 1955, S/38, 40, para. 11.

²⁰L/4687, adopted on 18 October 1978, 25S/68, 95, para. 4.1.

²¹DS38/R, dated 11 February 1994, para. 140.

(4) “or other measures”: other examples of restrictions

(a) Import or export prohibitions

The Panel on “United States Manufacturing Clause” examined Section 601 of Title 17 of the United States Code (the “Manufacturing Clause” of the copyright law), which prohibited, with certain exceptions, the importation or public distribution in the United States of copies of a work consisting preponderantly of copyrighted non-dramatic literary material in the English language, unless the portions consisting of such material had been manufactured in the United States or Canada. The EC maintained that this clause constituted a breach of Article XI:1; the US did not contest this position, maintaining its legality under the Protocol of Provisional Application.²² The Panel found that the Manufacturing Clause was inconsistent with Article XI:1.²³

The 1991 Panel Report on “United States - Restrictions on Imports of Tuna”, which has not been adopted, examined the provisions of the US Marine Mammal Protection Act (MMPA) which regulated harvesting of tuna within the jurisdiction of the US, and required that, as a condition of access to the United States market for the yellowfin tuna or yellowfin tuna products caught by its fleet, each country of registry of vessels fishing yellowfin tuna in the Eastern Tropical Pacific Ocean had to prove to the satisfaction of the US authorities that its overall regulatory regime regarding the taking of marine mammals is comparable to that of the US. To meet this requirement, the country in question had to prove that the average rate of incidental taking of marine mammals by its tuna fleet operating in the ETP was not in excess of 1.25 times the average incidental taking rate of US vessels operating in the ETP during the same period. The MMPA also provided that ninety days after imports of yellowfin tuna and yellowfin tuna products from a country had been prohibited as above, importation of such tuna and tuna products from any “intermediary nation” would also be prohibited, unless the intermediary nation proved that it too had acted to ban imports of such tuna and tuna products from the country subject to the direct import embargo. The Panel found that these measures did not constitute internal regulations covered by the Note Ad Article III.

“The Panel noted that the United States had, as mandated by the MMPA, announced and implemented a prohibition on imports of yellowfin tuna and yellowfin tuna products caught by vessels of Mexico with purse seine nets in the ETP. The Panel further noted that under United States customs law, fish caught by a vessel registered in a country was deemed to originate in that country, and that this prohibition therefore applied to imports of products of Mexico. The Panel noted that under the General Agreement, quantitative restrictions on imports are forbidden by Article XI:1 ... The Panel therefore found that the direct import prohibition on certain yellowfin tuna and certain yellowfin tuna products from Mexico and the provisions of the MMPA under which it is imposed were inconsistent with Article XI:1. The United States did not present to the Panel any arguments to support a different legal conclusion regarding Article XI.”²⁴

“The Panel further noted that the MMPA required that the United States authorities implement a prohibition on imports of yellowfin tuna and yellowfin tuna products from ‘intermediary nations’, and that the United States was refusing entry to yellowfin tuna unless the importer declared that no yellowfin tuna or yellowfin tuna product in the shipment were harvested with purse-seine nets in the ETP by vessels of Mexico. The Panel therefore found that these measures and the provisions of the MMPA mandating such an embargo were import restrictions or prohibitions inconsistent with Article XI:1. The United States did not present to the Panel any arguments to support a different legal conclusion regarding Article XI.”²⁵

With regard to import prohibitions in relation to Article XI:2(c), see also the excerpts from the 1982 Panel Report on “United States - Prohibition of Imports of Tuna and Tuna Products from Canada” and the 1988 Panel Report on “Japan - Restrictions on Certain Agricultural Products”, below at page 330ff. With regard to export prohibitions under Article XI:2(b), see the excerpts below at page 327 of the 1988 Panel Report on “Canada -

²²L/5609, adopted on 15/16 May 1984, 31S/74, 78, paras. 10-11.

²³*Ibid.* 31S/91, para. 42(i).

²⁴DS21/R (unadopted), 39S/155, 196, paras. 5.17-5.18.

²⁵*Ibid.*, 39S/201, para. 5.36.

Measures Affecting the Export of Unprocessed Herring and Salmon”.²⁶ See also the material on “prohibitions and restrictions” in the unadopted 1994 panel report on “United States - Restrictions on Imports of Tuna”.²⁷

(b) *Minimum price systems for imports or exports*

The 1978 Panel Report on “EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables” notes as follows:

“... The Panel ... noted the argument by the representative of the United States that this system prohibited importation of goods below a certain price and was, therefore, a restriction within the meaning of Article XI on the importation of those goods. The Panel also noted the argument by the representative of the Community that this system, as enforced by the additional security, was a non-tariff measure and that, in principle, imports of tomato concentrates into the Community were allowed, but not below the minimum price level. ... Finally, the Panel noted the assertion by the representative of the Community that this system was a measure which fell within the purview of Article XI and Article XI alone, and furthermore, that it qualified for the exemption from the provisions of Article XI:1 provided by Article XI:2(c)(i) and (ii). Having noted the foregoing, the Panel considered that the minimum import price system, as enforced by the additional security, was a restriction ‘other than duties taxes or other charges’ within the meaning of Article XI:1”.²⁸

The Panel Report on “Japan - Trade in Semi-conductors” provides:

“The Panel noted that the CONTRACTING PARTIES had decided in a previous case that the import regulation allowing the import of a product in principle, but not below a minimum price level, constituted a restriction on importation within the meaning of Article XI:1 (BISD 25S/99). The Panel considered that the principle applied in that case to restrictions on imports of goods below certain prices was equally applicable to restrictions on exports below certain prices”.²⁹

See also the 1950 Report of the Working Party on “The Use of Quantitative Restrictions for Protective and Commercial Purposes”, cited at page 324 below.

In February 1994, the EC gave notice that under a measure in force since 5 February 1994, importation of certain whitefish from all origins (including cod, haddock, coalfish, hake, monkfish and Alaska pollack) had been made conditional on observance of a reference price for imported fresh, frozen and chilled presentations of these products. The notification stated that the action had been “taken in relation to Community measures aimed at restricting the marketing of like or similar domestic products under Article XI:2 of GATT”.³⁰

(c) *State-trading operations*

See the Interpretative Note to Articles XI, XII, XIII, XIV and XVIII. The material in this note was originally located in Article 26 of the Geneva Draft (corresponding to GATT Article XII); however, as it was considered applicable to the entire section on quantitative restrictions, it was reworded so as to cover export restrictions as well as import restrictions, and was moved to become paragraph 3 of Article XI in the text of the General Agreement agreed 30 October 1947.³¹ The text of paragraph 3 read: “Throughout Articles XI, XII, XIII and XIV the terms ‘import restrictions’ or ‘export restrictions’ include restrictions made effective through State-trading operations”. This text was transferred to the Interpretative Notes and broadened (through addition of a reference to Article XVIII) by the 1955 Protocol Amending the Preamble and Parts II and III of the GATT.

²⁶L/6268, adopted on 22 March 1988, 35S/98.

²⁷DS29/R, dated 16 June 1994, para. 5.10.

²⁸L/4687, adopted on 18 October 1978, 25S/68, 99, para. 4.9.

²⁹L/6309, adopted on 4 May 1988, 35S/II6, 153 para. 105.

³⁰L/7413, “European Communities’ Trade Measures Affecting the Imports of Whitefish”, including text of Commission Regulation (EC) No. 275/94 of 4 February 1994.

³¹EPCT/141, p. 3.

The 1961 Report of the Working Party under Article XXII:2 on “Italian Restrictions Affecting Imports from the United States and Certain other Contracting Parties” notes, with regard to residual restrictions maintained through State-trading agencies operating under Article XVII, that “Insofar as the State-trading operation had the effect of restricting imports, the Italian authorities fully recognized that, by virtue of the interpretative notes *ad* Articles XI, XII, etc. in Annex I to the General Agreement, it constituted an import restriction within the purview of Article XI”.³²

The 1988 Panel Report on “Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies” examined practices of provincial liquor boards which had a monopoly over distribution and sale of alcoholic beverages within each province; federal legislation restricted the importation of liquor except under conditions established by a provincial liquor board. In respect to Article XI, the Panel examined the liquor boards’ practices concerning listing and delisting of products for sale, and the availability of points of sale which discriminated against imported beverages.

“The Panel first examined the relevance of Article XI to these requirements. The Panel noted Canada’s claim that the practices referred to were not ‘restrictions’ in the sense of Article XI because they were not associated with the ‘importation’ of the products. ...

“... The Panel considered it significant that the note [to Articles XI, XII, XIII, XIV and XVIII] referred to ‘restrictions made effective through state-trading operations’ and not to ‘import restrictions’. It considered that this was a recognition of the fact that in the case of enterprises enjoying a monopoly of both importation and distribution in the domestic market, the distinction normally made in the General Agreement between restrictions affecting the importation of products and restrictions affecting imported products lost much of its significance since both types of restriction could be made effective through decision by the monopoly. The Panel considered that systematic discriminatory practices of the kind referred to should be considered as restrictions made effective through ‘other measures’ contrary to the provisions of Article XI:1.”³³

The Panel Report adopted in 1992 on “Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies” again examined the practices of Canadian provincial liquor boards. The Panel found that the United States had not substantiated its claim that Canada still maintained listing and delisting practices inconsistent with Article XI, with the exception of listing and delisting practices in Ontario; as for the Ontario liquor board’s practice of limiting listing of imported beer to the six-pack size, while according listings in different package sizes to domestic beer, “The Panel noted that this package-size requirement, though implemented as a listing requirement, was in fact a requirement that did not affect the importation of beer as such but rather its offering for sale in certain liquor-board outlets. The Panel therefore considered that this requirement fell under Article III:4 ... The Panel found that the imposition of the six-pack configuration requirement on imported beer but not on domestic beer was inconsistent with that provision”.³⁴ As for the restrictions on access to points of sale, which the 1988 Panel had found to be inconsistent with Article XI:1,

“... the Panel considered that it was not necessary to decide whether the restrictions fell under Article XI:1 or Article III:4 because Canada was not invoking an exception to the General Agreement applicable only to measures taken under Article XI:1 (such as the exceptions in Articles XI:2 and XII) and the question of whether the restrictions violated Article III:4 or Article XI:1 of the General Agreement was therefore of no practical consequence in the present case. The Panel found that the restrictions on access by imported beer to points of sale were contrary to the provisions of the General Agreement”.³⁵

With respect to restrictions on private delivery of imported beer, and Canada’s argument that its right to deliver imported beer to the points of sale was an inherent part of Canada’s right to establish an import monopoly in accordance with Article XVII, “The Panel noted that ... Articles II:4, XVII and the Note *Ad* Articles XI, XII, XIII, XIV and XVIII clearly indicated the drafters’ intention not to allow contracting parties to frustrate the

³²L/1468, adopted on 16 May 1961, 10S/117, 119, para. 7.

³³L/6304, adopted on 22 March 1988, 35S/37, 89, para. 4.24.

³⁴DS17/R, adopted on 18 February 1992, 39S/27, 74-75, para. 5.3-5.4.

³⁵*Ibid.*, 39S/75-76, paras. 5.6-5.7.

principles of the General Agreement governing measures affecting private trade by regulating trade through monopolies. ... The Panel found ... that the practice of the liquor boards of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario and Quebec to prohibit the private delivery of imported beer to the points of sale while according domestic brewers the right to deliver their products to the points of sale was inconsistent with Article III:4”.³⁶

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” examined, *inter alia*, import restrictions on prepared and preserved beef and certain dairy products, which Japan argued were justified on the basis of its monopoly import system for certain beef and dairy products, maintained by the Livestock Industry Promotion Corporation (LIPC).

“The Panel noted the view of Japan that Article XI:1 did not apply to import restrictions made effective through an import monopoly. According to Japan, the drafters of the Havana Charter for an International Trade Organization intended to deal with the problem of quantitative trade limitations applied by import monopolies through a provision under which a monopoly of the importation of any product for which a concession had been negotiated would have ‘to import and offer for sale such quantities of the product as will be sufficient to satisfy the full domestic demand for the imported product’ (Article 31:5 of the Havana Charter). Japan contended that that provision had not been inserted into the General Agreement and that quantitative restrictions made effective through import monopolies could therefore not be considered to be covered by Article XI:1 of the General Agreement (paragraph 3.3.3 above).

“The Panel examined this contention and noted the following: Article XI:1 covers restrictions on the importation of any product, ‘whether made effective through quotas, import ... licences *or other measures*’ (emphasis added). The wording of this provision is comprehensive, thus comprising restrictions made effective through an import monopoly. This is confirmed by the note to Articles XI, XII, XIII, XIV and XVIII, according to which the term ‘import restrictions’ throughout these Articles covers restrictions made effective through state-trading operations. The basic purpose of this note is to extend to state-trading the rules of the General Agreement governing private trade and to ensure that the contracting parties cannot escape their obligations with respect to private trade by establishing state-trading operations. This purpose would be frustrated if import restrictions were considered to be consistent with Article XI:1 only because they were made effective through import monopolies. The note to Article II:4 of the General Agreement specifies that that provision ‘will be applied in the light of the provisions of Article 31 of the Havana Charter’. The obligation of a monopoly importing a product for which a concession had been granted ‘to import and offer for sale such quantities of the product as will be sufficient to satisfy the full domestic demand for the imported product’ is thus part of the General Agreement. The Panel could therefore not follow the arguments of Japan based on the assumption that Article 31:5 of the Havana Charter was not included in the General Agreement. The Panel found for these reasons that the import restrictions applied by Japan fell under Article XI independent of whether they were made effective through quotas or through import monopoly operations.”³⁷

The 1989 Panel Report on “Republic of Korea - Restrictions on Imports of Beef - Complaint by the United States” notes the argument made by the US that the Livestock Products Marketing Organization (LPMO), which was established to administer import restrictions on beef, constituted an import monopoly controlled by domestic producers and that the LPMO constituted a separate “import restriction” within the meaning of Article XI, aside from the restrictions administered by the LPMO. Korea stated that the LPMO administered but did not itself determine quota levels.

“The Panel ... examined the further claim by the United States that the existence, or use, of producer-controlled import monopolies to restrict imports was inconsistent with the provisions of Articles XI:1 and XVII. Korea contested that the existence of a producer-controlled import monopoly in itself constituted an additional barrier to trade. The Panel noted that the LPMO had been granted exclusive privileges as the

³⁶*Ibid.*, 39S/80, paras. 5.15-5.16.

³⁷L/6253, adopted on 2 February 1988, 35S/163, 229, paras. 5.2.2.1-5.2.2.2. For findings applying this rule to individual products see paragraphs 5.3.1.1 and 5.3.9 of the same Report.

sole importer of beef. As such, the LPMO had to comply with the provisions of the General Agreement applicable to state-trading enterprises, including those of Articles XI:1 and XVII.

“Article XI:1 proscribed the use of ‘prohibitions or restrictions other than duties, taxes or other charges’, including restrictions made effective through state-trading activities, but Article XVII permitted the establishment or maintenance of state-trading enterprises, including enterprises which had been granted exclusive or special privileges. The mere existence of producer-controlled import monopolies could not be considered as a separate import restriction inconsistent with the General Agreement. The Panel noted, however, that the activities of such enterprises had to conform to a number of rules contained in the General Agreement, including those of Article XVII and Article XI:1. The Panel had already found that the import restrictions presently administered by the LPMO violated the provisions of Article XI:1. As the rules of the General Agreement did not concern the organization or management of import monopolies but only their operations and effects on trade, the Panel concluded that the existence of a producer-controlled monopoly could not in itself be in violation of the General Agreement.”³⁸

See also the material on the Haitian tobacco monopoly at page 319.

(d) *Import and export restrictions*

The 1950 Report of the Working Party on “The Use of Quantitative Restrictions for Protective and Commercial Purposes”³⁹ examined the use of both import and export restrictions. The Report provides, *inter alia*:

“... The Working Party noted that there was evidence of a number of types of misuse of import restrictions, in particular:

- “(i) The maintenance by a country of balance-of-payment restrictions, which give priority to imports of particular products upon the basis of the competitiveness or non-competitiveness of such imports with a domestic industry, or which favour particular sources of supply upon a similar basis, in a manner inconsistent with the provisions of Articles XII to XIV ... Such type of misuse, for example, might take the form of total prohibitions on the import of products competing with domestic products, or of quotas which are unreasonably small having regard to the exchange availability of the country concerned and to other relevant factors.
- “(ii) The imposition by a country of administrative obstacles to the full utilization of balance-of-payment import quotas, e.g., by delaying the issuance of licences against such quotas or by establishing licence priorities for certain imports on the basis of the competitiveness or non-competitiveness of such imports with the products of domestic industry, in a manner inconsistent with the provisions of Articles XII to XIV ... In this connection, the Contracting Parties took note of Article XIII:2(d), which provides that ‘no conditions or formalities shall be imposed which would prevent any contracting party from utilising fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate’.
- “(iii) Quantitative restrictions on imports imposed not on balance-of-payment grounds but as a means of retaliation against a country which has refused to conclude a bilateral trade agreement with the country concerned.

“It appeared to the Working Party that insofar as these types of practice were in fact carried on for the purposes indicated above and were not justified under the provisions of Articles XII to XIV relating to the use of import restrictions to protect the balance of payments or under other provisions of the Agreement specifically permitting the use of import restrictions, they were inconsistent with the provisions of the

³⁸L/6503, adopted on 7 November 1989, 36S/268, 301-302, paras. 114-115.

³⁹GATT/CP.4/33, republished as “The Use of Quantitative Restrictions for Protective and Commercial Purposes,” Sales No. GATT/1950-3.

Agreement, and such misuse of import restrictions might appropriately provide a basis for recourse to the procedures laid down in the Agreement for the settlement of disputes. Moreover, it was not particularly relevant to the Agreement whether such practices were determined unilaterally or in the course of bilateral negotiations.

“The Working Party agreed that there did not appear to be any provision in the Agreement which would permit the imposition by a contracting party of quantitative restrictions on imports of a particular product for the purpose of avoiding an increase in the cost to the importing country of maintaining a price support programme for the like product of domestic origin and not for other purposes provided for in the Agreement”.⁴⁰

The same Report also sets out the Working Party’s examination of “several types of export restrictions ... applied for protective, promotional or other commercial purposes ... which appear to fall outside the exceptions provided for in [Articles XI, XIII, XIV, XV and XX]: (i) export restrictions used by a contracting party for the purpose of obtaining the relaxation of another contracting party’s import restrictions; (ii) export restrictions used by a contracting party to obtain a relaxation of another contracting party’s export restrictions on commodities in local or general short supply, or otherwise to obtain an advantage in the procurement from another contracting party of such commodities; (iii) restrictions used by a contracting party on the export of raw materials, in order to protect or promote a domestic fabricating industry; and (iv) export restrictions used by a contracting party to avoid price competition among exporters”.⁴¹

“... the Working Party could not find any provisions in the Agreement which would justify the linking of the issue of export licences for a particular product with the purchase by another contracting party of any other particular product. ... It was agreed that the use of export restrictions as a bargaining weapon to obtain the relaxation of import restrictions was inconsistent with the provisions of the Agreement. However, whether any particular export restriction could justly be regarded as having the assumed purposes would depend upon the facts in each particular case.”⁴²

“The Working Party concluded that the Agreement does not permit the imposition of restrictions upon the export of a raw material in order to protect or promote a domestic industry, whether by affording a price advantage to that industry for the purchase of its materials, or by reducing the supply of such materials available to foreign competitors, or by other means. However, it was agreed that the question of the objective of any given export restriction would have to be determined on the basis of the facts in each individual case.”⁴³

“The Working Party discussed a wide variety of circumstances in which exportation may be restricted in order to maintain the export price. The cases discussed included a commodity whose value might be greatly reduced if its supply to the world market were not controlled and a commodity whose world price was liable to be impaired by the collusive action of importers. The Working Party concluded that where export restrictions were in fact intended for the purpose of avoiding competition among exporters and not for the purposes set out in the exception provisions of Articles XI and XX, such restrictions were inconsistent with the provisions of the Agreement.”⁴⁴

(5) *Tariff rate quotas*

See the discussion of tariff rate quotas and high secondary tariffs in relation to Article XI:1, in the unadopted 1994 panel report on “EEC - Import Régime for Bananas”.⁴⁵

⁴⁰*Ibid.*, paras. 21-23.

⁴¹*Ibid.*, para. 2.

⁴²*Ibid.*, para. 6-7.

⁴³*Ibid.*, para. 12.

⁴⁴*Ibid.*, paras. 14-15.

⁴⁵DS38/R, dated 11 February 1994, paras. 138, 139.

2. Paragraph 2(a)

(1) *“export prohibitions or restrictions temporarily applied to prevent or relieve”*

The preparatory work indicates that the words “prevent or” were added in Geneva “to enable a member to take remedial action before a critical shortage has actually arisen”.⁴⁶

(2) *“critical shortages of foodstuffs”*

In the US proposed Charter in 1946 the phrase used was “conditions of distress”. The US representative stated that this phrase did not mean “economic distress but referred to shortages of crops, etc., in cases such as famine”.⁴⁷ With reference to the term “critical”, it was agreed in discussions at Geneva and again at Havana that the Australian export prohibitions on merino sheep were covered by paragraph 2(a).⁴⁸

At the Havana Conference the Sub-Committee on Articles 20 and 22 “was satisfied that the terms of paragraph 2(a) ... are adequate to allow a country to impose temporary export restrictions to meet a considerable rise in domestic prices of foodstuffs due to a rise in prices in other countries”.⁴⁹ The Report of the Review Working Party on “Quantitative Restrictions” also recorded the view that “to the extent that the rise in prices was associated with acute shortages of the products in question, as it normally would be, [temporary export restrictions applied to meet a considerable rise in domestic prices of food-stuffs due to a rise in prices in other countries], whether affecting foodstuffs or other products, was clearly covered by that sub-paragraph [2(a)]”.⁵⁰

(3) *“essential to the exporting country”*

The Sub-Committee at the Geneva session of the Preparatory Committee which considered this provision altered the wording “to indicate the view of the Sub-Committee that for the purposes of this provision the importance of any product should be judged in relation to the particular country concerned”.⁵¹

3. Paragraph 2(b)

The Sub-Committee at the Geneva session of the Preparatory Committee which considered this article widened this paragraph so as to include marketing regulations.⁵² It was also agreed in Geneva that this exception would permit the Australian butter marketing scheme, which utilized export licenses to spread exports of butter over time and was “not used in any way that could be reasonably described as restrictive over the period of the operation of the scheme”.⁵³ The Havana Conference Sub-committee which examined the general exceptions to the Charter chapter on commercial policy “expressed the view that governmental measures relating to the orderly marketing of agricultural commodities for which storage facilities in both the country of origin and destination were insufficient, were covered in paragraph 2(b) of Article 20 [corresponding to Article XI:2(b) of the General Agreement]”.⁵⁴

The Review Working Party on “Quantitative Restrictions” in 1954-55 considered various proposals to amend Article XI:2. While it considered that it was not desirable to amend these provisions,

“The Working Party agreed, however, to insert in this report brief agreed statements which would clarify some of the points that the proposed amendments were intended to cover. It might be useful, for instance, to reaffirm that the maintenance or the application of a restriction which went beyond what would

⁴⁶EPCT/141, p. 2.

⁴⁷EPCT/C.II/36, p. 9.

⁴⁸EPCT/A/PV/40(1), pp. 4, 6, 8, 9 discussing Australian proposal at EPCT/W/218 (post-drought shortage of sheep); endorsed in Sub-Committee Report in Havana Reports, p. 88, para. 11. See discussion of the interpretation of “critical” at EPCT/A/PV/40(1) p. 4-9.

⁴⁹Havana Reports, p. 88, para. 14.

⁵⁰L/332/Rev.1 + Add., adopted on 2, 4 and 5 March 1955, 3S/170, 191, para. 73.

⁵¹EPCT/141, p. 2.

⁵²EPCT/141, p. 2.

⁵³EPCT/A/PV/19, pp. 8-10.

⁵⁴Havana Reports p. 85, para. 24; E/CONF.2/C.3/SR.37, p. 3.

be ‘necessary’ to achieve the objects defined in paragraph 2(b) or 2(c) of Article XI would be inconsistent with the provisions of that Article. This is made clear in the text of these provisions by the use of the word ‘necessary’. Restrictions related to the application of standards or regulations for the classification, grading or marketing of commodities in international trade which go beyond what is necessary for the application of those standards or regulations and thus have an unduly restrictive effect on trade, would clearly be inconsistent with Article XI”.⁵⁵

The Panel Report on “Canada - Measures Affecting Exports of Unprocessed Herring and Salmon” examined, *inter alia*, the claim of Canada that its regulations prohibiting the exportation of unprocessed sockeye and pink salmon and herring were permitted under Article XI:2(b), as the fish were “commodities” and the regulations dealt with “standards” and “marketing”.

“... The Panel noted that Canada considered it necessary to prohibit the export of certain unprocessed salmon and unprocessed herring to maintain its quality standards for these fish, including the standards for frozen salmon exported from Canada ... The Panel noted that Canada applied quality standards to fish and that it prohibited the export of fish not meeting these standards. The Panel further noted, however, that Canada prohibited export of certain unprocessed salmon and unprocessed herring even if they could meet the standards generally applied to fish exported from Canada. The Panel therefore found that these export prohibitions could not be considered as ‘necessary’ to the application of standards within the meaning of Article XI:2(b).

“The Panel then examined the Canadian contention that the prohibition of exports of certain unprocessed salmon and unprocessed herring was necessary for the international marketing of processed salmon and herring. Canada had argued that, without these prohibitions, Canadian processors would not have been able to develop a superior quality fish product for marketing abroad and would not have been able to maintain their share of the market for herring roe in Japan. ... The question before the Panel therefore was thus whether the export restrictions on certain unprocessed salmon and unprocessed herring constituted marketing regulations on processed salmon and herring within the meaning of Article XI:2(b). The Panel noted that this provision referred to ‘... regulations ... for the marketing of commodities in international trade’, which suggests that the regulations covered by the provisions are not all regulations that facilitate foreign sales but only those that apply to the marketing as such. The drafters of Article XI:2(b) agreed that this provision would cover export restrictions designed to further the marketing of a commodity by spreading supplies of the restricted product over a longer period of time.⁵⁶ During the drafting mention was made only of export restrictions designed to promote foreign sales of the restricted product but not of export restrictions on one commodity designed to promote sales of another commodity. The broad interpretation of the term ‘marketing regulation’ implied in Canada’s argument would have the consequence that any import or export restriction protecting a domestic industry and enabling it to sell abroad would be exempted from the General Agreement’s prohibition of import and export restrictions. Such interpretation would therefore expand the scope of the provision far beyond its purpose. The Panel found for these reasons that the export prohibitions on certain unprocessed salmon and unprocessed herring were not ‘regulations for the marketing’ of processed salmon and herring in international trade within the meaning of Article XI:2(b). In the light of the considerations set out above, the Panel concluded that the export prohibitions were not justified by Article XI:2(b).”⁵⁷

4. Paragraph 2(c)

(1) General

The “Suggested Charter for an International Trade Organization of the United Nations” which was proposed by the United States in 1946 contained a provision corresponding to Article XI:2(c)(i). Except for some refinement and the addition of “fisheries products”, this provision remained unchanged through the course of the negotiations of the GATT and the Charter.

⁵⁵L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 189-190, para. 67.

⁵⁶A footnote to this sentence refers to EPCT/A/PV/19, p. 8.

⁵⁷L/6268, adopted on 22 March 1988, 35S/98, 112, paras. 4.2-4.3.

It was stated during discussions on this provision at the Geneva session of the Preparatory Committee, in reply to objections that industrial products should also be included in this exception, that

“... in agriculture and fisheries you have to deal with the capricious bounty of nature, which will sometimes give you a huge catch of fish or a huge crop, which knocks the bottom out of prices. You also have the phenomenon peculiar to agriculture and fisheries of a multitude of small unorganized producers that cannot organize themselves. It often happens that the Government has to step in and organize them. But if it does so, it cannot allow the results of its organization to be frustrated by uncontrolled imports”.⁵⁸

On the same occasion it was stated that “we view this not as a means of protection but as a means of making watertight, and making possible the working of, necessary forms of internal control”.⁵⁹

At the Havana Conference the Sub-Committee which examined Articles 20 and 22 of the Charter discussed various proposals to widen or narrow paragraph 2(c). It “agreed that paragraph 2(c) was not intended to provide a means of protecting domestic producers against foreign competition, but simply to permit, in appropriate cases, the enforcement of domestic governmental measures necessitated by the special problems relating to the production and marketing of agricultural and fisheries products”.⁶⁰

(2) Relationship with concessions and other obligations

The same Sub-Committee at the Havana Conference also noted in its report that “... the Sub-Committee agreed to have it recorded that in its view the freedom given to a Member to apply restrictions under paragraph (2)(c) did not free such Member from a prior obligation to any individual Member”.⁶¹

The Second Report of Committee I, which drew up the rules and procedures for the Dillon Round of trade negotiations which took place during 1960-61, discusses an Australian proposal to make import restrictions maintained under Article XI:2(c) negotiable. In response to comments on this proposal,

“The Australian representative ... recognized that a distinction should be drawn between restrictions which were ‘necessary’ in terms of paragraph 2(c) of Article XI and those which, although they might be applied in connection with measures which protected domestic production or marketings, were not necessary to the operation of such arrangements. It was not the intention ... to negotiate on those restrictions which were not an integral part of the protective system and which could not be justified under that provision under the General Agreement. On the other hand, ‘necessary’ restrictions should be regarded as negotiable in the same way as other elements of the arrangements covered by paragraph 2(c) of Article XI. It could well be that negotiations for the reduction of these restrictions would form part of wider negotiations on the products concerned.

“On ... non-discriminatory application of any concessions, the Australian representative pointed out that the results of such negotiations could take the form of global quotas or of country quotas in conformity with the provisions of Article XIII”.⁶²

The Dillon Round rules and procedures provided that “Participating countries may ... enter into negotiations in accordance with these rules in respect of the following matters: ... import restrictions as provided in paragraph 2(c) of Article XI”.⁶³

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” notes that “Article XI:2 - unlike some other provisions of the General Agreement permitting restrictive trade measures, such as Articles XVIII:C, XXVIII or XIX - does not provide for compensation for contracting parties adversely

⁵⁸EPCT/A/PV/19, p. 42; see also references to this passage at 36S/222, 37S/221-222.

⁵⁹*Ibid.*, p. 44.

⁶⁰Havana Reports, p. 89, para. 16.

⁶¹*Ibid.*, p. 95, para. 45.

⁶²L/1043, adopted on 19 November 1959, 8S/103, 106-107, para. 5.

⁶³Annex to *ibid.*, 8S/116, para. II(b)(ii).

affected by the measures taken under it”.⁶⁴ The 1989 Panel Reports on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile”, and “EEC - Restrictions on Imports of Apples - Complaint by the United States” each note that

“... The Panel ... considered that, as one of the basic functions of the General Agreement was to provide a legal framework for the exchange of tariff concessions, great care had to be taken to avoid an interpretation of Article XI:2(c)(i) which would impair this function. The Panel noted that Article XI:2(c)(i) - unlike all provisions of the General Agreement specifically permitting actions to protect domestic producers⁶⁵ - did not provide either for compensation to be granted by the contracting party invoking it, or for compensatory withdrawals by contracting parties adversely affected by the invocation. This reflected the fact that Article XI:2(c)(i) was not intended to be a provision permitting protective actions. If Article XI:2(c)(i) could be used to justify import restrictions which were not the counterpart of any governmental measure capable of limiting production, the value of the General Agreement as a legal framework for the exchange of tariff concessions in the agricultural field would be seriously impaired”.⁶⁶

(3) *Elements and burden of proof regarding claims under paragraph 2(c)(i)*

The 1989 Panel Report on “Canada - Import Restrictions on Ice Cream and Yoghurt” summarizes the elements and burden of proof regarding claims under paragraph 2(c) and 2(c)(i) as follows, drawing on the earlier Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”:

“As the party invoking an exception, it was incumbent upon Canada to demonstrate that the measures applied to imports of ice cream and yoghurt met each of the conditions under Article XI:2(c)(i) and XI:2(c) last sub-paragraph, in order to qualify in terms of these provisions for exemption from Article XI:1. These conditions are:

- “- the measure on importation must constitute an import restriction (and not a prohibition);
- “- the import restriction must be on an agricultural or fisheries product;
- “- the import restriction and the domestic marketing or production restriction must apply to ‘like’ products in any form (or directly substitutable products if there is no substantial production of the like product);
- “- there must be governmental measures which operate to restrict the quantities of the domestic product permitted to be marketed or produced;
- “- the import restriction must be necessary to the enforcement of the domestic supply restriction;
- “- the contracting party applying restrictions on importation must give public notice of the total quantity or value of the product permitted to be imported during a specified future period; and
- “- the restrictions applied must not reduce the proportion of total imports relative to total domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions”.⁶⁷

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” notes that the Panel “considered ... that the burden of providing the evidence that all the requirements of Article XI:2(c)(i),

⁶⁴L/6253, adopted on 2 February 1988, 35S/163, 227, para. 5.1.3.7.

⁶⁵The footnote to this sentence refers to e.g., Articles XVIII:A and C, XIX and XXVIII.

⁶⁶L/6491, adopted on 22 June 1989, 36S/93, 129, para. 12.15, and L/6513, adopted on 22 June 1989, 36S/135, 164, para. 5.15.

⁶⁷L/6568, adopted on 5 December 1989, 36S/68, 85-86, para. 62. See also identical passages in “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile”, L/6491, adopted on 22 June 1989, 36S/93, 124-125, para. 12.3, and in “EEC - Restrictions on Imports of Apples - Complaint by the United States”, L/6513, adopted on 22 June 1989, 36S/135, 160, para. 5.3.

including the proportionality requirement, had been met must remain fully with the contracting party invoking that provision”.⁶⁸

In the 1989 Panel Report on “Canada - Import Restrictions on Ice Cream and Yoghurt”:

“The Panel recalled that it had previously been concluded that a contracting party invoking an exception to the General Agreement bore the burden of proving that it had met all of the conditions of that exception.⁶⁹ It also noted, as had previous panels, that exceptions were to be interpreted narrowly and considered that this argued against flexible interpretation of Article XI:2(c)(i).⁷⁰ The Panel was aware that the requirements of Article XI:2(c)(i) for invoking an exception to the general prohibition on quantitative restrictions made this provision extremely difficult to comply with in practice.⁷¹ However, any change in the burden of proof could have consequences equivalent to amending Article XI, seriously affecting the balance of tariff concessions negotiated among contracting parties, and was therefore outside the scope of the Panel’s mandate”.⁷²

In this connection see also the unadopted 1993 panel report on “EEC - Member States’ Import Régimes for Bananas”.⁷³

(4) Scope and application of Paragraph 2(c)

(a) “Import restrictions”

The 1982 Panel Report on “United States - Prohibition of Imports of Tuna and Tuna Products from Canada” examined a US embargo of all tuna and tuna products from Canada, imposed following the seizure by Canada of US fishing boats in a dispute over fishing jurisdiction. The Panel found that the US action constituted a prohibition in terms of Article XI:1; as for the claim of the United States that the action fell under the exception in Article XI:2(c), “... the Panel noted the difference in language between Article XI:2(a) and (b) and Article XI:2(c), and it felt that the provisions of Article XI:2(c) could not justify the application of an import prohibition”. A footnote to this sentence provides: “In Article XI:2(a) and (b) the words ‘prohibitions or restrictions’ are used while in Article XI:2(c) mention is only made of ‘restrictions’”.⁷⁴

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” provides: “The Panel notes that Article XI:2(c)(i) does not permit the prohibition of imports but only their restriction. It finds that Japan maintains a *de facto* prohibition on the importation of evaporated milk (04.02 ex), sweetened condensed milk (04.02 ex), processed cheese (04.04 ex) and certain single-strength fruit juices (20.07 ex) into its general customs territory. The Panel concludes that these prohibitions maintained by Japan are contrary to Article XI”.⁷⁵ The Panel had earlier found with respect to various of these products that an import quota available only for imports for use in Okinawa, or for use in international tourist hotels and for international shipping vessels travelling between Japan and foreign countries, resulted in a *de facto* prohibition on the importation of the product into the general customs territory of Japan.⁷⁶

The 1989 Panel Reports on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile” and “EEC - Restrictions on Imports of Apples - Complaint by the United States” “followed the view that prohibitions

⁶⁸L/6253, adopted on 2 February 1988, 35S/163, 227, para. 5.1.3.7.

⁶⁹The footnote to this sentence refers to: Panel Report on “Canada - Administration of the Foreign Investment Review Act”, 30S/140, 164, para. 5.20; Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”, 35S/163, 227, para. 5.1.3.7; Panel Report on “European Economic Community - Restrictions on Imports of Dessert Apples - Complaint by Chile”, 36S/93, 124, para. 12.3.

⁷⁰The footnote to this sentence refers to, e.g., the Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”, L/6253, 35S/163, 226-27, para. 5.1.3.7, and Panel Report on “EEC - Restrictions on Imports of Apples - Complaint by the United States”, L/6513, 36S/135, 164, para. 5.13.

⁷¹The footnote to this sentence refers to, e.g., the Panel Report on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile”, L/6491.

⁷²L/6568, adopted on 5 December 1989, 36S/68, 84-85, para. 59.

⁷³DS32/R, dated 3 June 1994, para. 328.

⁷⁴L/5198, adopted on 22 February 1982, 29S/91, 107, para. 4.6.

⁷⁵L/6253, adopted on 2 February 1988, 35S/163, 244, para. 6.4.

⁷⁶*Ibid.*, 35S/230-231, 232, 238, paras. 5.3.1.2, 5.3.2.1, 5.3.10.2.

on imports were not permitted under this part of Article XI” but found that “As the EEC had at no time prohibited all imports of apples, its measures therefore constituted an import restriction, rather than an import prohibition”. The question of whether the EEC measures had operated as an effective prohibition of imports from Chile was dealt with under Article XIII.⁷⁷

In this connection see also the unadopted 1993 panel report on “EEC - Member States’ Import Régimes for Bananas”.⁷⁸

(b) *“on any agricultural or fisheries product”*

It was agreed at the Geneva session of the Preparatory Committee that a decision as to whether whales were included within fisheries products should be made by the ITO when established.⁷⁹

In discussions during the Havana Conference it was agreed that “the term ‘agricultural product’ in subparagraph 2(c) ... may include, inter alia, sericultural products and certain plant products (a) which are derived from the plant in the natural process of growth, such as gums, resins and syrups, and (b) a major part of the total output of which is produced by small producers”.⁸⁰

In the Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”, the Panel stated: “The General Agreement does not define the term ‘agricultural product’. In the past rounds of trade negotiations it was accepted that the products falling under Chapters 1 to 24 in the Customs Co-operation Council Nomenclature could in principle be regarded as agricultural products”.⁸¹

The Panel Report on “Canada - Import Restrictions on Ice Cream and Yoghurt” followed this rule, and “further noted that ice cream and yoghurt were food products generally regarded by consumers and the industry to be agricultural products. The Panel thus found that ice cream and yoghurt were agricultural products within the meaning of Article XI:2(c)”.⁸² The 1989 Panel Reports on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile” and “EEC - Restrictions on Imports of Apples - Complaint by the United States” also followed the same rule referring to CCCN Chapters 1 to 24 and found that the measures involved applied to an agricultural product.⁸³

(c) *“the like ... product”*

(i) *General*

During discussions at the London session of the Preparatory Committee reference was made to the definition of the term “like product” adopted by the League of Nations, which was “practically identical with another product”,⁸⁴ however it was also stated that “the expression had different meanings in different contexts of the Draft Charter”⁸⁵ and it was later agreed that the definition of this phrase should be left to the ITO.⁸⁶ As regards the use of the term “like domestic product” in paragraph 2(c) of Article XI, it was stated that in this context “the words ‘like product’ are used, but those words definitely do not mean what they mean in other contexts - merely a competing product. In other words, to take an extreme case, if a country restricted its output of apples, it could not restrict importation of bananas because they only compete with them”.⁸⁷

⁷⁷L/6491 and L/6513, both adopted on 22 June 1989, 36S/93 and 36S/135, at 36S/125 and 36S/161, paras. 12.5 and 5.5.

⁷⁸DS32/R, dated 3 June 1994, paras. 329-330.

⁷⁹EPCT/A/PV/40(1), pp. 12-15.

⁸⁰E/CONF.2/C.3/66 and E/CONF.2/C.3/SR.41, p. 8.

⁸¹L/6253, adopted on 2 February 1988, 35S/163, 223, para. 5.1.3.2.

⁸²L/6568, adopted on 5 December 1989, 36S/68, 86, para. 64.

⁸³L/6491 and L/6513, both adopted on 22 June 1989, 36S/93 and 36S/135, at 36S/125 and 36S/161, paras. 12.6 and 5.6.

⁸⁴EPCT/C.II/36, p. 8.

⁸⁵EPCT/C.II/65, p. 2.

⁸⁶EPCT/A/PV/41, p. 14.

⁸⁷EPCT/C.II/PV.12, p. 6.

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” refers to this material on “like product” and notes:

“Thus, the mere fact that a product is competitive with another does not in and of itself make them like products. ... Article XI:2(c) and the note supplementary to it regarding ‘in any form’ establish different requirements for (a) restrictions on the importation of products that are ‘like’ the product subject to domestic supply restrictions and (b) restrictions on the importation of products that are *processed* from a product that is ‘like’ the product subject to domestic supply restrictions. This differentiation would be lost if a product in its original form and a product processed from that product were to be considered to be ‘like’ products with the meaning of Article XI:2(c).”⁸⁸

The same panel report further notes that “as different requirements were established for restrictions on like products and on the importation of those products processed from a like product, a product in its original form and a product processed from it could not be considered to be ‘like products’.”⁸⁹

(ii) *“Like product” in particular instances*

In the 1978 Panel Report on “EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables”

“The Panel ... examined the concept of ‘the like domestic product’ within the meaning of Article XI:2(c)(i) and (ii), and attempted to determine which Community product should be considered as ‘the like domestic product’ in relation to imported tomato concentrate. Having noted that the General Agreement provided no definition of the terms ‘the like domestic product’ or ‘like product’, the Panel reviewed how these terms had been applied by the CONTRACTING PARTIES in previous cases and the discussions relating to these terms when the General Agreement was being drafted. During this review, the Panel noted the League of Nations definition of ‘practically identical with another product’ and the diverging interpretations of these terms by contracting parties in different contexts. The Panel further noted the definition of ‘like product’ contained in the GATT Anti-Dumping Code and the definitions of ‘identical goods’ and ‘similar goods’ contained in the Customs Co-operation Council’s Customs Valuation Explanatory Notes to the Brussels definition of value. On the basis of this review, the Panel considered that tomato concentrate produced within the Community would qualify as ‘the like domestic product’ but was unable to decide if fresh tomatoes grown within the Community would also qualify. As a pragmatic solution, the Panel decided to proceed to determine if the other conditions set forth in Article XI:2(c)(i) and (ii) were satisfied by the Community system, on the basis that ‘the like domestic product’ in this case could be domestically-produced tomato concentrate, fresh tomatoes or both.”⁹⁰

In the 1980 Panel Report on “EEC Restrictions on Imports of Apples from Chile”, the Panel considered “that Chilean apples, although of different varieties, were ‘a like product’ to Community apples for the purposes of Article XI:2(c).”⁹¹ The 1989 Panels on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile” and “EEC - Restrictions on Imports of Apples - Complaint by the United States” each provide with respect to this issue:

“The Panel examined carefully the arguments of the parties ... including the argument that differences in price, variety and quality between [Chilean and US apples respectively] and EEC apples were such as to make them unlike products in terms of this GATT provision. It concluded that while such differences did exist, as they might for many products, they were not such as to outweigh the basic likeness. Dessert apples whether imported or domestic performed a similar function for the consumer and were both marketed as apples, i.e., as substantially similar products. The Panel therefore found that EEC and [Chilean and US dessert apples respectively] were like products for the purposes of Article XI:2(c)(i).”⁹²

⁸⁸L/6253, adopted on 2 February 1988, 35S/163, 224-225, para. 5.1.3.4.

⁸⁹*Ibid.*, 35S/231 para. 5.3.1.4.

⁹⁰L/4687, adopted on 18 October 1978, 25S/68, 101, para. 4.12.

⁹¹L/5047, adopted on 10 November 1980, 27S/98, 112, para. 4.4.

⁹²Panel Reports on complaint by Chile, L/6491, 36S/93, 125, para. 12.7; and on complaint by US, L/6513, 36S/135, 161, para. 5.7.

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” examined import restrictions on twelve categories of products. The Panel found with respect to restrictions on prepared and preserved milk and cream that fresh milk for manufacturing use was not a “like product” in relation to products prepared from it, particularly evaporated milk, sweetened condensed milk, skimmed milk powder, whole milk powder, prepared whey, and whey powder;⁹³ imported processed cheese;⁹⁴ lactose;⁹⁵ and food preparations not elsewhere specified consisting mainly of dairy products (e.g. frozen yoghurt base, ice cream powder and prepared milk powder for infants).⁹⁶ The Panel found that imported dried leguminous vegetables were “like” the domestic product within the meaning of Article XI:2(c)⁹⁷ and that groundnuts produced in Japan and imported groundnuts were identical in all respects and were, therefore, like products.⁹⁸ With respect to the import restrictions on starch and inulin, the Panel observed that “the import restrictions were applied to all starches (except modified starch) and inulin and therefore considered that the Japanese ‘like product’ in this case would be all starches produced in Japan”.⁹⁹ The Panel considered that “imported fruit purée and paste, fruit pulp and fruit juice were not ‘like’ Japanese produced fresh fruit in terms of Article XI:2(c)(i)”,¹⁰⁰ that prepared and preserved pineapple was not “like” fresh pineapple in terms of Article XI:2(i)(c);¹⁰¹ and fresh tomatoes and tomato juice, sauce and ketchup were not “like products”.¹⁰²

The 1989 Panel Report on “Canada - Import Restrictions on Ice Cream and Yoghurt” examined import restrictions maintained by Canada on imports of yoghurt, ice cream, ice milk and ice milk novelties, and the claim of Canada that these import restrictions were justified under Article XI:2(c). The Panel determined that

“... the domestic product subject to restrictions had to be the product produced by farmers. In this case the farmers were producing raw milk, not ‘industrial’ or ‘fluid’ milk. The Panel found that the relevant Canadian ‘fresh’ product subject to restriction was total raw milk.

“The Panel next considered whether ice cream and yoghurt were ‘like’ products to raw milk. In the drafting of this provision it had been stated that the words ‘like products’ in Article XI:2(c) ‘... definitely do not mean what they mean in other contexts - merely a competing product’ (EPCT/C.II/PV.12). The Japanese Agriculture Panel had observed that Article XI:2(c)(i) and the note supplementary to it regarding ‘in any form’ established different requirements for (a) restrictions on the importation of products that are ‘like’ the product subject to domestic supply restrictions and (b) restrictions on the importation of products that are processed from a product that is ‘like’ the product subject to domestic supply restrictions. The Japanese Agriculture Panel had considered that this differentiation would be lost if a product in its original form and a product processed from the original one were to be considered to be ‘like’ products within the meaning of Article XI:2(c). This Panel concurred with that observation. It further noted that there was virtually no international trade in raw milk”.¹⁰³

In the 1991 Panel Report on “Thailand - Restrictions on Importation and Internal Taxes on Cigarettes” the Panel examined the claim of Thailand that its restrictions on the importation of cigarettes were necessary to enforce domestic marketing or production restrictions for leaf tobacco and cigarettes and that they were therefore justified under Article XI:2(c)(i). The Panel found that

“the reference to ‘the fresh product’ in this Note [*Ad* Article XI:2(c)] makes clear that the agricultural products subject to marketing or production restrictions must be fresh products. ... this interpretation was borne out by the drafting history, which suggested that the provision was intended to enable governments to

⁹³L/6253, adopted on 2 February 1988, 35S/163, 231, para. 5.3.1.4.

⁹⁴*Ibid.*, 35S/232, para. 5.3.2.2.

⁹⁵*Ibid.*, 35S/233, para. 5.3.3.

⁹⁶*Ibid.*, 35S/233-234 para. 5.3.4.

⁹⁷*Ibid.*, 35S/234, para. 5.3.5.1.

⁹⁸*Ibid.*, 35S/236, para. 5.3.8.1.

⁹⁹*Ibid.*, 35S/235, para. 5.3.6.1.

¹⁰⁰*Ibid.*, 35S/238, para. 5.3.10.3.

¹⁰¹*Ibid.*, 35S/239, para. 5.3.11.

¹⁰²*Ibid.*, 35S/240, para. 5.3.12.1.

¹⁰³L/6568, adopted on 5 December 1989, 36S/68, 87, paras. 66-67; see also Panel Report on “Thailand - Restrictions on Importation and Internal Taxes in Cigarettes”, 37S/200, 221, para. 69 (following the Ice Cream panel on this point).

protect farmers and fishermen who, because of the perishability of their produce, often could not withhold excess supplies of fresh product from the market.

“The Panel found for these reasons that the only domestic marketing and production restrictions that would be relevant under Article XI:2 (c)(i) were those that Thailand claimed to have imposed on the production of leaf tobacco - not those on cigarettes - and that consequently this provision would cover import restrictions only on (a) products that were ‘like’ domestic leaf tobacco and (b) products processed from such “like” products that met the conditions of the Note ad Article XI:2(c). The Panel not[ed] that ‘cigarettes were not ‘like’ leaf tobacco, but processed from leaf tobacco ...’.”¹⁰⁴

(d) *“imported in any form”: application of paragraph 2(c) to processed products*

The Interpretative Note to paragraph 2(c) states that “The term ‘in any form’ in this paragraph covers the same products when in an early stage of processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective”.

In discussions on this provision at the Geneva session of the Preparatory Committee, it was stated that the term “in any form” was meant to cover only “those earlier stages of processing which result in a perishable product” (e.g. kippers). The drafters stated that it was not the intention “... to extend the [import] control not merely to cured and smoked fish but to things like tinned fish and sardines. All that we have in view is an extension to those earlier stages of processing which result in a perishable product. You cannot keep a kipper indefinitely”.¹⁰⁵ and “... what we have in mind here is the perishable kind of processed product, not the kind which is capable of being stocked”.¹⁰⁶ While the word “perishable” was used in the Geneva Draft Charter and the General Agreement, at the Havana Conference this note (to Article 20 of the Charter) was redrafted to read:

“imported ‘in any form’ means the product in the form in which it is originally sold by its producer and such processed forms of the product as are so closely related to the original product as regards utilization that their unrestricted importation would make the restriction on the original product ineffective”.¹⁰⁷

This change was made because “... the term ‘perishable’ which is inapplicable to many types of agricultural products had unduly narrowed the scope of paragraph 2(c)”.¹⁰⁸ The Sub-Committee on Quantitative Restrictions at Havana noted:

“The Sub-Committee, however, wishes to make clear that the omission of the phrase ‘when in an early stage of processing and still perishable’ is dictated solely by the need to permit greater flexibility in taking into account the differing circumstances that may relate to the trade in different types of agricultural products, having in view only the necessity of not making ineffective the restriction on the importation of the product in its original form and is in no way intended to widen the field within which quantitative restrictions under paragraph 2(c) may be applied. In particular, it should not be construed as permitting the use of quantitative restrictions as a method of protecting the industrial processing of agricultural or fisheries products”.¹⁰⁹

The 1978 Panel Report on “EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables” examined the EEC’s minimum import price and associated additional security system in relation to Article XI:2(c)(i) and (ii). “The Panel considered that tomato concentrate was perishable because after a certain time it would decline in quality and value. The Panel also considered that tomato concentrate could compete directly with fresh tomatoes insofar as a large number of end-uses were

¹⁰⁴DS10/R, adopted on 7 November 1990, 37S/200, 222, paras 69-70.

¹⁰⁵EPCT/A/PV/19, p. 43.

¹⁰⁶EPCT/A/PV/19, p. 44; see citation to this passage in L/6253, Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”, adopted on 2 February 1988, 35S/163, 225, para. 5.1.3.4.

¹⁰⁷See reference to this Note in L/6253, Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”, adopted on 2 February 1988, 36S/163, 225, para. 5.1.3.4.

¹⁰⁸Havana Reports p. 93, para. 38.

¹⁰⁹*Ibid.*, para. 39.

concerned. Therefore, the Panel concluded that tomato concentrate qualified as an ‘agricultural or fisheries product, imported in any form’ within the meaning of Article XI:2(c).¹¹⁰

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” refers to the passage from the Havana Reports cited directly above and notes that “this extension to cover also products which were not perishable was not incorporated into the General Agreement and the condition of perishability remains in force”.¹¹¹ The Panel concluded that

“Article XI:2(c)(i) permits restrictions not only on fresh products but also on those processed agricultural and fishery products that are in the early stages of processing and still perishable which compete directly with the fresh product and, if freely imported, would render ineffective the restrictions on the fresh product. It concludes, on the basis of its findings presented above, that the import restrictions maintained by Japan on the following items do not meet all of these conditions and are thus not justified under Article XI:2(c)(i): prepared and preserved milk and cream (04.02), processed cheese (04.04 ex), starch and inulin (11.08), glucose, lactose and other sugars and syrups (17.02 ex), prepared or preserved pineapple (20.06 ex), certain fruit juice and tomato juice (20.07 ex), tomato ketchup and sauce (21.04), and certain food preparations, not elsewhere specified, consisting mainly of milk or of sugar (21.07 ex).”¹¹²

Some of these products were found to be “not perishable”¹¹³ or “a stable product capable of being stocked”,¹¹⁴ some were found to be a “product not intended for further processing”¹¹⁵ or “further processed from a processed product”¹¹⁶ or “consumer-ready prepared foods as opposed to products which had undergone only initial processing”.¹¹⁷ With respect to restrictions on imported processed products when an input of that product is unrestricted, in the case of canned pineapple the Panel “noted that imports of fresh and frozen pineapple were not restricted, and substantial quantities of the latter were imported for processing into canned pineapple. The Panel considered that if imports of frozen pineapple for processing into canned pineapple were presumed not to render ineffective the domestic measures relating to production of fresh pineapples, the importation of the further processed canned pineapple could not have such an effect”.¹¹⁸ With respect to dairy import quotas in particular,

“The Panel ... examined whether [prepared and preserved milk and cream products] met the requirements of products ‘in any form’, that is, whether these milk products were in an early stage of processing and still perishable, which competed directly with fresh milk and if freely imported would render ineffective the restrictions on fresh milk, as required by the interpretative note to Article XI:2(c). It noted that fresh milk as such was rarely traded internationally because of its bulk and perishability, but rather it was processed into (among other things) the canned, powdered or otherwise prepared milk and cream products in question which rendered it capable of being transported and stocked. The Panel considered that the difficulties regarding transport into Japan of a perishable milk product were such that it was highly unlikely that imports of such a product would of themselves render ineffective the government restriction on the production of fresh milk, nor that restriction of its importation would be necessary to the enforcement of the government program. Thus, although the Panel considered that some of these products might meet some of the requirements of being products in an early stage of processing and still perishable which could compete directly with fresh milk for manufacturing use and whose free importation might render ineffective the domestic measures on fresh milk, the Panel did not find that any of the products under consideration in

¹¹⁰L/4687, adopted on 18 October 1978, 25S/68, 100, para. 4.10.

¹¹¹L/6253, adopted on 2 February 1988, 36S/163, 225, para. 5.1.3.4.

¹¹²*Ibid.*, 35S/244, para. 6.6.

¹¹³Prepared and preserved milk and cream (35S/231-232, para. 5.3.1.4); lactose (35S/233, para. 5.3.3); fruit juices and those fruit products entering in a canned form (35S/238, para. 5.3.10.3); canned pineapple (35S/239, para. 5.3.11); “tomato juice in the canned form primarily imported into Japan” (35S/240, para. 5.3.12.2).

¹¹⁴Prepared and preserved milk and cream (e.g. evaporated milk, sweetened condensed milk, skimmed milk powder, whole milk powder, prepared whey, and whey powder) (35S/231-232, para. 5.3.1.4); processed cheese (35S/232, para. 5.3.2.2); lactose (35S/233, para. 5.3.3); starch (35S/236, para. 5.3.6.2); canned pineapple (35S/239, para. 5.3.11).

¹¹⁵Processed cheese (35S/232, para. 5.3.2.2); tomato juice, tomato paste and ketchup (35S/240, para. 5.3.12.2).

¹¹⁶Glucose and other sugars and food preparations, not elsewhere specified, consisting mainly of sugar (35S/236, para. 5.3.7).

¹¹⁷Food preparations not elsewhere specified consisting mainly of dairy products (35S/233-234, para. 5.3.4); tomato juice, tomato sauce and ketchup (35S/240, para. 5.3.12.3).

¹¹⁸*Ibid.*, 35S/239, para. 5.3.11; see also similar findings with respect to processed cheese (35S/232, para. 5.3.2.2), fruit pulp, fruit purée and fruit juice (35S/238-239, para. 5.3.10.3) and tomato sauce and ketchup (35S/240, para. 5.3.12.3).

tariff category 04.02 met all of the conditions of Article XI:2(c)(i), particularly that regarding perishability”.¹¹⁹

In the 1989 Panel Report on “Canada - Import Restrictions on Ice Cream and Yoghurt” the Panel examined “whether ice cream and yoghurt were ‘like’ products ‘in any form’ to raw milk. It was recognized in Article XI:2(c)(i) that it might be necessary to restrict not only the fresh product, but also some of its processed forms. However, the scope of this exception from the general prohibition on quantitative restrictions was limited by the interpretative note Ad Article XI ... Thus, the exception could not be extended to all processed forms of the fresh product but only to those which met the specified criteria”. Citing the Note to Article 20 as redrafted at Havana (see above at page 334), the Panel noted that

“It was this close relationship with regard to use that justified extension of the exception to some forms of processed products. While the interpretative note to the General Agreement focused more on defining the acceptable forms of the processed product, i.e. those that were in an early stage of processing and still perishable, the concept of a close relationship in terms of use was nonetheless retained in the requirements that the processed product compete directly with the fresh one to the extent that its free importation would render ineffective the restrictions on the fresh product. There was no evidence in either the drafting history nor the texts of the General Agreement itself that the exception was ever meant to apply to all, or even most, of the processed forms of any particular fresh product”.¹²⁰

The Panel found that

“The exception to Article XI:1 can be applied only to those processed products which meet all the conditions for ‘like’ products ‘in any form’ of the interpretative note Ad Article XI:2(c)(i): are in ‘an early stage of processing’, ‘still perishable’, ‘compete directly’ with the fresh product and if freely imported would ‘make the restriction on the fresh product ineffective’. The Panel found that ice cream and yoghurt did not compete directly with raw milk, and that their free importation would not render ineffective the Canadian production measures for raw milk. The Panel did not find it necessary to make findings with regard to the criterion of early stage of processing or perishability”.¹²¹

While the Panel did not make findings with respect to “early stage of processing” or “still perishable”, the Report contains an extensive discussion of these issues in relation to modern production methods and rapid changes in technology since the General Agreement was drafted.¹²² With respect to “directly competitive” and “would make the restrictions ineffective”,

“... The Panel considered that the term ‘compete directly with ...’ imposed a more limiting requirement than merely ‘compete with’. As stated in the US arguments, the concept of ‘displacement’ was apparently not intended by this provision. The essence of direct competition was that a buyer was basically indifferent if faced with the choice between one product or the other and viewed them as substitutable in terms of their use. Only limited competition existed between raw milk and ice cream and yoghurt. Their marketing was quite different, and as was implied in the Canadian arguments the competition which did exist was related to displacement of raw milk used in Canadian ice cream and yoghurt production. The Panel recalled that this provision was not designed to protect the processing industry. It further recalled its consideration concerning the narrow interpretation of exceptions (paragraph 59 above). The Panel did not consider it appropriate to broaden the scope of this requirement to include the concept of displacement or indirect competition. The Panel thus found that imports of ice cream and yoghurt did not compete directly with raw milk in terms of Article XI:2(c)(i). ...

“The Panel recognized that Canada’s concern was with regard to potential import levels, rather than historic ones, and with the accumulated effects of imports of various dairy products and the consequential effects on its domestic milk program. Prior to the imposition of the quantitative restrictions, imports of ice

¹¹⁹*Ibid.*, 35S/231-232, para. 5.3.1.4.

¹²⁰L/6568, adopted on 5 December 1989, 36S/68, 87-88, paras. 68-69.

¹²¹*Ibid.*, 36S/90, para. 76.

¹²²*Ibid.*, 36S/88-89, paras. 71, 72.

cream and yoghurt into Canada had been very small compared to Canadian production of these items, and these imports amounted to less than ten one-thousandths of one per cent of Canadian raw milk production. The factors cited by Canada could potentially lead to an increase in this import level; however, Canada had not provided evidence sufficient to convince the Panel that there existed an immediate threat of imports at such significantly increased levels as could render ineffective the Canadian dairy supply program. Article XI:2(c)(i) did not provide for the imposition of quantitative restrictions on imports at current levels merely on the basis of some hypothetical future situation. The Panel did not find that the evidence submitted by Canada justified the conclusion that unrestricted imports of ice cream and yoghurt would presently render ineffective the Canadian domestic restrictions on raw milk production".¹²³

In the 1991 Panel Report on "Thailand - Restrictions on Importation and Internal Taxes in Cigarettes"

"... The Panel, noting that cigarettes were not 'like' leaf tobacco, but processed from leaf tobacco, examined whether cigarettes fell within the range of products covered by this Note [ad Article XI:2(c)]. It recognized that a central requirement of the Note was that the product processed from the fresh product was still 'in an early stage of processing'. It noted that a previous panel had found that agricultural products not normally intended for further processing such as ketchup could not be regarded as eligible for import restrictions under Article XI:2(c)(i).¹²⁴ Since cigarettes could not be described as 'leaf tobacco in an early stage of processing' because they had already undergone extensive processing and, moreover, were not intended for further processing, the Panel found that they were not among the products eligible for import restrictions under Article XI:2(c)(i)".¹²⁵

(e) "necessary"

The Report on the London session of the Preparatory Committee notes that it was suggested that restrictions imposed under the exception contained in paragraph 2(c) "should not be imposed on seasonal commodities at a time when similar domestic products were not available".¹²⁶

The Report of the Review Session Working Party on "Quantitative Restrictions" notes that the Working Party considered and rejected a number of proposals for revision of Article XI, but agreed to insert in its report brief agreed statements which would clarify some of the points that the proposed amendments were meant to cover, including:

"... the maintenance or the application of a restriction which went beyond that which would be 'necessary' to achieve the objects defined in paragraph 2(b) or 2(c) of Article XI would be inconsistent with the provisions of that Article. This is made clear in the text by the use of the word 'necessary'. ... Moreover, if import restrictions of the type referred to in paragraph 2(c) were to be applied after the governmental measures referred to in that paragraph had ceased to be in force, those restrictions would no longer be necessary for the enforcement of those measures and would therefore be inconsistent with the provisions of that paragraph.

"It was also recognized that if restrictions of the type referred to in paragraph 2(c) were applied to imports during that part of the year in which domestic supplies of the product were not available, such restrictions would be regarded as consistent with the provisions of the Article only to the extent that they were necessary to enforce or to achieve the objectives of the governmental measures relating to control of the domestic product. Finally, it was recognized that it would be an abuse of intent of the provisions under paragraph 2(c)(i) of Article XI if contracting parties were to apply restrictions to processed products exceeding those 'necessary' to secure enforcement of the actual measure restricting production or marketing of the primary product".¹²⁷

¹²³36S/89-90, paras. 73, 75.

¹²⁴The footnote to this sentence refers to the Panel Report on "Japan - Restrictions on the Import of Certain Agricultural Products", adopted on 2 February 1988, 35S/163, para. 5.3.12.

¹²⁵DS10/R, adopted on 7 November 1990, 37S/200, 222, para. 70.

¹²⁶London Report, para.(e), p. 12.

¹²⁷L/332/Rev.1 and Addenda, adopted on 2,4 and 5 March 1955, 3S/170, 189-190, paras. 67-68.

In the 1978 Panel Report on “EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables”

“The Panel ... noted that the minimum import price and additional security system for tomato concentrates was permanent, i.e. in operation year round. The Panel also noted that the intervention system for fresh tomatoes, while being permanently in force, only operated at certain times of year, i.e. when fresh tomatoes were being marketed in quantities in excess of commercial market requirements. The Panel found that the minimum import price and associated additional security system for tomato concentrates would be ‘necessary to the enforcement of’ the intervention system for fresh tomatoes essentially during those periods when fresh tomatoes were being bought-in by the intervention organizations, and only to the extent that the system satisfied the other conditions contained in Article XI:2(c)(i) and (ii)”.¹²⁸

The 1980 Panel Report on “EEC Restrictions on Imports of Apples from Chile” found that “although the EEC measures occurred outside the EEC domestic production season, imports could have affected the possibilities for the disposal or release of EEC apples out of intervention on to the EEC market at that time”.¹²⁹

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” found as follows:

“The Panel observes that import restrictions applied under Article XI:2(c)(i) cannot exceed those ‘necessary’ for the operation of the domestic governmental measure concerned. Such restrictions can thus not normally be justified if applied to imports during that time of year in which domestic supplies of the product are not available (paragraph 5.1.3.5 above). The Panel further considers that a restriction on imports of a processed product can in general not be considered as necessary if importation of more directly competitive forms of the product, i.e. the fresh product (when economically feasible) or earlier-stage products processed from the fresh product, are not also restricted. For these reasons and in light of its findings in paragraph 5.3.10 above, the Panel concludes that Japanese import restrictions on fruit purees and pastes (20.05 ex), prepared or preserved fruit pulp (20.06 ex), and certain fruit juices (20.07 ex) are not justified under Article XI:2(c)(i)”.¹³⁰

However, the Panel did find that import restrictions were “necessary” to secure enforcement of production restrictions for dried leguminous vegetables, as it “noted that the Japanese production restrictions were applied to all categories of dried leguminous vegetables and that the various dried legumes were substitutable in terms of the principal form of their consumption in Japan, namely sweetened bean paste”.¹³¹ The same finding was made for groundnuts:

“The Panel ... noted that Japanese groundnuts and imported groundnuts were essentially identical and perfectly substitutable in terms of their use. It further observed that the marketing period for Japanese groundnuts was not limited to a few weeks or months, but was essentially the entire year. The Panel considered that the absence of restrictions on imports of processed groundnut products was not relevant to this consideration. The Panel found, therefore, that the restrictions maintained by Japan on imports of groundnuts could be reasonably considered as ‘necessary’ in terms of Article XI:2(c)”.¹³²

In the Panel Report on “Canada - Import Restrictions on Ice Cream and Yoghurt”,

“... When restrictions on processed products were involved, the Panel found it difficult to separate completely the criterion of ‘necessary to the enforcement’ from that regarding ‘would render ineffective the restriction on the fresh product.’ If unrestricted imports would render a government measure ineffective, it would be difficult not to conclude that some restriction of the imports was necessary. ...

¹²⁸L/4687, adopted on 18 October 1978, 25S/68, 100, para. 4.11.

¹²⁹L/5047, adopted on 10 November 1980, 27S/98, 112, para. 4.6.

¹³⁰L/6253, adopted on 2 February 1988, 35S/163, 244, para. 6.7.

¹³¹*Ibid.*, 35S/235, para. 5.3.5.2.

¹³²*Ibid.*, 35S/237, para. 5.3.8.2.

“The Panel recognized the merits of Canada’s argument that for a product which is traded almost exclusively in its processed forms, such as milk, restrictions on the imports of the processed products might in some sense be ‘necessary’ to ensure that the restriction on the production of the raw material was not undermined. ... At this time, however, there was not sufficient evidence to believe that future imports of ice cream and yoghurt would achieve such levels as to significantly affect Canadian producers’ ability to market raw milk. In the past, unrestricted imports had gained less than a half a per cent share of the Canadian ice cream and yoghurt market, and accounted for less than ten one-thousandths of one per cent of total raw milk production. Against this background and in the absence of an imminent threat to the Canadian dairy system, the Panel found that the criterion of ‘necessary’ to the operation of the governmental restrictions could not be met”.¹³³

See also at page 334 *et seq.*

(f) “to the enforcement of governmental measures”

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” notes, in relation to the argument made that Japan’s supply management measures were not “governmental measures” because they were non-legally-binding administrative guidance with which compliance was allegedly voluntary, that

“... in one respect the Panel took into account the special circumstances prevailing in Japan. This concerns the interpretation of the term ‘the enforcement of governmental measures’ in Article XI:2(c)(i) ... the text of this provision does not specify how the domestic production or marketing restrictions are to be imposed, except that they have to be governmental and the drafting history suggests that the drafters were primarily concerned with the effectiveness of the measures. Although the Panel had some difficulty during its initial proceedings in establishing the exact nature of the domestic restrictions, Japan fully cooperated in providing the necessary detailed information, from which it became clear that the measures did in fact emanate from the government. As regards the method used to enforce these measures the Panel found that the practice of ‘administrative guidance’ played an important role. Considering that this practice is a traditional tool of Japanese Government policy based on consensus and peer pressure, the Panel decided to base its judgements on the effectiveness of the measures in spite of the initial lack of transparency. In view of the special characteristics of Japanese society the Panel wishes, however, to stress that its approach in this particular case should not be interpreted as a precedent in other cases where societies are not adapted to this form of enforcing government policies”.¹³⁴

See also the excerpts from the Panel Report on “Japan - Trade in Semi-Conductors” at page 315ff.

The 1989 Panel Reports on “EEC Restrictions on Imports of Dessert Apples - Complaint by Chile” and “EEC Restrictions on Imports of Apples - Complaint by the United States” examined, *inter alia*, the issue of whether the EEC had “governmental” measures consistent with Article XI:2(c)(i). Each of the two Panel Reports provides as follows:

“... The Panel noted that the EEC did not claim that it restricted production of apples, but that it effectively restricted their marketing, through a system of market withdrawals carried out mainly by producer groups. The Panel also took note of the argument that these could not be considered ‘governmental’ measures in terms of Article XI:2(c) because of the voluntary basis of the organization and the non-obligatory method of their operation. The Panel recalled that the concept of ‘governmental’ measure had been previously examined on a number of occasions in respect of different articles of the General Agreement”.¹³⁵

These Panel Reports then refer to the Panel findings noted immediately above from the Reports on “Japan - Restrictions on Imports of Certain Agricultural Products” and “Japan - Trade in Semi-Conductors”, and

¹³³L/6568, adopted on 5 December 1989, 36S/68, 91-92, paras. 80-81.

¹³⁴L/6253, adopted on 2 February 1988, 35S/163, 242, para. 5.4.1.4; cited in Panel Report on “Japan - Trade in Semi-Conductors”, L/6309, 35S/116, 154, para. 107.

¹³⁵L/6491 and L/6513, both adopted on 22 June 1989, 36S/93 and 36S/135, at 36S/126 and 36S/161-162, paras. 12.8 and 5.8.

to a 1960 Panel which, examining the question of whether subsidies financed by a non-governmental levy were notifiable under Article XVI, expressed the view that "... the question ... depends upon the source of the funds and the extent of government action, if any, in their collection".¹³⁶

"The Panel examined the EEC measures in the light of these decisions by the CONTRACTING PARTIES. It noted that the EEC internal régime for apples was a hybrid one, which combined elements of public and private responsibility. Legally there were two possible systems, direct buying-in of apples by Member State authorities and withdrawals by producer groups. Under the system of withdrawals by producer groups, which was the EEC's preferred option, the operational involvement of public authorities was indirect. However, the régime as a whole was established by Community regulations which set out its structure. Its operation depended on Community decisions fixing prices, and on public financing; apples withdrawn were disposed of in ways prescribed by regulation. The Panel therefore found that both the buying-in and withdrawal systems established for apples under EEC Regulation 1035/72 (as amended) could be considered to be governmental measures for the purposes of Article XI:2(c)(i)."¹³⁷

(5) Paragraph 2(c)(i)

(a) "restrict the quantities ... permitted to be marketed or produced"

The report of a sub-committee which considered these provisions during the Geneva session of the Preparatory Committee in 1947 notes that the sub-committee was "unable to accept a proposal that governmental measures operating to regulate prices should be included under sub-paragraph (c)(i)".¹³⁸ Two proposals to include governmental measures to stabilize prices were also rejected.¹³⁹

The report of Sub-Committee B of the Third Committee, on Quantitative Restrictions, at the Havana Conference, which considered the Charter provision corresponding to Article XI, notes as follows:

"The Sub-Committee agreed that in interpreting the term 'restrict' for the purposes of paragraph 2(c), the essential point was that the measures of domestic restriction must effectively keep output below the level which it would have attained in the absence of restrictions".¹⁴⁰

"... the Sub-Committee agreed that it was not the case that subsidies were necessarily inconsistent with restrictions of production and that in some cases they might be necessary features of a governmental programme for restricting production. It was recognized, on the other hand, that there might be cases in which restrictions on domestic production were not effectively enforced and that this, particularly in conjunction with the application of subsidies, might lead to misuse of the provisions of paragraph 2(c). The Sub-Committee agreed that members whose interests were seriously prejudiced by the operation of a domestic subsidy should normally have recourse to the procedure of Article 25 [corresponding to Article XVI] and that this procedure would be open to any member which considered that restrictions on domestic agricultural production applied for the purposes of paragraph 2(c) were being rendered ineffective by the operation of a domestic subsidy. The essential point was that the restrictions on domestic production should be effectively enforced and the Sub-Committee recognized that unless this condition were fulfilled, restrictions on imports would not be warranted".¹⁴¹

To meet this point, and also to ensure that paragraph 2(c) should apply only when there was a surplus of production the word "effectively" was inserted after "operate" in the Charter. However, this change was not taken into the General Agreement.¹⁴²

¹³⁶L/1160, Report of the Panel on "Review pursuant to Article XVI:5", adopted on 24 May 1960, BISD 9S/188, 192, para. 12.

¹³⁷L/6491 and L/6513, both adopted on 22 June 1989, 36S/93 and 36S/135, at 36S/126-127 and 36S/162, paras. 12.9 and 5.9.

¹³⁸EPCT/141, p. 3.

¹³⁹Proposals at EPCT/W/75, EPCT/W/199, summarized in EPCT/W/223; discussion at EPCT/A/PV/19 p. 14-33.

¹⁴⁰Havana Reports, p. 89, para. 17.

¹⁴¹Havana Reports, p. 90, para. 22.

¹⁴²Havana Reports, p. 90, para. 23.

In 1975 a Working Party on “Canadian Import Quotas on Eggs” was set up to make an advisory ruling on certain questions in connection with Canada’s imposition of import quotas for eggs and egg products in connection with its supply management program for eggs. While the US did not agree that the system was effectively able to control production, the other members of the Working Party “agreed with the Canadian view that the operation of the Canadian supply management programme for eggs, as described and explained to the Working Party, was in conformity with the requirements of Article XI:2(c)(i).”¹⁴³

The 1978 Panel on “EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables” found with respect to the EEC intervention system for fresh tomatoes (under Council Regulation 1035/72) that:

“the Panel considered that there was no effective Community or governmental enforcement of the withdrawals of fresh tomatoes by the producers’ organizations; these organizations were merely encouraged to make such withdrawals. The Panel further considered that there was no requirement that tomato producers must create, join or market their production through such producers’ organizations. In the case where member States were obligated to buy in tomatoes which had been offered to them, the Panel considered that the provision allowing member States to claim an exemption from this obligation was so liberal that it would constitute a lack of effective enforcement of the intent of this Article of the Regulation. The Panel further considered that, in addition, in light of the fact that the buying-in or withdrawal prices were fixed at about one half of the normal cost of production, the intervention system would not effectively restrict the marketing or production of fresh tomatoes, but simply remove any market surplus after all potential commercial markets, including processing into tomato concentrate, had been saturated. The Panel further considered that, since this system was not considered to be an effective restriction on the marketing and production of fresh tomatoes, then it could not be considered to be an effective restriction on the marketing or production of tomato concentrate. Therefore, the Panel concluded that even if fresh tomatoes were considered to be the ‘like domestic product’, the intervention system for fresh tomatoes did not qualify as a governmental measure which operated ‘to restrict the quantities of the like domestic product permitted to be marketed or produced’, or ‘to remove a temporary surplus of the like domestic product by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level’, within the meaning of Article XI:2(c)(i) and (ii).”¹⁴⁴

The 1980 Panel Report on “EEC Restrictions on Imports of Apples from Chile” found with regard to the EEC domestic supply controls on apples that “As regards XI:2(c)(i), the Panel considered that the EEC grubbing-up programmes in 1969 and 1976 seemed to be isolated actions of production control rather than steps in a continuing long-term policy of the Community to restrict production. The Panel noted that the programmes had not resulted in any significant drop in EEC apple production. The Panel considered that the EEC did restrict quantities of apples permitted to be marketed, through its system of intervention purchases by member States and compensation to producer groups for withdrawing apples from the market.”¹⁴⁵

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” found generally, in relation to this issue:

“‘To restrict’ means, according to the drafters, to ‘keep output below the level which [would have been] allowed in the absence of restrictions’. The drafters rejected the proposal that *regulation* of production, through price stabilization programmes, also be an accepted criterion (EPCT/PV/19). They agreed that subsidies were *not* ‘necessarily inconsistent with restrictions on production and that in some cases they might be necessary features of a governmental programme for restricting production’ (Havana Reports, p. 90). According to the note to Article XI the proportion between imports and domestic production is to be determined by taking into account ‘special factors’ that may have affected or may be affecting the trade in the product concerned. The note specifically excludes from the definition of the term ‘special factors’ changes ‘artificially brought about by means not permitted under the [General] Agreement,’ but not changes artificially brought by legal means such as production subsidies or tariff protection granted within the

¹⁴³L/4279, adopted on 17 February 1976, 23S/91, 92, para. 4.

¹⁴⁴L/4687, adopted on 18 October 1978, 25S/68, 102-103, para. 4.13.

¹⁴⁵L/5047, adopted on 10 November 1980, 27S/98, 112, paras. 4.5-4.6.

bounds of Article II. It is thus clear that the production restrictions applied under Article XI:2(c)(i) may in principle coexist with production subsidies. This means that it is not necessary to restrict the level of production below the level that would exist in the absence of all government support. It also means that production which exists only because of production subsidies may be effectively restricted by imposing quantitative limits on the availability of subsidies. Other than requiring a government measure, Article XI:2(c)(i) does not specify how the production restriction is to be imposed”.¹⁴⁶

The Panel found specifically with respect to the restrictions on groundnuts that:

“The Panel considered that restrictions on planted area could not be considered the equivalent of restrictions on production or marketing unless they demonstrably had that effect. ... In this regard, the Panel noted that there was no penalty or charge imposed on Japanese producers who exceeded their target cultivation area, but rather they could lose eligibility to receive a benefit in the form of a subsidy or loan. The Panel considered that, as indicated by the drafting history of Article XI:2(c)(i), the important factor was not the methods used in restricting production but their effectiveness. The Panel further found that there were many factors, including the long-standing application of import restrictions, the provision of subsidies or loans for production, the changing pattern of agricultural production, and varieties, cultivation methods and improved yields, which affected historic and current output in often contradictory ways, rendering it virtually impossible to objectively determine what the level of production would have been in the absence of restrictions. The Panel considered, therefore, the actual pattern of quantities produced. It found that production exhibited a long-term trend of decline, and on an in-shell basis, had further declined since the reinforcement of the governmental measures in 1984. The Panel found, therefore, that the Japanese measures in the past had in practice been effective in restricting the quantity of groundnuts produced or marketed. On this basis the Panel considered that it could reasonably be assumed that the current production measures were capable of effectively limiting production”.¹⁴⁷

The 1989 Panel Report on “Canada - Import Restrictions on Ice Cream and Yoghurt” found with respect to Canadian domestic milk marketing programmes that:

“The Panel recalled that the requirement was for the effective *restriction* of production, not merely its *regulation*. A major element of the requirement of restricted production was that the measure, regardless of how operated, had to reduce production below the level it would otherwise have attained. The Panel observed that this concept was difficult to apply in practice. In situations such as the Canadian one, where the government measures had been in place for many years and were interrelated with price support and other production incentives, it was virtually impossible to determine what production levels would be in their absence. This determination would be necessary in order to have an objective basis for comparison with current production levels. In light of its findings in paragraphs 73 to 76 above, the Panel did not consider it necessary to further examine this issue. The Panel, therefore, did not make a finding with regard to whether the Canadian dairy management scheme constituted a government measure which effectively restricted total raw milk production in Canada”.¹⁴⁸

The 1989 Panel Reports on “EEC Restrictions on Imports of Dessert Apples - Complaint by Chile” and “EEC Restrictions on Imports of Apples - Complaint by the United States” examined, *inter alia*, the issue of whether the EEC measures (based on Council Regulation 1035/72) “operated to restrict the quantities of [EEC apples] permitted to be marketed”. Each of the Panel Reports notes the 1978 and 1980 Panel findings cited above with respect to the same intervention system for certain horticultural crops, and further notes “While taking careful note of the earlier panel reports, the Panel did not consider they relieved it of the responsibility, under its terms of reference, to carry out its own thorough examination on this important point”.¹⁴⁹

¹⁴⁶L/6253, adopted on 2 February 1988, 35S/163, 223-224, para. 5.1.3.3.

¹⁴⁷*Ibid.*, 35S/236-137, para. 5.3.8.1.; see also similar findings with respect to restrictions on dried leguminous vegetables, *ibid.*, 35S/234-235, para. 5.3.5.1.

¹⁴⁸L/6568, adopted on 5 December 1989, 36S/68, 91, para. 79.

¹⁴⁹L/6491 and L/6513, both adopted on 22 June 1989, 36S/93 and 36S/135, at 36S/127 and 36S/162, paras. 12.10 and 5.10.

“The Panel’s scrutiny of the EEC market intervention scheme for apples led it to distinguish a number of features particularly relevant to the application of Article XI:2(c)(i). The system’s operation and targets were essentially price-related; it was activated or suspended according to market price movements in relation to target prices fixed by the EEC. This was true of both direct intervention (buying-in) by member states and the decentralized withdrawal of apples from the dessert apple market by producers’ organizations which could take place at a slightly higher price level than the former. The system thus operated to provide a price floor to EEC producers. In certain years it had resulted in the withdrawal of substantial quantities of apples from the consumer market for dessert apples; but there was no quantitative target or limit defined by the EEC either for these withdrawals or for the overall quantity marketed. The overall quantity withdrawn in any year was a residual amount, resulting from the interplay of market forces instead of being determined by the EEC authorities. Likewise there was no quantitative restriction on supply by producers - i.e., the quantity they could offer for sale. The EEC régime, in assuring producers a minimum price but prescribing no ceiling on the quantity eligible for this guarantee, could in fact act as an incentive for producers operating at the margin of profitability and thereby increase the total amount of apples offered for sale. As noted in paragraph 12.8 above, marketing restrictions under Article XI:2(c)(i) may be implemented and enforced in various ways; but the Panel considered that the above features of the EEC system raised the more basic issue of whether it constituted a marketing restriction within the meaning of Article XI:2(c)(i) at all.

“The Panel considered it necessary to examine a basic interpretative issue involved in this GATT requirement - i.e., did Article XI:2(c)(i) cover only schemes which set quantitative limits on the amount producers could offer for sale, or did it also cover schemes which could result in a reduction of products reaching the consumer through withdrawals activated by reference to a floor price without quantitative targets? ...

“The Panel noted that Article XI:2(c)(i) referred to governmental measures which ‘operated to restrict the quantities’ of the domestic products ‘permitted to be marketed or produced’. Given the ordinary meanings of ‘to permit’ (to authorize or allow) and ‘to market’ (to expose for sale in a market or to sell) the *wording* of the provision suggested in the view of the Panel that the governmental measures must include an effective limitation on the quantity that domestic producers are authorized or allowed to sell. Measures which simply prevented consumers from buying products below certain prices would not appear to be covered by this wording. ...

“As to the *context* in which the provision appears, the Panel noted that the final paragraph of Article XI:2 stipulated that imports may be restricted under Article XI:2(c)(i) only in proportion to domestic *production*, whether the government has chosen to restrict the quantities permitted to be *marketed* or those permitted to be *produced*. It is thus clear that in the case of marketing restrictions, also, imports may only be reduced to the extent that production declines. ... a scheme which imposes no limitations on what producers may sell cannot, by itself, bring about a restriction of production. It therefore follows from the context of the provision that such a scheme would not be covered by Article XI:2(c)(i). The Panel also noted that, unlike Article XI:2(c)(i), Article XI:2(c)(ii), which concerned the removal of a temporary surplus, did not stipulate any restriction on domestic output in order to justify import restrictions. A withdrawal programme not capable of limiting production could possibly come under Article XI:2(c)(ii), provided that the specific requirements of the provision were met. The difference between the two sub-paragraphs was a further contextual indication that Article XI:2(c)(i) could not be interpreted as widely as argued by the EEC.

“Concerning the *purpose* of Article XI:2(c)(i), the Panel recalled that the title of Article XI was ‘General Elimination of Quantitative Restrictions’. Article XI:2(c)(i) made an exception to this general rule ... The Panel noted that Article XI:2(c)(i) - unlike all provisions of the General Agreement specifically permitting actions to protect domestic producers [e.g. Articles XVIII:A and C, XIX and XXVIII] - did not provide either for compensation to be granted by the contracting party invoking it, or for compensatory withdrawals by contracting parties adversely affected by the invocation. This reflected the fact that Article XI:2(c)(i) was not intended to be a provision permitting protective actions. If Article XI:2(c)(i) could be used to justify import restrictions which were not the counterpart of any governmental measure

capable of limiting production, the value of the General Agreement as a legal frame-work for the exchange of tariff concessions in the agricultural field would be seriously impaired.”¹⁵⁰

“In the light of the considerations set out above, the Panel found that the EEC measures taken under the intervention system for apples did not constitute marketing restrictions of a type which could justify import restrictions under Article XI:2(c)(i).”¹⁵¹

In this connection see also the unadopted 1993 panel report on “EEC - Member States’ Import Régimes for Bananas”.¹⁵²

b) “*of the like domestic product*”

See at page 331 *et seq.*

(6) Paragraph 2(c)(ii)

The 1989 Panel Reports on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile” and “EEC - Restrictions on Imports of Apples - Complaint by the United States” also “noted that, unlike Article XI:2(c)(i), Article XI:2(c)(ii), which concerned the removal of a temporary surplus, did not stipulate any restriction on domestic output in order to justify import restrictions. A withdrawal programme not capable of limiting production could possibly come under Article XI:2(c)(ii), provided that the specific requirements of the provision were met”.¹⁵³

(a) “*temporary surplus*”

At the Havana Conference, the Sub-Committee on Quantitative Restrictions “agreed that the provisions of paragraph 2(c)(ii) would cover arrangements under which the government concerned made temporary surpluses of grain available as animal feeding stuffs to small holders and similar categories with a low standard of living, free of charge or at prices below the current market level”.¹⁵⁴ The Review Working Party on Quantitative Restrictions also agreed that this case was clearly covered by the terms of that provision.¹⁵⁵

The 1980 Panel Report on “EEC Restrictions on Imports of Apples from Chile” found with respect to a claim by the EEC that the restrictions were justified under Article XI:2(c)(ii):

“As regards XI:2(c)(ii), the Panel found that the EEC was ‘making the surplus available to certain groups of domestic consumer free of charge or at prices below the current market level’, in so far as the apples withdrawn from the market during 1978/79 went into animal feed as well as were distributed freely to social organizations. The panel thought that the EEC surplus of apples could not be considered ‘temporary’ as it appeared year after year. However, the Panel noted that the surplus in 1979 was significantly higher than normal and could be considered to be a temporary surplus above the recurring surplus”.¹⁵⁶

The 1989 Panels on the complaints by Chile and the United States on “EEC - Restrictions on Imports of Dessert Apples” also examined the restrictions in question in relation to Article XI:2(c)(ii).

“... The Panel ... took note of the views of the 1980 Panel on this point, noting that that Panel’s finding of a ‘temporary surplus above the recurring surplus’ related only to the situation in 1979. Article XI:2(c)(ii) clearly required the Panel to consider whether the EEC’s surplus at the time the import restrictions were

¹⁵⁰*Ibid.*, at 36S/127-129 and 36S/163-165, paras. 12.11-12.15 and 5.11-5.15.

¹⁵¹*Ibid.*, 36S/129 and 36S/165, paras. 12.17 and 5.17.

¹⁵²DS32/R, dated 3 June 1993, paras. 331-335.

¹⁵³L/6491 and L/6513, both adopted on 22 June 1989, 36S/93 and 36S/135, at 36S/128 and 36S/164, paras. 12.14 and 5.14.

¹⁵⁴Havana Reports, p. 93, para. 34.

¹⁵⁵L/332/Rev.1 and Addenda, adopted on 2,4 and 5 March 1955, 3S/170, 191, para. 73.

¹⁵⁶L/5047, adopted on 10 November 1980, 27S/98, 114, para. 4.10.

imposed, i.e. April 1988, had been demonstrated to be temporary. The Panel considered that the only practicable way to reach a finding on this point was to compare the EEC's apple surplus in 1988 with that in the previous years. From the statistics available to it ... it observed that while amounts withdrawn had varied in the years up to and including the 1987-88 marketing year, stocks had remained relatively stable at levels which indicated a substantial structural surplus. The Panel thus found that the 1988 surplus could not be considered a temporary one, and that therefore the EEC did not meet the conditions for imposing import restrictions under Article XI:2(c)(ii). In the light of this finding the Panel did not consider it necessary to examine whether the EEC measures were in conformity with the other requirements of this provision."¹⁵⁷

(7) Paragraph 2(c)(iii)

(a) "the production of which is directly dependent, wholly or mainly"

The Report of the Sub-Committee on Quantitative Restrictions at the Havana Conference provides that

"... It was agreed that under the existing text, in a case for example in which a Member wished to restrict the quantities permitted to be produced of any animal product the production of which was dependent wholly or mainly on two or more imported kinds of feeding stuffs considered together but not necessarily on either kind considered separately, it would be open to that Member to restrict the production of animal products, provided that domestic production of imported kinds of feeding-stuffs were relatively negligible, by treating the imported kinds of feeding-stuffs as a single commodity and applying import restrictions thereto.

"It was further agreed that if the various imported feeding-stuffs were in fact treated as a single commodity, import restrictions thereon should be applied globally on the total combined imports without allocating shares to the individual feeding-stuffs. It was felt that, in cases where this procedure would not be practicable, the import restrictions should take the form of an equal proportionate reduction in the amount permitted to be imported of each of the several feeding-stuffs".¹⁵⁸

5. Last sub-paragraph of paragraph 2

(1) "Public notice", miscellaneous or "basket" import quotas and quota administration through discretionary licensing

The Report of the Review Working Party on "Quantitative Restrictions" notes the following agreed interpretations:

"The requirement that any contracting party applying restrictions pursuant to paragraph 2(c) should give public notice of the quantities or values to be imported should be construed as requiring that contracting party to send a copy of that notice to the CONTRACTING PARTIES ... which would circulate this information to all contracting parties concerned.

"The Working Party recommends that, whenever practicable, a contracting party intending to introduce restrictions pursuant to paragraph 2(c) of Article XI should give advance notice, on a confidential basis, to interested contracting parties and to the CONTRACTING PARTIES ... to give them an opportunity for consultation".¹⁵⁹

Various contracting parties have notified trade measures they consider to be in conformity with Article XI:2(c).¹⁶⁰

In the 1980 Panel Report on "EEC Restrictions on Imports of Apples from Chile", examining the criteria in the last paragraph of Article XI:2, "The Panel noted that the EEC had not given public notice of the quantities or

¹⁵⁷L/6491, adopted on 22 June 1989, 36S/93, 129-130, para. 12.19; L/6513, adopted on 22 June 1989, 36S/135, 165, para. 5.19.

¹⁵⁸Havana Reports, p. 92, paras. 32-33.

¹⁵⁹L/332/Rev.1 and Addenda, adopted on 2,4 and 5 March 1955, 3S/170, 190, paras. 70-71.

¹⁶⁰See, e.g., L/3455, L/4187, L/4868.

values to be imported under the voluntary restraint agreements it had negotiated ... as required by the first sentence of this paragraph”.¹⁶¹

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” found that “import restrictions made effective through a miscellaneous ‘basket’ quota for which only a global value or quantity was announced could not satisfy the requirements of Article XI:2(c)”¹⁶², and concluded:

“The Panel recalls that under the last sub-paragraph of Article XI:2(c) a contracting party applying an import restriction must give public notice of the total quantity or value of each product permitted to be imported during a specified future period. This requirement implies that under Article XI:2(c) only those quotas can be applied which define the particular quantity or value for each product subject to quota. The Panel finds that the Miscellaneous Import Quota maintained by Japan precludes the identification of the quantity or value of permitted imports of each product included therein. The Panel therefore concludes that those import restrictions maintained by Japan through the Miscellaneous Import Quota on prepared whey powder (04.02 ex), starch and inulin for special use (11.08 ex), certain prepared and preserved bovine meat products (16.02 ex), lactose, glucose and other sugars and sugar syrups (17.02 ex), certain fruit purees and pastes (20.05 ex), certain fruit juices (20.07 ex), and food preparations not elsewhere specified mainly consisting of dairy or sugar (21.07 ex), are not justified under the provisions of Article XI:2(c)”.¹⁶³

The 1989 Panel Report on “Canada - Import Restrictions on Ice Cream and Yoghurt” noted, in connection with a permit system for imports of these products, that the Panel “did observe ... that restrictions applied through discretionary licensing could not meet the requirement in Article XI:2(c) of prior public notice of the quantity or value permitted to be imported”.¹⁶⁴

(2) “during a previous representative period”

In the 1980 Panel Report on “EEC Restrictions on Imports of Apples from Chile”

“... the Panel looked at total imports into the EEC from Southern Hemisphere suppliers, including Chile, as these were the main EEC suppliers during the marketing season concerned when restraints were in effect. The Panel looked at the proportion of these imports to EEC production ‘prevailing during a previous representative period’ as provided in the third sentence of the last paragraph of XI:2. In keeping with normal GATT practice, the Panel considered it appropriate to use as a ‘representative period’ a three-year period previous to 1979, the year in which the EEC measures were in effect. Due to the existence of restrictions in 1976, the Panel held that that year could not be considered as representative, and that the year immediately preceding 1976 should be used instead. The Panel thus chose the years 1975, 1977 and 1978 as a ‘representative period’”.¹⁶⁵

See also the discussion of “previous representative period” under Article XIII.

(3) Proportionality requirement

In the 1980 Panel Report on “EEC Restrictions on Imports of Apples from Chile”

“The Panel noted ... that measures taken under XI:2(c)(i) must also meet the criteria expressed in the last paragraph of XI:2. ... The Panel considered that the evidence before it suggested that the EEC measures did not fulfil the conditions of the second sentence of this paragraph ... The Panel found that the EEC had not maintained this proportion [between ‘the total of imports’ and ‘the total of domestic production’]”.¹⁶⁶

¹⁶¹L/5047, adopted on 10 November 1980, 27S/98, 112-113, para. 4.7.

¹⁶²L/6253, adopted on 2 February 1988, 35S/163, 231, para. 5.3.1.3.

¹⁶³*Ibid.*, 35S/245, para. 6.8; see also 35S/226, para. 5.1.3.6.

¹⁶⁴L/6568, adopted on 5 December 1989, 36S/68, 93, para. 83.

¹⁶⁵L/5047, adopted on 10 November 1980, 27S/98, 113, para. 4.8.

¹⁶⁶L/5047, adopted on 10 November 1980, 27S/98, 113, para. 4.7.

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” provides as follows:

“The Panel noted that in the case before it the import restrictions maintained by Japan had been in place for decades and there was, therefore, no previous period free of restrictions in which the shares of imports and domestic supplies could reasonably be assumed to resemble those which would prevail today. The Panel further noted that the CONTRACTING PARTIES recognized in a previous case that a contracting party invoking an exception to the General Agreement had the burden of demonstrating that the requirements of the exception were fulfilled.¹⁶⁷ The Panel realized that a strict application of this burden of proof rule had the consequence that Article XI:2(c)(i) could in practice not be invoked in cases in which restrictions had been maintained for such a long time that the proportion between imports and domestic supplies that would prevail in the absence of restrictions could no longer be determined on the basis of a previous representative period. The Panel, therefore, examined whether it would be possible to change the burden of proof in such a way that the provision could be resorted to also in such a situation. The Panel noted that one among the possible ways of achieving this aim would be to consider a demonstration that the size of the quota is equivalent to a certain percentage of the quantities marketed or produced in the importing country as a sufficient proof that the proportionality requirement had been met. The Panel however also noted that the practical consequence of such a change in the burden of proof would be to turn the requirement of Article XI:2(c)(i) to fix the size of the import quotas in relation to the reduction in the quantities marketed or produced into a requirement to determine the size of the quota in relation to the quantities actually marketed or produced. The Panel found that the above or any other change in the burden of proof to make Article XI:2(c)(i) operational in the case of long-term import and/or supply restrictions would have consequences equivalent to those of an amendment of this provision and could therefore seriously affect the balance of tariff concessions negotiated among contracting parties. The Panel noted in this context that Article XI:2 - unlike some other provisions of the General Agreement permitting restrictive trade measures, such as Articles XVIII:C, XXVIII or XIX - does not provide for compensation for contracting parties adversely affected by the measures taken under it. The Panel considered for these reasons that the burden of providing the evidence that all the requirements of Article XI:2(c)(i), including the proportionality requirement, had been met must remain fully with the contracting party invoking that provision”.¹⁶⁸

In this connection see also the unadopted 1993 panel report on “EEC - Member States’ Import Régimes for Bananas”.¹⁶⁹

(4) “special factors”

See the Interpretative Note to the last sub-paragraph of paragraph 2. See also the discussion of “special factors” under Article XIII:4.

In discussions at the Geneva session of the Preparatory Committee, it was stated that “the term ‘special factors’ would include real changes in relative productive efficiency as between domestic producers and foreign producers, or as between different foreign producers: in a word, real changes in the competitive situation and not changes artificially introduced or encouraged by government action of a kind which other sections of the Charter would not allow”.¹⁷⁰ The Report of the Sub-Committee on Quantitative Restrictions at Havana notes that “... the Sub-Committee agreed that it was desirable to make it clear that changes in relative productive efficiency between the home producers and foreign producers should be taken into consideration in determining the size of import quotas under paragraph 2(c)(i). ... The Sub-Committee, after consideration of the interpretative notes on ‘special factors’ to Articles 20 and 22 of the Geneva text, agreed that, as stated in those notes, changes artificially brought about since the representative period (assuming that period to have preceded the coming into force of the Charter) were not to be regarded as ‘special factors’ for the purposes of paragraph 2(c) and Article 22 [corresponding to

¹⁶⁷A footnote to this sentence refers to the Report of the Panel on “Canada - Administration of the Foreign Investment Review Act”, 30S/140.

¹⁶⁸L/6253, adopted on 2 February 1988, 35S/163, 226-227, para. 5.1.3.7.

¹⁶⁹DS32/R, dated 3 June 1993, paras. 336-339.

¹⁷⁰EPCT/A/PV/19, p. 45.

Articles XI:2(c) and XIII]”.¹⁷¹ The same Report also notes that “It was ... agreed that in the case of perishable commodities, due regard should be had for the special problems affecting the trade in these commodities”.¹⁷²

In the Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”, the Panel stated that “the last sentence of Article XI:2 prescribes the minimum size of the import quotas that contracting parties may establish in accordance with sub-paragraph (c)(i) of that provision. The quotas must be such as not to reduce the total of imports relative to domestic production as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In order to determine the size of the import quota the contracting party thus has to estimate what the amount of domestic production and of imports would be during the quota period in the absence of supply and quantitative import restrictions. The General Agreement states that in making this determination contracting parties shall pay ‘due regard’ to the proportions that prevailed during a previous representative period and to ‘special factors’ that affected or may be affecting the trade in the product concerned”.¹⁷³ See also the reference to “special factors” in the excerpt from this panel report at page 341 above.

B. RELATIONSHIP BETWEEN ARTICLE XI AND OTHER GATT ARTICLES

1. Article III

See under Article III.

2. Article VI

During the Geneva discussions of the Preparatory Committee, “The suggestion was made that it should be permissible to use import restrictions, under proper safeguards, as an anti-dumping measure in those cases of intermittent dumping in which import duties did not provide a suitable instrument of control. After consideration it was generally agreed that as far as the establishment of new industries is concerned, the position should be sufficiently covered by the provisions of Chapter IV [Article XVIII]. In respect of the threat of intermittent dumping to established industries, there was wide agreement with the view that the position was probably already adequately covered under Article 34 [XIX]”.¹⁷⁴ See also the chapter on Article VI.

3. Article XXIII

See under Article XXIII.

4. Article XXIV:12

See under Article XXIV.

C. RELATIONSHIP BETWEEN ARTICLE XI AND OTHER INTERNATIONAL AGREEMENTS

1. General

The Report of the Havana Conference Sub-Committee on Quantitative Restrictions notes: “... the Sub-Committee agreed to have it recorded that in its view the freedom given to a Member to apply restrictions under paragraph 2(c) did not free such Member from a prior obligation to any individual Member”.¹⁷⁵

¹⁷¹Havana Reports, p. 94, paras. 42-43.

¹⁷²Havana Reports, p. 91, para. 28.

¹⁷³L/6253, adopted on 2 February 1988, 35S/163, 226, para. 5.1.3.7.

¹⁷⁴London Report, para.(j), p. 12.

¹⁷⁵Havana Reports, p. 95, para. 45.

2. Arrangement Regarding International Trade in Textiles

The Arrangement Regarding International Trade in Textiles (“Multi-Fibre Arrangement”, or MFA) of 20 December 1973,¹⁷⁶ as extended by various Protocols allows for various quantitative restrictions among participating countries but states in paragraph 6 of Article 1: “The provisions of this Arrangement shall not affect the rights and obligations of the participating countries under the GATT”.

3. Agreement on Import Licensing Procedures

See the discussion above on “import and export licences”, the discussion under Article XIII:3 on “administration of import licensing”, and the material on this Agreement at the end of the chapter on Article XIII.

3. Agreement on Trade in Civil Aircraft

Article 5 of the Agreement on Trade in Civil Aircraft of 12 April 1979 reads:

“5.1 Signatories shall not apply quantitative restrictions (import quotas) or import licensing requirements to restrict imports of civil aircraft in a manner inconsistent with applicable provisions of the GATT. This does not preclude import monitoring or licensing systems consistent with the GATT.

“5.2 Signatories shall not apply quantitative restrictions or export licensing or other similar requirements to restrict, for commercial or competitive reasons, exports of civil aircraft to other Signatories in a manner inconsistent with applicable provisions of the GATT”.¹⁷⁷

D. EXCEPTIONS AND DEROGATIONS

See Article XI:2 above; also Articles XII, XVIII, XIX, XX and XXI.

1. Reservations in accession protocols

Paragraph 4 of the Protocol for the Accession of Switzerland¹⁷⁸ provides that “Switzerland reserves its position with regard to the application of the provisions of Article XI of the General Agreement” to the extent necessary to permit it to apply import restrictions pursuant to certain internal legislation. However, this reservation is qualified by the requirements that Switzerland, so far as is consistent with the implementation of these laws, observe to the fullest possible extent the appropriate provisions of the General Agreement, and endeavour to ensure that they are applied in such a manner as to cause minimum harm to the interests of contracting parties. Annual reports and a triennial review are required; also, paragraph 6 of the Protocol provides that “Switzerland shall enter into consultations pursuant to Articles XXII and XXIII of the General Agreement upon request of any contracting party regarding the reservations mentioned in paragraphs 4 and 5 above”. When the text of the Protocol was submitted to the CONTRACTING PARTIES for approval, the Chairman stated that this reservation could be considered analogous to a waiver granted under Article XXV, paragraph 5, “in that such waivers normally contain a clause to the effect that the decision does not preclude the right of affected countries to have recourse to all the provisions of Article XXIII”.¹⁷⁹

The Protocol of Accession of Costa Rica provides that “As indicated in paragraph 50 of document L/6589, Costa Rica will continue to gradually eliminate current import licensing restrictions, and quantitative restrictions, and will complete their elimination four years after the day of Costa Rica’s accession to the General Agreement. ... If this is not accomplished, the issue will be reviewed by the CONTRACTING PARTIES”.¹⁸⁰

¹⁷⁶21S/3.

¹⁷⁷26S/162, 165.

¹⁷⁸14S/6, 8.

¹⁷⁹SR.23/7.

¹⁸⁰L/6626, 37S/7-8, para. 4.

2. Waivers under Article XXV:5

The few waivers which have been granted to Article XI are listed in the table of waivers at the end of the chapter on Article XXV.

E. WORK CARRIED OUT IN THE GATT ON QUANTITATIVE RESTRICTIONS MAINTAINED FOR OTHER THAN BALANCE-OF-PAYMENTS REASONS

1. Import restrictions

The text of Article XII:4(b) in the 30 October 1947 text of the General Agreement required that a review of all restrictions under Article XII be conducted not later than 1 January 1951. This review was carried out in connection with the second review of discriminatory application of import restrictions under Article XIV:1(g), and documents the widespread use of balance-of-payments restrictions at that time.¹⁸¹ When the balance-of-payments Articles were revised in the Review Session of 1954-55, the revised Article XII:4(b) and Article XVIII:12(b) each called for another review of such restrictions. This review was completed by the CONTRACTING PARTIES in 1958-59.¹⁸²

As for restrictions for other than balance-of-payments purposes, a Report was adopted at the Fourth Session on "The Use of Quantitative Restrictions for Protective and Other Commercial Purposes"; see the material on this Report above at page 324. At the Fifth Session in 1950, it was agreed as a follow-up to this Report to gather information on import and export restrictions maintained as exceptions to Article XI:1, other than those applied for balance-of-payments purposes.¹⁸³ A Note was later circulated which summarized the information received.¹⁸⁴

During the first fifteen years of the GATT, work on progressive liberalization of quantitative import restrictions in Europe was being carried out in the Organization for European Economic Co-operation (OEEC).¹⁸⁵

In 1955, at the Review Session, the Review Working Party on Quantitative Restrictions considered problems raised by certain contracting parties in eliminating balance-of-payments import restrictions. The Working Party drafted a waiver decision, temporarily waiving Article XI for the "hard core" restrictions (many of them on agricultural products) which these contracting parties considered to be difficult to eliminate immediately. Application of this "hard-core" waiver decision was extended successively until 31 December 1962, and then expired.¹⁸⁶

In the period following the Review Session, work on quantitative restrictions continued in two directions: one focusing on non-tariff barriers of all types to agricultural trade, and one focusing on other quantitative restrictions, particularly those affecting developing country exports. Under the Programme for Expansion of International Trade initiated in 1958, agricultural policies including subsidies and quantitative restrictions were discussed in Committee II, and barriers to trade in products of interest to developing countries (including quantitative restrictions) were discussed in Committee III.

In 1960, procedures were approved for dealing with residual import restrictions; contracting parties were invited to notify lists of import restrictions which they were applying contrary to the provisions of the General Agreement, and to notify changes to those lists. The procedures provided for bilateral consultations upon request under Article XXII:1, and if necessary, resort either to Article XXII:2 or Article XXIII:2.¹⁸⁷ In 1962, a Panel appointed by the CONTRACTING PARTIES examined the adequacy of these notifications and put forward certain

¹⁸¹See GATT/CP.6/12/Rev.2 and GATT/CP.6/48, published as *Use of Quantitative Import Restrictions to Safeguard Balances of Payments* (Sales No. GATT/1951-2, out of print).

¹⁸²The results of the review appear in MGT(59)75 of 30 July 1959. See also material under Article XII:4(b) in this Index.

¹⁸³GATT/CP.5/SR.4, GATT/CP.5/SR.25, GATT/CP.5/3, GATT/CP.5/39/Rev.1, GATT/CP/93 (Note inviting notifications).

¹⁸⁴GATT/CP/93/Add.1, dated 20 October 1951.

¹⁸⁵See reference in Report of Review Working Party on "Quantitative Restrictions", L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 178-179, paras. 31-33.

¹⁸⁶*Ibid.*, 3S/191-195, paras. 75-91; Decision of 3 March 1955 on "Problems Raised for Contracting Parties in Eliminating Import Restrictions Maintained During a Period of Balance-of-Payments Difficulties", 3S/38, extended at 7S/33, 8S/27, 9S/35, 10S/35.

¹⁸⁷Procedures approved 16 November 1960, 9S/18-20.

suggestions on the type of information that should be included in notifications.¹⁸⁸ In 1965 it was suggested to newly-independent countries that, even if they were not yet in a position to determine whether they wished to invoke the provisions of Article XVIII as justification for some or all restrictions in force, they might submit descriptive material relative to their entire import control systems, without prejudice to the consistency of the measures maintained with their GATT obligations.¹⁸⁹ A number of notifications under this procedure were made.

A meeting of the CONTRACTING PARTIES at Ministerial level held in May 1963, which also launched the Kennedy Round of multilateral trade negotiations, adopted an Action Programme and Ministerial Conclusions on the expansion of trade of developing countries. Point (ii) of the Action Programme provided that "Quantitative restrictions on imports from less-developed countries which are inconsistent with the provisions of the GATT shall be eliminated within a period of one year. Where, on consultation between the industrialized and the less-developed countries concerned, it is established that there are special problems which prevent action being taken within this period, the restrictions on such items would be progressively reduced and eliminated by 31 December 1965".¹⁹⁰ Notifications of residual restrictions had been examined in Committee III.¹⁹¹ This examination was continued in the Action Committee and in the Committee on Trade and Development, and in the Group on Residual Restrictions of the Committee on Trade and Development.¹⁹²

In January 1970 the Council established a Joint Working Group on Import Restrictions (JWG), which submitted a report in March 1971 including a systematic collection of data on quantitative restrictions in eighteen developed countries.¹⁹³ In 1971 the Council decided that the data assembled by the JWG should be kept up to date and that the contracting parties concerned should be invited to notify annually by 30 September any changes which should be made concerning the restrictions listed in the consolidated document.¹⁹⁴ This decision was reaffirmed by the Council in March 1980.¹⁹⁵ Accordingly, the consolidated table on import restrictions prepared by the JWG was revised annually until 1982 on the basis of notifications from countries applying restrictions.¹⁹⁶ However, not all contracting parties concerned submitted notifications.

During the Tokyo Round of 1973-79, further discussions took place in the Committee on Industrial Products, the Committee on Trade and Development, and the NTM Subgroup on Quantitative Restrictions.¹⁹⁷ The Agreement on Import Licensing Procedures was negotiated as a result of this process. Negotiations were also conducted on a request-offer basis concerning quantitative restrictions¹⁹⁸ and "non-tariff measures not dealt with multilaterally".¹⁹⁹ Negotiations also took place separately on non-tariff barriers of all types in agricultural trade.

Since 1979, some work on quantitative restrictions has taken place in the context of the Committee on Trade and Development's work on trade liberalization in areas of special interest to developing countries which led to the updating of the data on restrictions applied by developed countries to products of export interest to

¹⁸⁸11S/206, 210.

¹⁸⁹14S/161.

¹⁹⁰Ministerial Conclusions adopted on 21 May 1963, 12S/36-37, para. I.1(ii).

¹⁹¹See Report of Committee III, L/1989, 12S/88, 95-97, and Secretariat compilation of restrictions, AC/SC.1/3, 12 November 1963.

¹⁹²See Secretariat notes from 1965-1969 in COM.TD/16, COM.TD/19, COM.TD/W/19, COM.TD/W/43, COM.TD/W/60, COM.TD/W/64, COM.TD/W/68, COM.TD/W/76, COM.TD/W/93, COM.TD/W/95. See also the annual reports of the Committee.

¹⁹³L/3391/Rev.1.

¹⁹⁴C/M/70.

¹⁹⁵C/M/139; see C/III, Proposal by the Director-General on "Notification and Surveillance - Procedures for the Review of Developments in the Trading System", adopted on 26 March 1980, 27S/20.

¹⁹⁶L/5265. The last revised data of the JWG were contained in document L/5415 and Corrigenda.

¹⁹⁷See documents listed in TA/INF/1/Rev.8, p. 38-44.

¹⁹⁸See Secretariat Notes on "Technical arrangements for bilateral or plurilateral consultations or discussions on quantitative restrictions" (MTN/NTM/W/13); "Consultations or discussions on QRs: Status report and proposed procedure for reports" (MTN/NTM/W/21) and further status reports in MTN/NTM/W/54; "Information regarding import restrictions" (MTN/NTM/W/30, MTN/NTM/W/77, MTN/NTM/W/131, MTN/NTM/W/199); "Feasibility study of establishment of a list of QRs" (MTN/NTM/W/112) and various other papers in the MTN/NTM/W/ series.

¹⁹⁹See Secretariat Note on "Negotiations on Non-tariff Measures Not Dealt with Multilaterally", MTN/NTM/W/4; "Notification of Non-tariff Measures Not Dealt with Multilaterally", MTN/NTM/W/82+Add.; notes on procedures for such negotiations at NTM/W/45, MTN/NTM/W/137; and other papers in the MTN/NTM/W series.

developing countries.²⁰⁰ Also, the GATT Committee on Trade in Agriculture established in 1982 drew up documentation on non-tariff measures, including quantitative restrictions, for agricultural products.²⁰¹

A Group on Quantitative Restrictions and Other Non-Tariff Measures was established under the 1982 Ministerial work programme to review existing quantitative restrictions and other non-tariff measures, the grounds on which these were maintained and their conformity with the General Agreement, so as to achieve the elimination of quantitative restrictions which were not in conformity with the General Agreement or their being brought into conformity with the General Agreement, and also to achieve progress in liberalizing other quantitative restrictions and non-tariff measures, adequate attention being given to measures affecting products of export interest to developing countries.²⁰² It was agreed that:

“The Group’s establishment and any work carried out by it, including the presentation, examination and discussion of quantitative restrictions and other non-tariff measures, were without prejudice to the rights and obligations of contracting parties under the GATT and to any action already taken by the CONTRACTING PARTIES”.²⁰³

The Group drew up an information base comprised of notifications made by contracting parties of the quantitative restrictions which they themselves apply, including information on grounds and GATT justifications.²⁰⁴ It also kept up to date the Inventory of Non-Tariff Measures (Industrial Products), which contains notifications by contracting parties affected by the measures.²⁰⁵ Procedures for up-dating the Inventory had been adopted in 1980.²⁰⁶

Since 1986, a Technical Group on Quantitative Restrictions and Other Non-Tariff Measures has taken over the task of updating and analysis of the documentation in accordance with the timetable and procedures agreed by the CONTRACTING PARTIES in 1984 and 1985.²⁰⁷ These procedures provide for contracting parties to notify details of changes in the quantitative restrictions that they maintain as and when these changes occur and to make a complete notification of their quantitative restrictions once every two years; they also specify the content of the notifications, which are to include an indication of the grounds and GATT justification for the measures maintained.²⁰⁸ The most recent compilation of quantitative restrictions was issued in 1989 and has been periodically updated.²⁰⁹ Information on quantitative restrictions and non-tariff measures is also included in the Integrated Data Base established by a Council Decision of November 1987.²¹⁰

2. Export restrictions

During 1978-79, the Tokyo Round “Framework” Group drafted an “Understanding regarding export restrictions and charges”, which provides:

“The participants in the Multilateral Trade Negotiations have examined the various existing provisions of the General Agreement relating to export restrictions and charges. The Annex contains a statement of these provisions.

²⁰⁰COM.TD/W/338/Rev.1.

²⁰¹AG/FOR/- and AG/FOR/REV/- series.

²⁰²29S/17.

²⁰³L/5713, adopted on 30 November 1984, 31S/211, 212, para. 4; see also NTM/2.

²⁰⁴NTM/W/6/- series.

²⁰⁵NTM/INV/I-V and Addenda.

²⁰⁶C/110, Proposal by Director-General on “Documentation on Non-Tariff Measures”, adopted on 26 March 1980, 27S/18.

²⁰⁷L/6200, Action taken on 24-26 November 1986, 33S/54.

²⁰⁸L/5713, Report (1984) of the Group on Quantitative Restrictions and Other Non-Tariff Measures, adopted on 30 November 1984, 31S/211, 221-223 and 227-228, paras. 44 and 65; L/5888, Report (1985) of the Group on Quantitative Restrictions and Other Non-Tariff Measures, adopted on 28 November 1985, 32S/91, 92-94, paras. 5-II.

²⁰⁹NTM/W/6/Rev.5 dated 31 January 1989, Secretariat compilation of “Quantitative Restrictions” including table by CCCN or HS classification, and Addenda 1-7 (to September 1993).

²¹⁰Decision on “Integrated Data Base” of 10 November 1987, L/6290, 34S/66; see also material on the IDB in the chapter on Article II, and the April 1994 User Reference Manual for the IDB, IDB/URM/1.

“In the light of the examination referred to, participants agree upon the need to reassess in the near future the GATT provisions relating to export restrictions and charges, in the context of the international trade system as a whole, taking into account the development, financial and trade needs of the developing countries. They request the CONTRACTING PARTIES to address themselves to this task as one of the priority issues to be taken up after the Multilateral Trade Negotiations are ended”.

This Understanding was adopted by the Trade Negotiations Committee at the end of the Tokyo Round²¹¹ and was submitted to the CONTRACTING PARTIES at their Thirty-fifth Session held in November 1979.²¹²

See also a 1974 Technical Note by the Secretariat on “GATT and Export Restrictions”²¹³ discussing legal mechanisms for negotiation in this area; a Secretariat Note of 1980 on “Export Restrictions and Charges”, which also lists known export prohibitions, embargoes and licensing-based restrictions²¹⁴; and a 1989 Background Note by the Secretariat on “Export Restrictions and Charges”²¹⁵ providing information on export restrictions and charges, their nature, purpose and coverage, relevant GATT provisions and past GATT work.

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

Corresponding provisions in the Havana Charter are contained in Article 20; in the US Proposals in Chapter III C-1; in the US Draft in Article 19; in the London & New York Drafts in Article 25; and in the Geneva Draft in Article 20.

Differences from the Havana Charter: Article 20:2(b) of the Charter included a reference to the revision of internationally agreed standards. The drafters of the General Agreement decided not to include it in the General Agreement; it was stated that it would be “unwise to envisage the CONTRACTING PARTIES as being in a position to examine marketing standards and agree on regulations”, and that this would be appropriate for the ITO, which would have a staff of experts.²¹⁶ Article 20 also included additional safeguards for exporting countries (prior notice and consultation) in the case of invocation of Article 20:2(c); these were inserted at Havana and were not taken into the General Agreement.²¹⁷ The Sub-Committee at Havana also inserted an interpretative note to Article 20:2(a) to respond to Greek concerns relating to olive oil production, which permitted export restrictions necessary to maintain domestic stocks to avoid critical shortages, in the case of products which are basic to the diet in the exporting country and are subject to alternate annual shortages and surpluses.²¹⁸ This too was not taken into the General Agreement.

The wording of the Interpretative Note to paragraph 2(c) in the General Agreement is different from that in the corresponding Interpretative Note to paragraph 2(c) of Article 20 of the Charter. The wording of the Interpretative Note to the last sub-paragraph of paragraph 2 in the General Agreement is different from that in the corresponding Interpretative Note 3(d) of Article 20 of the Charter: “The words ‘or as between different foreign producers’ had been deleted from this footnote (in the Charter) because they were pertinent only to the footnote on ‘special factors’ in Article 22 [XIII]”.²¹⁹

The inclusion in the General Agreement of Articles XI-XIV was accepted by certain delegations without the insertion of the Charter Articles 4 and 6 relating to the removal of maladjustments within the balance-of-payments and safeguards for members subject to external inflationary or deflationary pressure, on the understanding that if

²¹¹MTN/FR/6, pp. 5/1-5/10; adopted by TNC at MTN/28 and Corr.1.

²¹²L/4884 and Add.1.

²¹³MTN/3B/9, dated 1 May 1974.

²¹⁴CG.18/W/43 dated 10 October 1980.

²¹⁵MTN.GNG/NG2/W/40, dated 8 August 1989.

²¹⁶EPCT/TAC/PV/27, p. 18.

²¹⁷Havana Reports, pp. 90-91, paras. 24-28.

²¹⁸Havana Reports p. 88, para. 12.

²¹⁹E/CONF.2/C.3/SR.37, p. 7.

a situation of the sort envisaged in the chapter relating to employment and economic activity should arise, the provisions on nullification and impairment could be invoked.²²⁰

Article XI has been amended only once. In the Review Session it was agreed to move the former paragraph 3 of Article XI into an interpretative note and to add a reference in that note to Article XVIII (which had been revised into its present form at the Review Session).²²¹ A number of other amendments were considered and rejected in the Review Session Working Party on Quantitative Restrictions; see the documents listed below.

IV. RELEVANT DOCUMENTS

London

Discussion: EPCT/C.II/27, 36, 45;
EPCT/C.II/QR/PV/1, 4, 5
(part 3);
EPCT/C.II/PV/4, 5, 13
Reports: EPCT/C.II/36, 43, 59; EPCT/30

New York

Discussion: EPCT/C.6/17, 20, 21, 27, 64,
106
Reports: EPCT/C.6/14, 97/Rev.1
Other: EPCT/C.6/W/5, 16, 17, 29, 43
and Corr.1, 70, 72

Geneva

Discussion: EPCT/EC/PV.2/22
EPCT/A/SR.19, 21, 22, 23, 26,
30 (p. 6), 40(1);
EPCT/A/PV/19, 22 and Corr. 1-
5, 23 and Corr. 1-2, 41
EPCT/TAC/SR.11, 13
EPCT/TAC/PV/27, 28
Reports: EPCT/135, 189, 196, 212,
214/Add.1/Rev.1
Other: EPCT/141, 162, 163, 164,
EPCT/W/64, 75, 196, 199, 208,
217, 218, 223, 272, 280, 301,
313, 318

Havana

Discussion: E/CONF.2/C.3/SR.10, 12, 14,
16, 18, 19, 37, 41
Reports: E/CONF.2/19, 23
E/CONF.2/C.3/54, 66
Other: E/CONF.2/C.3/E/W.3, 11, 16, 18

Review Session

Reports: Spec/74/55, W.9/230 and Add. 1,
L/332/Rev.1 and Adds., 3S/170
Discussion: SR.9/25, 26, 44
Other: L/261/Add.1, 273, 282
W.9/24, 66, 88, 89, 116, 126-
128, 160, 202
Sec/146/54, 157/54, 161/54
Spec/62/55, 76/55, 95/55 and
Rev.1-2, 105/55, 151/55, 167/55,
170/55

²²⁰EPCT/TAC/SR.13, pp. 4-5.

²²¹Protocol Amending the Preamble and Parts II and III of the General Agreement, as rectified by Procès-Verbal of Rectification concerning (*inter alia*) this Protocol; both entered into effect 7 October 1957.

ARTICLE XII

RESTRICTIONS TO SAFEGUARD THE BALANCE OF PAYMENTS

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I. TEXT OF ARTICLE XII, RELEVANT INTERPRETATIVE NOTES AND UNDERSTANDING ON THE BALANCE-OF-PAYMENTS PROVISIONS OF GATT 1994

Article XII*

Restrictions to Safeguard the Balance of Payments

1. Notwithstanding the provisions of paragraph 1 of Article XI, any contracting party, in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be imported, subject to the provisions of the following paragraphs of this Article.

2. (a) Import restrictions instituted, maintained or intensified by a contracting party under this Article shall not exceed those necessary:

- (i) to forestall the imminent threat of, or to stop, a serious decline in its monetary reserves, or
- (ii) in the case of a contracting party with very low monetary reserves, to achieve a reasonable rate of increase in its reserves.

Due regard shall be paid in either case to any special factors which may be affecting the reserves of such contracting party or its need for reserves, including, where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.

(b) Contracting parties applying restrictions under sub-paragraph (a) of this paragraph shall progressively relax them as such conditions improve, maintaining them only to the extent that the conditions specified in that sub-paragraph still justify their application. They shall eliminate the restrictions when conditions would no longer justify their institution or maintenance under that sub-paragraph.

3. (a) Contracting parties undertake, in carrying out their domestic policies, to pay due regard to the need for maintaining or restoring equilibrium in their balance of payments on a sound and lasting basis and to the desirability of avoiding an uneconomic employment of productive resources. They recognize that, in order to achieve these ends, it is desirable so far as possible to adopt measures which expand rather than contract international trade.

(b) Contracting parties applying restrictions under this Article may determine the incidence of the restrictions on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential.

(c) Contracting parties applying restrictions under this Article undertake:

- (i) to avoid unnecessary damage to the commercial or economic interests of any other contracting party;*
- (ii) not to apply restrictions so as to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and
- (iii) not to apply restrictions which would prevent the importation of commercial samples or prevent compliance with patent, trade mark, copyright, or similar procedures.

(d) The contracting parties recognize that, as a result of domestic policies directed towards the achievement and maintenance of full and productive employment or towards the development of economic resources, a contracting party may experience a high level of demand for imports involving a threat to its monetary reserves of the sort referred to in paragraph 2 (a) of this Article. Accordingly, a contracting party otherwise complying with the provisions of this Article shall not be required to withdraw or modify restrictions on the ground that a change in those policies would render unnecessary restrictions which it is applying under this Article.

4. (a) Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Article shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance of payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties.

(b) On a date to be determined by them,* the CONTRACTING PARTIES shall review all restrictions still applied under this Article on that date. Beginning one year after that date, contracting parties applying import restrictions under this Article shall enter into consultations of the type provided for in sub-paragraph (a) of this paragraph with the CONTRACTING PARTIES annually.

(c) (i) If, in the course of consultations with a contracting party under sub-paragraph (a) or (b) above, the CONTRACTING PARTIES find that the restrictions are not consistent with provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV), they shall indicate the nature of the inconsistency and may advise that the restrictions be suitably modified.

(ii) If, however, as a result of the consultations, the CONTRACTING PARTIES determine that the restrictions are being applied in a manner involving an inconsistency of a serious nature with the provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV) and that damage to the trade of any contracting party is caused or threatened thereby, they shall so inform the contracting party applying the restrictions and shall make appropriate recommendations for securing conformity with such provisions within the specified period of time. If such contracting party does not comply with these recommendations within the specified period, the CONTRACTING PARTIES may release any contracting party the trade of which is adversely affected by the restrictions from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(d) The CONTRACTING PARTIES shall invite any contracting party which is applying restrictions under this Article to enter into consultations with them at the request of any contracting party which can establish a *prima facie* case that the restrictions are inconsistent with the provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV) and that its trade is adversely affected thereby. However, no such invitation shall be issued unless the CONTRACTING PARTIES have ascertained that direct discussions between the contracting parties concerned have not been successful. If, as a result of the consultations with the CONTRACTING PARTIES, no agreement is reached and they determine that the restrictions are being applied inconsistently with such provisions, and that damage to the trade of the contracting party initiating the procedure is caused or threatened thereby, they shall recommend the withdrawal or modification of the restrictions. If the restrictions are not withdrawn or modified within such time as the CONTRACTING PARTIES may prescribe, they may release the

contracting party initiating the procedure from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(e) In proceeding under this paragraph, the CONTRACTING PARTIES shall have due regard to any special external factors adversely affecting the export trade of the contracting party applying the restrictions.*

(f) Determinations under this paragraph shall be rendered expeditiously and, if possible, within sixty days of the initiation of the consultations.

5. If there is a persistent and widespread application of import restrictions under this Article, indicating the existence of a general disequilibrium which is restricting international trade, the CONTRACTING PARTIES shall initiate discussions to consider whether other measures might be taken, either by those contracting parties the balances of payments of which are under pressure or by those the balances of payments of which are tending to be exceptionally favourable, or by any appropriate intergovernmental organization, to remove the underlying causes of the disequilibrium. On the invitation of the CONTRACTING PARTIES, contracting parties shall participate in such discussions.

Interpretative Notes from Annex I

Ad Article XII

The CONTRACTING PARTIES shall make provision for the utmost secrecy in the conduct of any consultation under the provisions of this Article.

Paragraph 3 (c)(i)

Contracting parties applying restrictions shall endeavour to avoid causing serious prejudice to exports of a commodity on which the economy of a contracting party is largely dependent.

Paragraph 4 (b)

It is agreed that the date shall be within ninety days after the entry into force of the amendments of this Article effected by the Protocol Amending the Preamble and Parts II and III of this Agreement. However, should the CONTRACTING PARTIES find that conditions were not suitable for the application of the provisions of this sub-paragraph at the time envisaged, they may determine a later date; *Provided* that such date is not more than thirty days after such time as the obligations of Article VIII, Sections 2, 3 and 4, of the Articles of Agreement of the International Monetary Fund become applicable to contracting parties, members of the Fund, the combined foreign trade of which constitutes at least fifty per centum of the aggregate foreign trade of all contracting parties.

Paragraph 4 (e)

It is agreed that paragraph 4 (e) does not add any new criteria for the imposition or maintenance of quantitative restrictions for balance of payments reasons. It is solely intended to ensure that all external factors such as changes in the terms of trade, quantitative restrictions, excessive tariffs and subsidies, which may be contributing to the balance of payments difficulties of the contracting party applying restrictions, will be fully taken into account.

Ad Articles XI, XII, XIII, XIV and XVIII

Throughout Articles XI, XII, XIII, XIV and XVIII, the terms "import restrictions" or "export restrictions" include restrictions made effective through state-trading operations.

UNDERSTANDING ON THE BALANCE-OF-PAYMENTS PROVISIONS
OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members,

Recognizing the provisions of Articles XII and XVIII:B of GATT 1994 and of the Declaration on Trade Measures Taken for Balance-of-Payments Purposes adopted on 28 November 1979 (BISD 26S/205-209, referred to in this Understanding as the "1979 Declaration") and in order to clarify such provisions¹;

Hereby agree as follows:

Application of Measures

1. Members confirm their commitment to announce publicly, as soon as possible, time-schedules for the removal of restrictive import measures taken for balance-of-payments purposes. It is understood that such time-schedules may be modified as appropriate to take into account changes in the balance-of-payments situation. Whenever a time-schedule is not publicly announced by a Member, that Member shall provide justification as to the reasons therefor.
2. Members confirm their commitment to give preference to those measures which have the least disruptive effect on trade. Such measures (referred to in this Understanding as "price-based measures") shall be understood to include import surcharges, import deposit requirements or other equivalent trade measures with an impact on the price of imported goods. It is understood that, notwithstanding the provisions of Article II, price-based measures taken for balance-of-payments purposes may be applied by a Member in excess of the duties inscribed in the Schedule of that Member. Furthermore, that Member shall indicate the amount by which the price-based measure exceeds the bound duty clearly and separately under the notification procedures of this Understanding.
3. Members shall seek to avoid the imposition of new quantitative restrictions for balance-of-payments purposes unless, because of a critical balance-of-payments situation, price-based measures cannot arrest a sharp deterioration in the external payments position. In those cases in which a Member applies quantitative restrictions, it shall provide justification as to the reasons why price-based measures are not an adequate instrument to deal with the balance-of-payments situation. A Member maintaining quantitative restrictions shall indicate in successive consultations the progress made in significantly reducing the incidence and restrictive effect of such measures. It is understood that not more than one type of restrictive import measure taken for balance-of-payments purposes may be applied on the same product.
4. Members confirm that restrictive import measures taken for balance-of-payments purposes may only be applied to control the general level of imports and may not exceed what is necessary to address the balance-of-payments situation. In order to minimize any incidental protective effects, a Member shall administer restrictions in a transparent manner. The authorities of the importing Member shall provide adequate justification as to the criteria used to determine which products are subject to restriction. As provided in paragraph 3 of Article XII and paragraph 10 of Article XVIII, Members may, in the case of certain essential products, exclude or limit the application of surcharges applied across the board or other measures applied for balance-of-payments purposes. The term "essential products" shall be understood to mean products which meet basic consumption needs or which contribute to the Member's effort to improve its balance-of-payments situation, such as capital goods or inputs needed for production. In the administration of quantitative restrictions, a Member shall use discretionary licensing only when unavoidable and shall phase it out progressively. Appropriate justification shall be provided as to the criteria used to determine allowable import quantities or values.

Procedures for Balance-of-Payments Consultations

5. The Committee on Balance-of-Payments Restrictions (referred to in this Understanding as the "Committee") shall carry out consultations in order to review all restrictive import measures taken for balance-of-payments purposes. The membership of the Committee is open to all Members indicating their wish to serve on it. The Committee shall follow the procedures for consultations on balance-of-payments restrictions approved on 28 April 1970 (BISD 18S/48-53, referred to in this Understanding as "full consultation procedures"), subject to the provisions set out below.
6. A Member applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures shall enter into consultations with the Committee within four months of the adoption of such measures. The Member adopting such measures may request that a consultation be held under paragraph 4(a) of Article XII or paragraph 12(a) of Article XVIII as appropriate. If no such request has been made, the Chairman of the Committee shall invite the Member to hold such a consultation. Factors that may be examined in the consultation would include, inter alia, the introduction of new types of restrictive measures for balance-of-payments purposes, or an increase in the level or product coverage of restrictions.
7. All restrictions applied for balance-of-payments purposes shall be subject to periodic review in the Committee under paragraph 4(b) of Article XII or under paragraph 12(b) of Article XVIII, subject to the possibility of altering the periodicity of consultations in agreement with the consulting Member or pursuant to any specific review procedure that may be recommended by the General Council.

¹Nothing in this Understanding is intended to modify the rights and obligations of Members under Articles XII or XVIII:B of GATT 1994. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of restrictive import measures taken for balance-of-payments purposes.

8. Consultations may be held under the simplified procedures approved on 19 December 1972 (BISD 20S/47-49, referred to in this Understanding as "simplified consultation procedures") in the case of least-developed country Members or in the case of developing country Members which are pursuing liberalization efforts in conformity with the schedule presented to the Committee in previous consultations. Simplified consultation procedures may also be used when the Trade Policy Review of a developing country Member is scheduled for the same calendar year as the date fixed for the consultations. In such cases the decision as to whether full consultation procedures should be used will be made on the basis of the factors enumerated in paragraph 8 of the 1979 Declaration. Except in the case of least-developed country Members, no more than two successive consultations may be held under simplified consultation procedures.

Notification and Documentation

9. A Member shall notify to the General Council the introduction of or any changes in the application of restrictive import measures taken for balance-of-payments purposes, as well as any modifications in time-schedules for the removal of such measures as announced under paragraph 1. Significant changes shall be notified to the General Council prior to or not later than 30 days after their announcement. On a yearly basis, each Member shall make available to the Secretariat a consolidated notification, including all changes in laws, regulations, policy statements or public notices, for examination by Members. Notifications shall include full information, as far as possible, at the tariff-line level, on the type of measures applied, the criteria used for their administration, product coverage and trade flows affected.

10. At the request of any Member, notifications may be reviewed by the Committee. Such reviews would be limited to the clarification of specific issues raised by a notification or examination of whether a consultation under paragraph 4(a) of Article XII or paragraph 12(a) of Article XVIII is required. Members which have reasons to believe that a restrictive import measure applied by another Member was taken for balance-of-payments purposes may bring the matter to the attention of the Committee. The Chairman of the Committee shall request information on the measure and make it available to all Members. Without prejudice to the right of any member of the Committee to seek appropriate clarifications in the course of consultations, questions may be submitted in advance for consideration by the consulting Member.

11. The consulting Member shall prepare a Basic Document for the consultations which, in addition to any other information considered to be relevant, should include: (a) an overview of the balance-of-payments situation and prospects, including a consideration of the internal and external factors having a bearing on the balance-of-payments situation and the domestic policy measures taken in order to restore equilibrium on a sound and lasting basis; (b) a full description of the restrictions applied for balance-of-payments purposes, their legal basis and steps taken to reduce incidental protective effects; (c) measures taken since the last consultation to liberalize import restrictions, in the light of the conclusions of the Committee; (d) a plan for the elimination and progressive relaxation of remaining restrictions. References may be made, when relevant, to the information provided in other notifications or reports made to the WTO. Under simplified consultation procedures, the consulting Member shall submit a written statement containing essential information on the elements covered by the Basic Document.

12. The Secretariat shall, with a view to facilitating the consultations in the Committee, prepare a factual background paper dealing with the different aspects of the plan for consultations. In the case of developing country Members, the Secretariat document shall include relevant background and analytical material on the incidence of the external trading environment on the balance-of-payments situation and prospects of the consulting Member. The technical assistance services of the Secretariat shall, at the request of a developing country Member, assist in preparing the documentation for the consultations.

Conclusions of Balance-of-Payments Consultations

13. The Committee shall report on its consultations to the General Council. When full consultation procedures have been used, the report should indicate the Committee's conclusions on the different elements of the plan for consultations, as well as the facts and reasons on which they are based. The Committee shall endeavour to include in its conclusions proposals for recommendations aimed at promoting the implementation of Articles XII and XVIII:B, the 1979 Declaration and this Understanding. In those cases in which a time-schedule has been presented for the removal of restrictive measures taken for balance-of-payments purposes, the General Council may recommend that, in adhering to such a time-schedule, a Member shall be deemed to be in compliance with its GATT 1994 obligations. Whenever the General Council has made specific recommendations, the rights and obligations of Members shall be assessed in the light of such recommendations. In the absence of specific proposals for recommendations by the General Council, the Committee's conclusions should record the different views expressed in the Committee. When simplified consultation procedures have been used, the report shall include a summary of the main elements discussed in the Committee and a decision on whether full consultation procedures are required.

II. INTERPRETATION AND APPLICATION OF ARTICLE XII

A. SCOPE AND APPLICATION OF ARTICLE XII

1. General

The present text of Articles XII and XVIII was agreed in the 1954-55 Review Session, and entered into effect in October 1957. The principal source concerning the drafting of these provisions is the Report of the Review Working Party on "Quantitative Restrictions"². This Report notes generally concerning Article XII:

"After a detailed consideration of the various proposals put forward with a view to establishing stricter rules for the introduction and maintenance of quantitative restrictions through the institution of fixed time-limits and approval by the CONTRACTING PARTIES, the Working Party came to the conclusion that such proposals would not find general acceptance among the contracting parties, but that, on the other hand, the general opinion was in favour of strengthening and widening the scope of consultations under Article XII, as well as under Article XIV. Consequently, the new text of the first three paragraphs of Article XII does not involve any change of substance. Their provisions have been rearranged in order to improve the language and to set them out in a better logical sequence ...".³

Articles XII and XVIII:B have been amplified by detailed consultation procedures introduced in 1970, by "simplified" consultation procedures for developing countries introduced in 1972, and by provisions on the application of the Articles and consultation procedures laid down in the 1979 Declaration on Trade Measures Taken for Balance-of-Payments Purposes, which extend GATT examination under the balance-of-payments provisions from quantitative restrictions alone to all trade measures taken for balance-of-payments purposes. Section II(C) of this chapter discusses the consultation procedures applicable to such measures generally under Articles XII and XVIII.

2. Paragraph 1

(1) *"any contracting party": member States of the EEC*

At the Twelfth Session in 1957, four sub-groups were appointed to examine the relevant provisions of the Treaty of Rome in the light of the provisions of the General Agreement. The Report of Sub-Group B, which examined those provisions of the Treaty relating to quantitative restrictions notes as follows:

"Members of the Sub-Group expressed concern that under the Rome Treaty provisions a Member State would be permitted to use quantitative restrictions not justified by its own balance-of-payments position. They recognized that this cause for concern would be removed if at some future stage the integration of the economies of the Six proceeded to the point that they held their foreign exchange reserves in common.

"The Six [EEC member States] considered that the opening phrase of paragraph 5 of Article XXIV provided a general exception under which they were entitled to deviate from the other provisions of the General Agreement, including Articles XI to XIV, insofar as the application of these provisions would constitute obstacles to the formation of the customs union and to the achievement of its objectives ..."

"Most members of the Sub-Group had a different interpretation of Article XXIV. In their view countries entering a customs union would continue to be governed by the provisions of Article XI prohibiting the use of quantitative restrictions as well as by the other provisions of the Agreement which provided certain exceptions permitting the use of quantitative restrictions where necessary to deal with balance-of-payments difficulties ... Since paragraph 8(a)(i) permitted where necessary the use of quantitative restrictions for balance-of-payments reasons, it followed that the use of quantitative restrictions by individual countries within the union for these reasons could not be regarded as preventing the formation of a customs union as defined in Article XXIV.

²L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170-185.

³*Ibid.*, 3S/171, para. 4.

“Most members of the Sub-Group could not accept the interpretation of the Six of paragraph 5(a). In their view the use of the term ‘regulations’ in this paragraph and in paragraph 8(a)(ii) does not include quantitative restrictions imposed for balance-of-payments reasons ... the term ‘regulation’ does not occur in the balance-of-payments Articles of the General Agreement. The General Agreement prohibits the use of quantitative restrictions for protective purposes and permits their use only in exceptional circumstances and mainly to deal with balance-of-payments difficulties. Accordingly, the notion that paragraph 5(a) would require that temporary quantitative restrictions should be treated in the same way as normal protective measures such as tariffs in determining the trade relations between countries in a customs union and third countries would be contrary to the basic provisions of the Agreement which preclude the use of quantitative restrictions as an acceptable protective instrument.

...

“Most members of the Sub-Group believed that the imposition of common quotas by the Six, quite apart from being contrary to Article XII of the GATT, would be contrary to fundamental economic reasoning unless they held their reserves in common. Common quotas could mean that a member of the customs union in balance-of-payments difficulties would be unable to apply restrictions appropriate to its particular difficulties while other members would be applying restrictions not required or justified by their payments position. ...

“Most members of the Sub-Group emphasized that if the Six were individually no longer to be bound by the balance-of-payments provisions of the Agreement permitting the use of quantitative restrictions only in carefully defined circumstances, then the balance of rights and obligations under the Agreement would be impaired.

...

“The Sub-Group took the view that Member States of the Six as regards their individual use of quantitative restrictions should be subject to the consultation procedures applicable to other contracting parties in like circumstances, and agreed that it would not be proper to envisage special consultation procedures. If in the application of the provisions of the Treaty any Member country found it necessary to take action which would bring into play the consultation provisions of the General Agreement, then the country concerned would fulfil its obligations under GATT.”⁴

(2) “in order to safeguard its external financial position and its balance of payments”

When this wording was proposed during the Geneva session of the Preparatory Committee, it was indicated that it would eliminate the risk that the provision “could be interpreted to mean that import restrictions were not ‘necessary’ (and therefore were not permitted) until every other possible corrective measure (such as exchange controls, exchange depreciation, etc.) had been tried and found inadequate”⁵. It was also stated that it remained clear, of course, that the Organization had the right during the course of consultation with the Members fully to discuss and recommend alternative action which a Member might take to meet its difficulties.⁶

(3) “may restrict the quantity or value of merchandise permitted to be imported”: Quantitative and other trade measures for balance-of-payments purposes, including import surcharges and import deposit schemes

Import surcharges and import deposit schemes for balance-of-payments purposes are governed by the 1979 Declaration on “Trade Measures taken for Balance-of-Payments Purposes”⁷ which specifies that “The procedures for examination stipulated in Articles XII and XVIII shall apply to all restrictive import measures taken for balance-of-payments purposes”. The history of the treatment of such schemes in the GATT 1947 divides into two

⁴L/778, adopted on 29 November 1957, 6S/70, 76-80, paras. 2-5, 7-8, 11.

⁵EPCT/W/223, p. 13.

⁶*Ibid.*, p. 15.

⁷L/4904, adopted on 28 November 1979, 26S/205.

periods, before and after the adoption of the Declaration. In this connection see also the provisions of the Understanding on the Balance-of-Payment Provisions of the GATT 1994.

(a) *Treatment of import surcharges prior to 1979*

The 1979 Declaration reflected the use of import surcharges and import deposit schemes for balance-of-payments purposes in the fifteen years preceding, as well as the practice developed by the Committee on Balance-of-Payments Restrictions and discussed below. In 1964, the Committee on Legal and Institutional Framework, which prepared the text of Part IV of the General Agreement, had also recommended an amendment to Section B of Article XVIII to permit a less-developed contracting party to use temporary import surcharges, in place of quantitative restrictions, to safeguard its balance of payments.⁸ This Recommendation had been referred to the Committee on Trade and Development which debated the question in an Ad Hoc Group on Legal Amendments during 1965-1966, and agreed to defer consideration of the issue indefinitely.⁹

In a review of its work in the 1970-74 period, the Committee on Balance-of-Payments Restrictions reported to the Council in 1975 that:

“Surcharges appear to have been applied in twenty-four cases, involving twenty-three contracting parties. The Balance-of-Payments Committee discussed, examined or generally dealt with ten of these cases. In two cases only did it recommend a waiver - Uruguay and Turkey. Both these cases involved extensions of waivers granted originally in 1961 and 1963, making it difficult for the Committee to depart from established practice. In two other cases - Israel and Yugoslavia - the Committee adopted a new approach by assimilating the surcharge to quantitative restrictions applied for balance-of-payments reasons, thus dispensing with the formalities of a waiver. In the other six cases, the surcharges were discussed, not always in detail, in the course of the consultations. It is not within the Committee's terms of reference to recommend a waiver unless it has been assigned the task by the Council. There seems to be a trend on the part of Committee members towards adopting gradually a more flexible approach, rather than emphasize the legal requirements of GATT.

“Of the twenty-four different surcharges, five cases were dealt with in other GATT bodies (Denmark, India, Indonesia, Pakistan and United States); three of which resulting in waivers. Further, nine cases were not brought to the attention of contracting parties.”¹⁰

“In the case of import surcharges on bound items, the decision to be taken, according to the General Agreement, is whether or not to grant a waiver (Article XXV:5). In examining import surcharges, the Committee's main concern has never been the question of whether or not it should recommend to the CONTRACTING PARTIES the validation of the measure through a waiver. The Committee's conclusions have focused instead on the question of whether the surcharges meet the criteria set forth in the General Agreement for import restrictions. A typical example is the 1970 consultation on the Yugoslav special import charge. Here the Committee decided to recommend to the Council to take note of the surcharge on the understanding ‘that all the conditions and criteria embodied in the appropriate provisions of the General Agreement concerning the use of quantitative restrictions for balance-of-payments reasons should be deemed applicable in respect of this import charge’. A similar approach was adopted in three other cases (1971 Israel; 1974 Israel; 1974 Yugoslavia). The Committee's decisions assimilating surcharges to the procedures and criteria for import restrictions were adopted unanimously. In the 1971 Israel consultation, however, the representative of Japan asked to have his view recorded in the conclusions that the case should not be regarded as a precedent.

“The Committee's approach towards import surcharges during the past five years contrasts with a more formal approach of the CONTRACTING PARTIES in the early 1960s when waivers for surcharges, at least when imposed by developing countries, were frequently granted. ...

⁸L/2281, para. 7 and Annex II; L/2297, para. 6.

⁹13S/76; 14S/141. See also COM.TD/F/W/3, Note by the Secretariat done for the Ad-Hoc Group on “The Use of Import Surcharges by Contracting Parties”, dated 25 May 1965.

¹⁰L/4200, paras. 31-32.

“The procedural assimilation of surcharges to import restrictions by the Committee does not, of course, change the rights of contracting parties affected by surcharges. The Committee, in some of its conclusions on surcharges re-affirmed the rights of affected countries by stating that the decision to take note by the Council would in no way preclude recourse to the appropriate provisions of the General Agreement by any contracting party which considered that any benefits accruing to it under Article II of the Agreement in respect of any bound item were nullified or impaired as a consequence of the surcharge.”¹¹

In 1964 the United Kingdom gave notice of its decision to impose a temporary import surcharge in order to safeguard the external financial position of the United Kingdom and its balance of payments; the United Kingdom invoked the provisions of Article XII as justification while recognizing that “the type of restriction on imports there envisaged was the use of quantitative restrictions”. The Council, while “bearing in mind that Article XII envisaged that any necessary restraint on imports would be by way of quantitative restrictions”, appointed a Working Party of which the terms of reference were identical to those stated in Article XII:4(a), with the addition: “as to the nature of the measures taken”.¹²

In 1971, the United States introduced a temporary import surcharge in conjunction with changes in exchange rate policy and a domestic wage and price freeze. The Report of the Working Party on “United States Temporary Import Surcharge” examined the surcharge and noted that “The United States, taking into account the findings of the IMF, considered itself entitled under Article XII to apply quantitative restrictions to safeguard its external financial position and balance of payments but had chosen instead to apply surcharges which were less damaging to world trade. ... The other members of the Working Party ... noted that the surcharge, to the extent that it raised the incidence of customs charges beyond the maximum rates bound under Article II, was not compatible with the provisions of the General Agreement”.¹³

The Report in 1972 of the Working Party on the “Danish Temporary Import Surcharge” notes that “Denmark, taking into account the findings of the International Monetary Fund, considered that, although the implementation of an import surcharge was not explicitly covered by any provision of the GATT, such action had been taken in the spirit of Article XII:2(a). Quantitative restrictions provided for in Article XII would have had a more serious effect on the interests of its trading partners ... The Working Party noted that the surcharge, to the extent that it raised the incidence of customs charges beyond the maximum rates bound under Article II, was not compatible with the provisions of the General Agreement”.¹⁴

(b) Treatment of import deposit schemes prior to 1979

In 1978, an import deposit scheme was examined by the Panel on “EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables”. The measure in dispute provided that importation of certain products would be conditional on production of a certificate; the issue of the certificate would be conditional on the lodging of a security to guarantee that the imports in question would be made, and an additional security to guarantee that the imports would be made at a minimum price. The United States argued that the minimum import price system operated as a charge on imports, and that charges in excess of bound duties were levied through lost interest, debt servicing, and clerical and administrative costs associated with the provision of security deposits, and through the forfeiture of security deposits if the importation did not occur within the 75-day validity of the licence or if the minimum import price was not respected.¹⁵ The Report of the Panel notes:

“... The Panel considered that these interest charges and costs were ‘other duties or charges of any kind imposed on or in connection with importation’ in excess of the bound rate within the meaning of Article II:1(b). Therefore, the Panel concluded that the interest charges and costs in connection with the

¹¹L/4200, paras. 40-42. See also BOP Committee Reports referred to on Yugoslavia in 1970 (BOP/R/48, p. 10); Israel 1971 (BOP/R/54, page 8 with Japanese reservation at p. 8); Israel 1974 (BOP/R/78, page 6); Yugoslavia 1974 (BOP/R/74 p. 7).

¹²L/2676, adopted on 17 November 1966, 15S/113, 113-114, paras. 2-4.

¹³L/3573, adopted on 16 September 1971, 18S/212, 222-223, para. 41.

¹⁴L/3648, adopted on 12 January 1972, 19S/120, 129, paras. 36-37.

¹⁵L/4687, adopted on 18 October 1978, 25S/68, 87-88, para. 3.56.

lodging of the additional security associated with the minimum import price for tomato concentrates were inconsistent with the obligations of the Community under Article II:1(b).¹⁶

On the relevance of this Panel finding for the consideration in the Committee on Balance-of-Payments Restrictions of whether import deposit requirements are “charges” in terms of Article II:1(b), see, for example, the 1980 consultations with Israel¹⁷ and the 1981 consultation with Italy on the Italian deposit requirement for purchases of foreign currency.¹⁸

Concerning the treatment of import deposit schemes prior to 1978, the Balance-of-Payments Committee reported to the Council in its review of its work in 1970-74 that:

“Seventeen different import deposit requirements appear to have been applied involving sixteen contracting parties. The Balance-of-Payments Committee discussed or examined seven different cases. The Committee has generally referred to the measures in its conclusions, though without giving much emphasis; it has either noted or welcomed reduction of rates, or hoped or called for early phase-out or removal. In three cases the import deposits were discussed in the course of the consultations but not mentioned in the conclusions (Argentina, Korea and Uruguay).

“Three cases of import deposits were examined in other GATT bodies - United Kingdom, Italy and Iceland, none of which were invoking Article XII at the time, but all of which invoked balance-of-payments reasons.

“Seven cases were not notified to GATT and were not discussed in GATT bodies”.¹⁹

“... the CONTRACTING PARTIES have not decided whether a deposit requirement in respect of bound items is a ‘charge ... imposed on or in connection with importation’ or, more generally, a ‘treatment ... less favourable than that provided for in the appropriate ... Schedule’, and therefore contrary to Article II.

“Possibly as a result of this, the conclusions on import deposits have generally been vague and have avoided any connotation of approval or disapproval. A typical example is the 1974 consultation with Greece in which the Committee merely ‘noted the intention of Greece to continue reducing the rates of the prior import deposit scheme’. There was no case where an import deposit scheme was found to be violating the General Agreement’s financial or commercial criteria for import restrictions”.²⁰

In 1968, the United Kingdom introduced an import deposit scheme “as a measure necessary to accelerate progress in bringing the United Kingdom balance of payments into surplus”. This measure was examined in the Working Party on “United Kingdom Import Deposits” which consulted with the International Monetary Fund and concluded that “the deposits were not more restrictive than measures that an application of the provisions of Article XII permits”.²¹ The scheme was terminated on 4 December 1970.²² The 1974 Report of the Working Party on “Italian Import Deposit” notes that “there was a wide measure of support for the conclusion that the Italian import deposit scheme was not more restrictive than measures that an application of the provisions of Article XII of the GATT permits”.²³ In the Report in 1976 of the Working Party on the “New Zealand Import Deposit Scheme” it is noted: “The Working Party agreed that the New Zealand import deposit scheme applied on a temporary basis was not more restrictive than an application of the provisions of Article XII of the General Agreement. Noting that New Zealand was not invoking the provisions of Article XII or any other provision of the General Agreement, the Working Party agreed that this conclusion was without prejudice to the rights and obligations of contracting parties under the General Agreement”.²⁴

¹⁶*Ibid.*, 25S/103, para. 4.15.

¹⁷BOP/W/37, para. 8.

¹⁸BOP/R/119; BOP/W/51, para. 8.

¹⁹L/4200, p. 11, paras. 34-36.

²⁰*Ibid.*, p. 13, paras. 43-44.

²¹L/3193, adopted on 15 April 1969, 17S/144, 149, para. 17.

²²18S/212.

²³L/4082, adopted on 21 October 1974, 21S/121, 125, para. 13.

²⁴L/4363, adopted on 15 July 1976, 23S/84, 91, para. 24.

(c) *Practice since 1979*

On 28 November 1979 the CONTRACTING PARTIES adopted the Declaration on "Trade Measures taken for Balance-of-Payments Purposes"²⁵ which notes in its preamble that "restrictive import measures other than quantitative restrictions have been used for balance-of-payments purposes", and provides:

"1. The procedures for examination stipulated in Articles XII and XVIII shall apply to all restrictive import measures taken for balance-of-payments purposes. The application of restrictive import measures taken for balance-of-payments purposes shall be subject to the following conditions in addition to those provided for in Articles XII, XIII, XV and XVIII without prejudice to other provisions of the General Agreement:

"(a) In applying restrictive import measures contracting parties shall abide by the disciplines provided for in the GATT and give preference to the measure which has the least disruptive effect on trade²⁶;

"(b) The simultaneous application of more than one type of trade measure for this purpose should be avoided; ...

"The provisions of this paragraph are not intended to modify the substantive provisions of the General Agreement. ...

"4. All restrictive import measures taken for balance-of-payments purposes shall be subject to consultation in the GATT Committee on Balance-of-Payments Restrictions".

Thus, since 1979, in principle, all restrictive import measures, including but not limited to quantitative restrictions, surcharges and import deposit requirements, have been subject to examination in the Committee and not to examination by special working parties. The 1979 Declaration followed on discussions prior to and during the Tokyo Round of multilateral trade negotiations.²⁷

The 1981 Report of the Committee on Balance-of-Payments Restrictions on the "Italian Deposit Requirement for Purchases of Foreign Currency" notes the view of the Italian Government "that the GATT rules on trade measures taken for balance-of-payments purposes did not apply to the deposit scheme because it was of a monetary nature and its main and primary effects were financial and monetary". The Committee concluded, *inter alia*, "that the deposit scheme, though monetary in form, had some effect on trade and that, in so far as these trade effects were concerned, the scheme could be considered in the spirit of the Declaration on Trade Measures Taken for Balance-of-Payments Purposes".²⁸ The deposit scheme was terminated on 7 February 1982.²⁹

Surcharges for balance-of-payments reasons were notified under Article XII by the Czech and Slovak Republic in January 1991, by Poland in December 1992, and by the Slovak Republic in March 1994.³⁰ Surcharges for balance-of-payments reasons were notified under Article XVIII:B by Israel in September 1982 and by South Africa without reference to either Article XVIII:B or Article XII in September 1988.³¹

²⁵L/4904, adopted on 28 November 1979, 26S/205.

²⁶A footnote to paragraph 1(a) of the Declaration states: "It is understood that the less developed contracting parties must take into account their individual development, financial and trade situation when selecting the particular measure to be applied."

²⁷See, e.g., CG.18/W/5, 19 February 1976, at p. 3; CG.18/W/7; CG.18/W/8; CG.18/W/9 and Rev.1; 1976-1978 Report of the Consultative Group of Eighteen: L/4429, 23S/38, 43-45, paras. 19-25; L/4585, 24S/58, 59-60, paras. 7-9; L/4715, 25S/37, 38-39, paras. 6-7. See also Tokyo Round negotiating documents including MTN/FR/W/1, MTN/FR/W/2, MTN/FR/W/10, MTN/FR/W/12, MTN/FR/W/13, MTN/INF/16, MTN/INF/25 and Rev.1, MTN/FR/4.

²⁸BOP/R/119, adopted on 3 November 1981, C/M/152.

²⁹L/5162/Add.3.

³⁰Czech and Slovak Republic: see L/6812 and Add.1-2; see also BOP/R/193, C/W/693, C/M/254. The Czech and Slovak Republic ceased to exist on 31 December 1992 and the surcharge was abolished at that time. Poland: see L/7164, C/RM/G/31, BOP/R/206, notification in L/7461 of extension of surcharge to 17 December 1997, BOP/W/154, BOP/317 and BOP/R/216. Slovak Republic: see L/7428, BOP/W/156, BOP/319, BOP/R/218.

³¹Israel: see L/5361 (notification), BOP/R/195, BOP/307, C/M/254 p. 3-4, L/7092, BOP/R/210, BOP/R/213, BOP/R/215. South Africa: see L/5898 (imposition), L/5898/Add.1-3 (changes); see also L/7084, C/M/259 p. 62-63, C/M/260 p. 12, BOP/R/211. Both Israel and South Africa consulted in the Committee on Balance-of-Payments Restrictions without reference to either Article XII or XVIII; see at page 378

Paragraphs 2 and 3 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provide as follows:

“Members confirm their commitment to give preference to those measures which have the least disruptive effect on trade. Such measures (referred to in this Understanding as ‘price-based measures’) shall be understood to include import surcharges, import deposit requirements or other equivalent trade measures with an impact on the price of imported goods. It is understood that, notwithstanding the provisions of Article II, price-based measures taken for balance-of-payments purposes may be applied by a Member in excess of the duties inscribed in the Schedule of that Member. Furthermore, that Member shall indicate the amount by which the price-based measure exceeds the bound duty clearly and separately under the notification procedures of this Understanding.

“Members shall seek to avoid the imposition of new quantitative restrictions for balance-of-payments purposes unless, because of a critical balance-of-payments situation, price-based measures cannot arrest a sharp deterioration in the external payments position. In those cases in which a Member applies quantitative restrictions, it shall provide justification as to the reasons why price-based measures are not an adequate instrument to deal with the balance-of-payments situation. ... It is understood that not more than one type of restrictive import measure taken for balance-of-payments purposes may be applied on the same product.”

Concerning import surcharges and import deposit schemes, see also Article II.

3. Paragraph 2

(1) *“Import restrictions ... shall not exceed those necessary”*

Paragraph 4 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provides *inter alia* that “Members confirm that restrictive import measures taken for balance-of-payments purposes may only be applied to control the general level of imports and may not exceed what is necessary to address the balance-of-payments situation.”

(2) *“a serious decline in its monetary reserves”*

Article XV:2 provides that “The CONTRACTING PARTIES, in reaching their final decision in cases involving the criteria set forth in paragraph 2(a) of Article XII ... shall accept the determination of the Fund as to what constitutes a serious decline in the contracting party’s monetary reserves, a very low level of its monetary reserves or a reasonable rate of increase in its monetary reserves, and as to the financial aspects of other matters covered in consultation in such cases”.

During discussions at the Havana Conference, it was stated that

“The seriousness of a decline in reserves depended on a number of factors such as the size of a country, its need for reserves, the variability of its trade and the size of the reserves. Neither the absolute amount of the decline nor the proportionate amount would be valid in all cases as the criterion of the seriousness of the decline”.³²

(3) *“special factors which may be affecting the reserves of such contracting party or its need for reserves”*

The report of discussions at the London session of the Preparatory Committee notes that

“There are, however, many factors to which due regard must be paid ... There may be special non-recurrent movements of funds affecting a country’s reserves, a country may have special credits outside its monetary reserves which it might be expected to use to a proper extent and at a proper rate to meet a strain on its external position, a country which has high reserves may, nevertheless, have high future commitments or

below.

³²E/CONF.2/C.3/SR.38, p. 3.

probable drains upon its resources to meet in the near future. All such factors will have to be taken into account in interpreting movements in a country's reserves".³³

Also, the report of discussions at the Havana Conference notes that

"It was the view of the Sub-Committee that the present text of Article 21 [XII] made adequate provisions for many of the considerations put forward by the delegates of Venezuela and Uruguay. ... It was pointed out that a country exporting principally a small number of products would, in like conditions, probably be considered to have need for greater reserves than a country exporting a large variety of products, particularly if the exports were exhaustible or subject to considerable fluctuations of supply or price. A country actively embarked on a programme of economic development which is raising levels of production and foreign trade would probably then be considered to have need for greater reserves than when its economic activity was at a lower level".³⁴

See also the discussion below under sub-paragraph 4(e) and at page 389 concerning consideration of external factors in balance-of-payments consultations.

(4) *Disinvocation of Article XII*

Contracting parties having disinvoked Article XII since 1979 are indicated in Table 2 at the end of this chapter. See also the Secretariat Note of 24 June 1988 on "Consultations Held in the Committee on Balance-of-Payments Restrictions under Articles XII and XVIII:B since 1975".³⁵

4. Paragraph 3

(1) *Paragraph 3(a): adjustment*

The 1950 Report of the Working Party on "The Use of Quantitative Restrictions for Protective and Commercial Purposes"³⁶ notes that

"In discussing the application of the Agreement to import restrictions applied for protective, promotional or other commercial purposes, the Working Party devoted its main attention to two points:

"(a) The fact that balance-of-payment restrictions almost inevitably have the incidental effect of protecting those domestic industries which produce the types of goods subject to restriction and of stimulating the development of those industries. Any consequent development of uneconomic production could interfere with the process of removing balance-of-payment restrictions as and when the justification for such restrictions under the Agreement disappears ...".

The report recommended a number of "methods whereby the undesirable incidental protective effects of balance-of-payment restrictions can be minimised": see below under paragraph 3(c).

The 1955 Report of the Review Working Party on "Quantitative Restrictions" notes that

"The Working Party considered a proposal to the effect that a provision be included in paragraph 3(c) requiring contracting parties to minimize the incidental protective effects of the restrictions. The Working Party, while in general agreement with the intent of the proposal, considered such a provision unnecessary; it was of the view that this had been adequately addressed by other provisions in the revised Article, including paragraph 3(a), which requires contracting parties to pay due regard to the desirability of avoiding uneconomic employment of productive resources, and paragraph 3(c)(i) under which contracting parties

³³London Report, p. 13, para. (c).

³⁴Havana Reports, p. 105, para. 11; see also E/CONF.2/C.3/SR.38, pp. 2-3.

³⁵MTN.GNG/NG7/W/46, para. 30.

³⁶GATT/CP.4/33 (Sales No. GATT/1950-3).

undertake to avoid unnecessary damage to the commercial and economic interests of any other contracting party”.³⁷

In the “Uruguayan Recourse to Article XXIII” in 1962, the complaint of Uruguay included, *inter alia*, balance-of-payments measures maintained by Denmark, Finland, and Japan. In each instance, the Panel Report noted that “the Panel would recall the view of contracting parties, as expressed in the consultations under Article XII:4, that the Government of [Denmark/Finland/Japan] should endeavour to ensure that the quantitative restrictions maintained under Article XII did not have incidental protective effects which would render their removal difficult when [Denmark/Finland/Japan] no longer had need to have recourse to Article XII”.³⁸

Paragraph 4 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provides *inter alia* that “In order to minimize any incidental protective effects, a Member shall administer restrictions in a transparent manner.”

(2) Paragraph 3(b): “to give priority to the importation of those products which are more essential”

The report of discussions at the London session of the Preparatory Committee notes that permission to give priority for the importation of certain more-essential products was expressly laid down “so that a Member can, if necessary, restrict the importation of consumer goods without restricting the importation of capital goods”.³⁹

Paragraph 4 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provides *inter alia* that:

“Members confirm that restrictive import measures taken for balance-of-payments purposes may only be applied to control the general level of imports The authorities of the importing Member shall provide adequate justification as to the criteria used to determine which products are subject to restriction. As provided in paragraph 3 of Article XII and paragraph 10 of Article XVIII, Members may, in the case of certain essential products, exclude or limit the application of surcharges applied across the board or other measures applied for balance-of-payments purposes. The term ‘essential products’ shall be understood to mean products which meet basic consumption needs or which contribute to the Member’s effort to improve its balance-of-payments situation, such as capital goods or inputs needed for production. ...

(3) Paragraph 3(c): application of restrictions under Article XII

(a) Conditions applicable to balance-of-payments measures

The Report of the Working Party on “The Use of Quantitative Restrictions for Protective and Commercial Purposes”,⁴⁰ adopted at the Fourth Session in 1951, recommended the following “methods by which countries applying balance-of-payment restrictions can seek to minimise the undesirable incidental protective effects resulting from such restrictions ... which countries might where possible employ in their own interests and in the spirit of the Agreement in order to stimulate efficiency on the part of their domestic industries and to prepare them for the time when import restrictions can be relaxed or removed”:

- “(a) avoiding encouragement of investment in enterprises which could not survive without this type of protection beyond the period in which quantitative restrictions may be legitimately maintained;
- “(b) finding frequent opportunities to impress upon producers who are protected by balance-of-payment restrictions the fact that these restrictions are not permanent and will not be maintained beyond the period of balance-of-payment difficulties;

³⁷L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 171, para. 5.

³⁸L/1923, adopted on 16 November 1962, 11S/95, Annexes E, F and J, at 11S/116 para. 4, 11S/119 para. 4, and 11S/133 para. 4.

³⁹London Report, p. 14, para. (r); see also EPCT/C.II/PV/13 p. 10.

⁴⁰GATT/CP.4/33 (Sales No. GATT/1950-3).

- “(c) administering balance-of-payment restrictions on a flexible basis and adjusting them to changing circumstances, thereby impressing upon the protected industries the impermanent character of the protection afforded by the restrictions;
- “(d) allowing the importation of ‘token’ amounts of products, which otherwise would be excluded on balance-of-payment grounds, in order to expose domestic producers of like commodities to at least some foreign competition and to keep such producers constantly aware of the need ultimately to be prepared to meet foreign competition;
- “(e) avoiding, as far as balance-of-payment and technical considerations permit, the allocation of quotas among supplying countries in favour of general licences unrestricted in amount or unallocated quotas applying non-discriminatorily to as many countries as possible; and
- “(f) avoiding as far as possible narrow classifications and restrictive definitions of products eligible to enter under any given quota.”⁴¹

“... the Working Party noted that there was evidence of a number of types of misuse of import restrictions, in particular:

- “(i) The maintenance by a country of balance-of-payment restrictions, which give priority to imports of particular products upon the basis of the competitiveness or non-competitiveness of such imports with a domestic industry, or which favour particular sources of supply upon a similar basis, in a manner inconsistent with the provisions of Articles XII to XIV. ... Such type of misuse, for example, might take the form of total prohibitions on the import of products competing with domestic products, or of quotas which are unreasonably small having regard to the exchange availability of the country concerned and to other relevant factors.
- “(ii) The imposition by a country of administrative obstacles to the full utilization of balance-of-payment import quotas, e.g., by delaying the issuance of licences against such quotas or by establishing licence priorities for certain imports on the basis of the competitiveness or non-competitiveness of such imports with the products of domestic industry, in a manner inconsistent with the provisions of Articles XII to XIV ...”⁴²

See also the discussion of the relationship between Article XXIII and Articles XII and XVIII, under Article XXIII.

In late 1950, at the Torquay Session the CONTRACTING PARTIES adopted a Working Party Report on a proposal for a Code of Standard Practices for the Administration of Import and Export Restrictions and Exchange Controls,⁴³ including the recommendations therein that the CONTRACTING PARTIES “approve the draft standards set out in the Annex to this Report [and] recommend these practices to the individual contracting parties as a code which they should endeavour to adopt to the maximum practicable extent”. The Report further provides:

“The Working Party considered that the proposed standards ... should be regarded as a code for the guidance of contracting parties and not as additional obligations imposed upon them under the General Agreement ... it was recognised that, where there are clear and overriding considerations, or in individual cases where there is good reason to suspect the bona fides of transactions in question, it may be necessary for contracting parties to depart from the precise terms of these recommendations”.

⁴¹*Ibid.*, para. 19.

⁴²*Ibid.*, para. 21.

⁴³GATT/CP.5/30/Rev.1; adopted on 30 November 1950, GATT/CP.5/SR.16 p. 2-4; preliminary draft at GATT/CP.5/8, discussion also at GATT/CP.5/SR.8, SR.9.

The provisions of this Code appear *in extenso* under Article XIII:3.

See also the provisions of the 1979 Declaration on “Trade Measures Taken for Balance-of-Payments Purposes” above at page 366 and paragraphs 1-4 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994.

(b) “to avoid unnecessary damage to the commercial or economic interests of any other contracting party”

See the Interpretative Note to paragraph 3(c)(i).

The 1979 Declaration on Trade Measures Taken for Balance-of-Payments Purposes also provides that “If, notwithstanding the principles of this Declaration, a developed contracting party is compelled to apply restrictive import measures for balance-of-payments purposes, it shall, in determining the incidence of its measures, take into account the export interests of the less-developed contracting parties and may exempt from its measures products of export interest to those contracting parties”.⁴⁴

In the Fifth Session in 1950, Belgium reported that it had carried out consultations under Article XXIII, and had reached a satisfactory resolution, concerning quantitative restrictions applied by the United Kingdom and France for protectionist purposes and which, in the view of the Belgian Government, were unnecessarily causing damage to the Belgian economy.⁴⁵

c) “description of goods”

During discussions at the Geneva session of the Preparatory Committee, it was stated that “whether you mean fountain pens as a class or each brand of fountain pen ... you certainly do not mean the importation of one particular kind”.⁴⁶

(d) “minimum commercial quantities”

During discussions at the Geneva session of the Preparatory Committee, it was stated that “the object ... is to keep open the channels of trade, to make it just worthwhile for the exporter to keep his sales organization together in the overseas market”.⁴⁷ Although it was recognized that the phrase was open to a wide interpretation, it was stressed as being a matter of common sense on which Members in good faith ought not to disagree very seriously. It was agreed in these discussions to record the statement that “there should be an understood priority for the importation of spare parts, because in prohibiting the importation of spare parts into a country, you are making it impossible for other countries to export machinery”.⁴⁸

See also the reference above to “token” imports.

(4) Paragraph 3(d): causes of balance-of-payments problems and their relationship with full employment

(a) Relationship to paragraph 3(a)

The Report of the Review Working Party on “Quantitative Restrictions” notes:

“... As regards the redraft of paragraph 3(d), the Working Party wishes to place on record that the provisions of that sub-paragraph should be interpreted, *inter alia*, in the light of the undertaking set forth in sub-paragraph 3(a).”⁴⁹

⁴⁴L/4904, adopted on 28 November 1979, 26S/205, 206, para. 2.

⁴⁵GATT/CP.5/SR.25 p. 3.

⁴⁶EPCT/A/PV/28, p. 19.

⁴⁷EPCT/A/PV/28, p. 10.

⁴⁸EPCT/A/PV/41, p. 28.

⁴⁹L/332/Rev.I and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 171, para. 5.

During the Fifth Session it was proposed to amend the General Agreement to add Articles 3, 4, and 6 of the Havana Charter Chapter II on employment and economic activity; however, this suggestion did not gain general support.⁵⁰ At the 1954-55 Review Session it was proposed to include in the General Agreement an article on full employment. However, the Report of the Review Working Party on "Organizational and Functional Questions" notes that the Working Party considered such an insertion unnecessary since the objectives sought through the proposed amendment were already covered in existing or proposed new Articles of the Agreement.⁵¹

(b) *"a contracting party may experience a high level of demand for imports"*

The meaning of this provision was discussed thoroughly at Havana. As a result the provision was amplified in the Havana Charter as follows (paragraph 4(b)): "Such a Member may find that demands for foreign exchange on account of imports and other current payments are absorbing the foreign exchange resources currently available to it in such a manner as to exercise pressure on its monetary reserves which would justify the institution or maintenance of restrictions under paragraph 3 in this Article".⁵² The Interpretative Note *Ad Article 21* of the Havana Charter provided:

"With regard to the special problems that might be created for Members which, as a result of their programmes of full employment, maintenance of high and rising levels of demand and economic development, find themselves faced with a high level of demand for imports, and in consequence maintain quantitative regulation of their foreign trade, it was considered that the text of Article 21 [XII], together with the provision for export controls in certain parts of this Charter, for example, in Article 45 [XX], fully meet the position of these economies".

However, these provisions were not taken into Article XII, either in 1948 or in the Review Session.

(c) *"shall not be required to withdraw or modify restrictions"*

In the course of the discussion at the Geneva session of the Preparatory Committee in 1947 it was suggested that paragraphs 3(b)(i) and 4(d) of Article 26 of the Draft Charter (corresponding to the present GATT Article XII:3(d) and XII:4(d)) were contradictory. The following statement was made in reply:

"If [the restrictions] are necessary in the sense of meeting the criteria in paragraph 2 [XII:2], if they are administered in a way which is in accord with the undertakings in paragraph 3(c), [XII:3(a) and (c)] then you cannot be required to withdraw them on the grounds that if you adopted a policy of deflation or ceased reconstruction, you would no longer be in difficulties, but if you undertake restrictions which do not meet the criteria of paragraph 2, or if you break the undertakings given in paragraph 3(c), then you may be required to withdraw the restrictions".⁵³

5. Paragraph 4

(1) *Paragraph 4(a): obligation to consult*

The Report of the Review Working Party on "Quantitative Restrictions" notes:

"... Paragraph 4(a) ... has been redrafted for the sake of brevity, but the intent remains unchanged. The reference to 'new restrictions' covers the case described in paragraph 4(a) of the present Article, that of a contracting party which was not applying restrictions under the Article but finds it necessary to introduce restrictions on imports. On the other hand, the phrase: 'raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Article shall ...' corresponds to the second part of the first sentence of paragraph 4(b) of the present Article. The language adopted, and in particular the use of the word 'measures' is meant to convey the idea that the intensification referred to in this

⁵⁰Proposal at GATT/CP.5/23, discussion at GATT/CP.5/SR.10 p. 2-4.

⁵¹L/327, adopted on 28 February, 5 and 7 March 1955, 3S/231, 240-242, paras. 27-32.

⁵²E/CONF.2/C.3/82.

⁵³EPCT/A/PV/41, p. 20.

paragraph may be achieved either by increasing the restrictive effect of the restrictions applied to products the import of which is already limited, or by the institution of new restrictions on products the import of which was not yet subject to limitations.”⁵⁴

Paragraph 6 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provides as follows:

“A Member applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures shall enter into consultations with the Committee within four months of the adoption of such measures. The Member adopting such measures may request that a consultation be held under paragraph 4(a) of Article XII or paragraph 12(a) of Article XVIII as appropriate. If no such request has been made, the Chairman of the Committee shall invite the Member to hold such a consultation. ...”

(a) *“alternative corrective measures which may be available”*

In discussions during the London session of the Preparatory Committee in 1946, it was stated that “the purpose of this paragraph as we see it is to make sure that before a member puts on import restrictions it should also adequately consider with the international organisations concerned other possible remedial measures such as exchange depreciation, exchange restrictions, special grants from the Fund, special loans from the Bank, and all this kind of thing”.⁵⁵

(2) Paragraph 4(b): Review of restrictions applied under Article XII

The text of paragraph 4(b) in the 30 October 1947 text of the General Agreement required that a review of all restrictions under Article XII be conducted not later than 1 January 1951. This review was carried out in connection with the second review of discriminatory application of import restrictions under Article XIV:1(g).⁵⁶ Article XII:4(b) was then revised in the Review Session of 1954-55, to call for an additional review of restrictions applied under Article XII. The review required by the provisions of paragraph 4(b) as revised, the timing of which is the subject of an Interpretative Note, was carried out by the CONTRACTING PARTIES in 1958-59. Part I of the resulting document discusses the financial background of the restrictions and discriminations, recent changes in the use of restrictions and the then-current level of restrictions and discrimination in the use of restrictions. Part II contains separate notes describing the restrictions in force as at the end of 1958 or early in 1959, in the twenty-five contracting parties resorting to Article XII or Article XVIII:B at that time.⁵⁷

See also section C below on balance-of-payments consultations in the GATT.

(3) Paragraph 4(c)

The Report of the Review Working Party on “Quantitative Restrictions” notes that

“... Sub-paragraph (c)(i) is meant to apply to inconsistencies [with Articles XII-XIV] of a minor or technical nature. It is expected that if, during the course of consultations, the CONTRACTING PARTIES should find that such inconsistencies exist in the restrictions maintained by a particular contracting party, they would draw the attention of the contracting party to them, and, in their discretion, advise how they might be suitably modified; no other action is envisaged. It is envisaged that the provisions of (c)(i) will cover the majority of cases in which the consultations may bring to light inconsistencies with the relevant provisions of the Agreement.

⁵⁴L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 171, para. 6.

⁵⁵EPCT/C.II/QR/PV/3 p. 26.

⁵⁶See GATT/CP.6/12/Rev.2 and GATT/CP.6/48, published as *Use of Quantitative Restrictions to Safeguard Balances of Payments* (Sales No. GATT/1951-2, out of print).

⁵⁷MGT(59)76, dated 30 July 1959; see also material on the background of this review at 6S/39-40, paras. 13-16.

“Sub-paragraph (c)(ii) deals with cases where the CONTRACTING PARTIES find serious inconsistencies in the application of the restrictions, and moreover, that those inconsistencies are of such a nature as to cause or threaten damage to other parties. In those cases, the CONTRACTING PARTIES would be required to make recommendations to remove the inconsistencies and to set up a time-limit for the removal or modification of the restrictions. If their recommendations are not complied with, the CONTRACTING PARTIES may then release a contracting party affected from certain obligations according to a procedure similar to that of Article XXIII”.⁵⁸

(4) Paragraph 4(d)

(a) “Consultations”

The Report of the Review Working Party on “Quantitative Restrictions” notes:

“... Although the changes are more of emphasis than of substance, the new text brings out clearly that the action of the contracting parties adversely affected by an application of restrictions which would not conform to the provisions of the Article, takes the form of a request for consultations rather than of a challenge”.⁵⁹

(b) “prima facie case”

The records of discussions of this provision during the London session of the Preparatory Committee indicate that these words were inserted to exclude frivolous complaints and to oblige countries to document to some extent any case presented.⁶⁰ As to the relation between sub-paragraph 4(d) and the balance-of-payments consultation process, the rapporteur in those discussions explained that “the Organization ... would have approved a certain restriction of total imports, and a country which was hurt under 3(b) [XII:4(a)] could therefore say ‘You are unnecessarily damaging my interests by choosing [to restrict] combs rather than toothbrushes’”.⁶¹

The Report of the Working Party in 1956 on “Accession of Switzerland” notes that:

“it would be appropriate for the CONTRACTING PARTIES to receive a complaint on the part of Switzerland under the provisions of paragraph 4(d) of Article XII if a contracting party which was otherwise entitled to resort to the provisions of Article XII imposed restrictions on Swiss exports which were of such a character as to cause damage to the commercial and economic interests of Switzerland, and in considering such a complaint to pay special attention to the question whether these particular restrictions were necessary. The Working Party in this connexion had particularly in mind the provisions of paragraph 3(c)(iii) of Article XII”.⁶²

(5) Paragraph 4(e): “due regard to ... external factors”

The Report of the Review Working Party on “Quantitative Restrictions” notes with respect to the drafting of this sub-paragraph:

“It was agreed that the scope of consultations under Articles XII and XIV should include external as well as internal causes of balance-of-payments difficulties, with a view to finding ways and means of eliminating them. In order to make that clear the Working Party agreed to insert a new paragraph ... This insertion was agreed on the understanding that it would not introduce any new criteria for the resort to restrictions under this Article. The intent of the sub-paragraph is clarified by an interpretative note”.⁶³

⁵⁸L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 173, paras. 9-10.

⁵⁹*Ibid.*, 3S/173, para. 11.

⁶⁰EPCT/C.II/QR/PV/5, p. 21. Concerning paragraph 4(d) see generally *ibid.* pp. 16-27.

⁶¹EPCT/C.II/QR/PV/3 p. 35.

⁶²L/598, adopted on 17 November 1956, 5S/40, 42-43, para. 10. See also *inter alia* Havana Reports p. 102-105, GATT/TN.2/3/Add.1, GATT/CP.4/40 and GATT/CP/67 on concerns raised previously by Switzerland in this connection.

⁶³L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 173, para. 12.

The Resolution of 17 November 1956 on “Particular Difficulties Connected with Trade in Primary Commodities” provides, *inter alia*, that:

“the [CONTRACTING PARTIES] shall in the course of consultations undertaken under Article XII and ... under Article XVIII:B, take account of problems relating to international commodity trade among other difficulties which may be contributing to the disequilibrium of the balance of payments and compelling certain contracting parties to maintain import restrictions”.⁶⁴

See also the material on “expanded” consultations at page 389 below. See also the discussion under Article XVIII:5.

6. Paragraph 5: “persistent and widespread application of import restrictions ... indicating the existence of a general disequilibrium”

Paragraph 5 was incorporated into the text during the London session of the Preparatory Committee; its source was a United Kingdom proposal.⁶⁵ The Report of the 1949 Working Party on “Consultation Procedures under Articles XII, XIII and XIV - other than Article XII:4(a)” notes regarding procedures for the use of Article XII:5: “Because of the broad nature of such discussions the working party considered that generally these issues would be dealt with in regular or special sessions of the CONTRACTING PARTIES”.⁶⁶

Discussions under paragraph 5 have been proposed only once, in July 1949 in connection with an agreement by Commonwealth countries to endeavour to reduce dollar-area imports by 25 per cent from 1948 levels in order to halt a severe drain on their central reserves. Action was deferred in view of pending discussions in the International Monetary Fund; these discussions led to the September 1949 round of devaluations of sterling and other currencies against the dollar.⁶⁷

The Report of the Review Working Party on “Quantitative Restrictions” notes that during the Review Session, various proposals were made to amend the General Agreement to provide for joint action to restore equilibrium in the system of world trade and payments in the event that that system became seriously unbalanced, and to avoid the imposition of unnecessarily severe restrictions on international trade. In relation to two “scarce currency” proposals, designed for a situation where some large and commercially important country might develop a persistent surplus in its balance of payments with the rest of the world, place a strain on other countries’ reserves, and cause a general scarcity of its currency:

“There was general agreement in the Working Party that such a situation might arise from a variety of different circumstances and that the prime responsibility for the state of unbalance might rest either with the surplus or the deficit countries.

“It was noted that provisions are already contained in the General Agreement and also in the Articles of Agreement of the International Monetary Fund to enable consultation to take place on the measures that might appropriately be adopted to meet such situations.

“In particular it was noted that Article XII:5 of the GATT lays an obligation on the CONTRACTING PARTIES to initiate discussions ...

⁶⁴5S/26, 27, para. 2.

⁶⁵Proposal at EPCT/C.II/W.22; discussion at EPCT/C.II/QR/PV/3 p. 41-42.

⁶⁶GATT/CP.3/50/Rev.1, adopted on 4 July 1949, II/95, 99, para. 21.

⁶⁷GATT/CP.3/SR.42, p. 19-21; see UK notification of agreement at GATT/CP.3/68, and reference in paragraph 10 of Working Party Report on “Balance-of-Payments Questions”, GATT/CP.4/38, adopted on 1 April 1950, II/103, 106-107; see also ICITO/1/14, ICITO/1/17 (referring also to Articles 4 and 21(b) of the Havana Charter) and Annecy Press Release No. 59.

“In the discussion of this matter in the Working Party a number of contracting parties stressed the desirability of providing for continuous co-operation and consultation between the GATT and the International Monetary Fund with a view to keeping the world economic situation under constant review and to enabling action to be concerted in good time to prevent any serious disequilibrium in world trade and payments from developing ...”.⁶⁸

See also the material under Article XIV:5(a).

A. RELATIONSHIP BETWEEN ARTICLE XII AND OTHER ARTICLES

1. Articles I and XIII

The Reports of the Working Parties on “United Kingdom Temporary Import Charges”⁶⁹ and “United States Temporary Import Surcharge”⁷⁰ each note the arguments of developing countries in favour of exempting from the surcharge products of developing countries or products of which developing countries were the principal supplier. These Reports also note the arguments in response that special exemption of imports by origin would produce trade diversion and, to the extent that it encouraged imports, delay removal of the surcharge.⁷¹ The Report in 1971 of the Group of Three (constituted of the Chairmen of the CONTRACTING PARTIES, the Council and the Committee on Trade and Development) recommended that if the United States surcharge were maintained beyond 1 January 1972, “the United States Government should take steps to exempt imports from developing countries from the charge”, and that the Danish temporary surcharge should exempt products covered by the Danish preference scheme for imports from developing countries.⁷² In the Working Party Report on the “Danish Temporary Import Surcharge”, “Without prejudice to the legal issues involved, the Working Party noted that as from the introduction of the Danish general preference scheme on 1 January 1972, products included in that scheme would be exempted from the surcharge when imported from members of the Group of Seventy-Seven. Several members of the Working Party welcomed this decision of the Danish Government noting that this had been one of the recommendations of the Group of Three. Other members expressed concern that the exemption did not extend to all developing countries. Some other members said that the discrimination created by these exemptions gave their delegations cause for concern”.⁷³

Paragraph 2 of the 1979 Declaration on “Trade Measures Taken for Balance-of-Payments Purposes” provides that:

“If, notwithstanding the principles of this Declaration, a developed contracting party is compelled to apply restrictive import measures for balance-of-payments purposes, it shall, in determining the incidence of its measures, take into account the export interests of the less-developed contracting parties and may exempt from its measures products of export interest to those contracting parties”.⁷⁴

A 1984 Statement by the Chairman of the Committee on Balance-of-Payments Restrictions to the Council, summarizing the result of discussions in 1982-83 concerning the work of the Committee and the role therein of balance-of-payments problems confronting heavily-indebted developing countries, notes *inter alia* that these discussions had endorsed the view that “any action taken in the balance-of-payments field should be consistent with the multilateral principles embodied in the General Agreement”⁷⁵ and adds:

⁶⁸L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 174-176, paras. 16-18, 23.

Comparison of the provisions of Article XII and Article XVIII:B

⁶⁹L/2676, adopted on 17 November 1966, 15S/113, 115, para. 10.

⁷⁰L/3573, adopted on 16 September 1971, 18S/212, 220-222, paras. 34-38.

⁷¹15S/115-116, para. 10; 18S/218, para. 25.

⁷²L/3610, 18S/70, 74, para. 17(ii) (US surcharge); 75, para. 20 (Danish surcharge).

⁷³L/3648, adopted on 12 January 1972, 19S/120, 126, 129 (identical text in paras. 22 and 41).

⁷⁴26S/206, 207; for background to this provision see, e.g., Report of the Working Party on “United States Temporary Import Surcharge”, L/3573, adopted on 16 September 1971, 18S/212, 220-223, paras. 34-38, 40.

⁷⁵C/125, dated 13 March 1984, approved by the Council on 15/16 May 1984 (C/M/178, p. 26), 31S/56, 60, para. 13.

Comparison of the provisions of Article XII and Article XVIII:B

	Art. XII	Art. XVIII:B	Significant differences
Special considerations for developing contracting parties	---	2(b) and 8	For developed countries see Article XII:3(d).
General statement on the use of restrictions	1	9	
Limits of application of the provisions	2(a)	9 proviso	Criteria in Article XII relate to "imminent threat" and "very low reserves", and in Article XVIII:B to "threat" and "inadequate reserves".
Relaxation and elimination of restrictions	2(b)	11 second sentence	See precautionary clause in interpretative note <i>ad</i> Article XVIII:11.
Right to choose goods to restrict	3(b)	10	
Conditions and undertakings	3(c)	10 provisos	
Domestic policy considerations	3(a) and 3(d)	11 first sentence and proviso	Different arrangements of clauses reflect differences in emphasis
Review and consultation procedures	4(a) to (d)	12(a) to (d)	Interval between regular consultations under (b) is one year in Article XII, two years in Article XVIII:B; also note proviso to Article XVIII:12(b).
Consideration of special factors in consultations	4(e)	12(f) first sentence	Consideration in Article XII relates to external factors (see note <i>ad</i> Article XII:4(e)) and in Article XVIII to factors in Article XVIII:2
Expediency in making determinations	4(f)	12(f) second sentence	
Right to withdraw on shorter notice, upon unfavourable determination	---	12(e)	When GATT is definitively applied under Art. XXVI, withdrawal is governed by Article XXXI and requires six months' notice
Non-discriminatory application	Article XIII		
Deviation from rule of non-discrimination	Article XIV		

"In clear language this means that actions should be taken on a most-favoured-nation basis or, pursuant to the provisions of Part IV of the General Agreement (particularly Article XXXVII) and the 1979 Decision on Differential and More Favourable, Treatment, Reciprocity and Fuller Participation of Developing Countries, in a manner consistent with that decision, including special treatment for the least-developed among the developing countries. It was noted that Paragraph 2(c) of the Decision allows for the possibility of more favourable treatment to be accorded among developing contracting parties. ...

"In view of the consensus to respect multilateral principles in responding to the needs of countries experiencing severe balance-of-payments difficulties, the possibility of focusing trade actions on such countries would depend on the choice of products for which a particular country is a principal or substantial supplier to a particular market, or on the choice of specific measures which would particularly benefit that

country, it being understood that the implementation of each particular measure would be consistent with the multilateral principles referred to".⁷⁶

2. Article XVIII

The table above presents a simplified comparison of the provisions of Article XII and Article XVIII:B.

In a few instances consultations have been conducted concerning balance-of-payments measures without reference to either Article XII or Article XVIII.⁷⁷ In another instance a contracting party has consulted concerning the same measures under Article XVIII:B and subsequently under Article XII.⁷⁸

In the 1958 Working Party Report on "Consultations and Review Regarding Balance-of-Payments Restrictions", the Working Party "noted the recommendation of the Chairman of the CONTRACTING PARTIES that it be placed on record that twelve of the contracting parties applying balance-of-payments import restrictions at present fulfil the requirements of Article XVIII:4 and that their restrictions be considered as being applied under Article XVIII:B rather than Article XII; consequently, the other fourteen contracting parties applying restrictions are considered as acting under Article XII, and are therefore required to consult under Article XII:4(b) in 1959".⁷⁹

3. Article XXIII

See Article XXIII.

4. Article XXIV

See Article XXIV.

C. BALANCE-OF-PAYMENTS CONSULTATIONS IN THE GATT

1. Committee on Balance-of-Payments Restrictions

Prior to 1958, consultations under the balance-of-payments Articles of the General Agreement were conducted in a series of working parties established by the CONTRACTING PARTIES for that purpose. When the balance-of-payments Articles were revised during the Review Session, it was agreed to study improvement of the arrangements for consultations.⁸⁰ The Committee on Balance-of-Payments Restrictions was established on 22 November 1958. Its present terms of reference are as follows:

"To conduct the consultations under Article XII:4(b) and Article XVIII:12(b) as well as any such consultations as may be initiated under Article XII:4(a) or Article XVIII:12(a).

"Pursuant to paragraph 4 of the Declaration on Trade Measures Taken for Balance-of-Payments Purposes, adopted by the CONTRACTING PARTIES on 28 November 1979, 'all restrictive import measures taken for balance-of-payments purposes shall be subject to consultation in the GATT Committee on Balance-of-Payments Restrictions'".⁸¹

In April 1978, one contracting party raised the question of the balance of representation in the Balance-of-Payments Committee, and suggested that the membership should reflect a suitable balance between developed and

⁷⁶*Ibid.*, 31S/60-61, paras. 14, 16.

⁷⁷Israel (BOP/R/90, BOP/R/101, BOP/R/113, BOP/R/129, BOP/R/142, BOP/R/155, BOP/R/170, BOP/R/187, BOP/R/195, BOP/R/210); Portugal (BOP/R/62, BOP/R/93, BOP/R/106, BOP/R/111, BOP/R/118, BOP/R/125, BOP/R/134, BOP/R/145, BOP/R/152); South Africa (BOP/R/92, BOP/R/211).

⁷⁸Greece (consultations under Article XVIII:B in BOP/R/89, BOP/R/100, BOP/R/114, BOP/R/123; Article XVIII:B disinvoked, 1984; consultation under Article XII, BOP/R/160; Article XII disinvoked 1987).

⁷⁹L/931, adopted on 22 November 1958, 7S/90, 92, para. 8. The twelve contracting parties referred to are: Brazil, Chile, Ghana, Greece, India, Indonesia, Malaysia, Myanmar, Pakistan, Sri Lanka, Turkey and Uruguay.

⁸⁰3S/179, para. 34.

⁸¹L/6526/Rev.4, dated 22 April 1993 (also listing the members of the Committee as of that date).

developing contracting parties. In response the Director-General pointed out that members of the Committee were designated by the Council, which had never refused an application for membership.⁸²

The 1979 “Declaration on Trade Measures Taken for Balance-of-Payments Purposes” (referred to below as the “1979 Declaration”) also provides: “The membership of the Committee is open to all contracting parties indicating their wish to serve on it. Efforts shall be made to ensure that the composition of the Committee reflects as far as possible the characteristics of the contracting parties in general in terms of their geographical location, external financial position and stage of economic development.”⁸³

A 1984 Statement by the Chairman of the Committee on Balance-of-Payments Restrictions to the Council, summarizing the result of discussions in 1982-83 concerning the work of the Committee and the role therein of balance-of-payments problems confronting heavily-indebted developing countries, notes *inter alia* that: “The need for more active participation in the Balance-of-Payments Committee by both developed and developing countries was recognized. In this connection, it may be recalled that the Committee is open-ended and that any contracting party may become a member of the Committee simply by informing the Director-General of its wish to do so. The level of representation in the Committee was considered as a matter for individual governments’ decision”.⁸⁴

Paragraph 5 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provides *inter alia*: “The Committee on Balance-of-Payments Restrictions ... shall carry out consultations in order to review all restrictive import measures taken for balance-of-payments purposes. The membership of the Committee is open to all Members indicating their wish to serve on it. ... ”

2. Procedures for examination of balance-of-payments measures

(1) General

The Report of the Review Working Party on “Quantitative Restrictions” notes that the main difference between the provisions of Article XVIII:12 and the corresponding provisions of Article XII:4 “relates to the periodicity of the consultations under sub-paragraph (b)” and further notes that “The remarks and agreed statements referring to consultations under Article XII and which are reproduced in paragraphs 6 to 11 of this report apply also to consultations under paragraph 12 of Article XVIII”.⁸⁵

(2) Scope of consultations

The 1979 Declaration provides that “The procedures for examination stipulated in Articles XII and XVIII shall apply to all restrictive import measures taken for balance-of-payments purposes.”⁸⁶ Thus, the scope of consultations includes both quantitative restrictions for balance-of-payments purposes and other restrictive import measures, such as import surcharges and import deposits, taken for balance-of-payments purposes. See the discussion above at page 366 on the treatment of import surcharges and import deposit measures in balance-of-payments consultations since the 1979 Declaration. Paragraph 5 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 also provides that the Committee “... shall carry out consultations in order to review all restrictive import measures taken for balance-of-payments purposes. ...”

In the period before 1979, the Committee did not routinely examine non-quantitative balance-of-payments measures. However, in certain instances the Council requested that the Committee examine non-quantitative measures when the Council viewed such measures as appropriately considered in conjunction with existing balance-of-payments quantitative restrictions: these included import surcharges and/or deposits applied by

⁸²C/M/124, p. 4-5.

⁸³L/4904, adopted on 28 November 1979, 26S/205, 207, para. 5.

⁸⁴C/125, dated 13 March 1984, approved by the Council on 15/16 May 1984 (C/M/178, p. 26), 31S/56, 59, para. 10.

⁸⁵L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 183-84, para. 46.

⁸⁶L/4904, adopted on 28 November 1979, 26S/205, para. 1.

Brazil, Finland, Israel, Portugal, South Africa and Yugoslavia. The Committee also examined the extension of the waiver decisions for the stamp duty applied by Turkey as a balance-of-payments measure.⁸⁷

(3) Procedures

The 1979 Declaration states, with regard to examination of balance-of-payments measures in the Committee on Balance-of-Payments Restrictions, that “The Committee shall follow the procedures for consultations on balance-of-payments restrictions approved by the Council on 28 April 1970 (18S/48-53, hereinafter referred to as ‘full consultations procedures’) or the procedures for regular consultations on balance-of-payments restrictions with developing countries approved by the Council on 19 December 1972 (20S/47-49, hereinafter referred to as ‘simplified consultation procedures’) subject to the provisions set out below.”⁸⁸ Paragraph 5 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 also provides that “... The Committee shall follow the procedures for consultations on balance-of-payments restrictions approved on 28 April 1970 (BISD 18S/48-53, referred to in this Understanding as ‘full consultation procedures’), subject to the provisions set out below”.

The 1970 “full consultations procedures” referred to in the 1979 Declaration describe the arrangements and procedures originally agreed in 1958 for consultations under Article XII:4(b) and Article XVIII:12(b) as revised in the Review Session, as they had evolved to 1970. The 1970 procedures deal with the contents of the consultations, the documentation for the consultations, the time schedule for the consultations, arrangements for consultation with the International Monetary Fund, the composition of the Committee on Balance-of-Payments Restrictions, and the reports to be prepared on the consultations. Attached to the 1970 procedures are a plan of discussion for balance-of-payments consultations, and a list of points to be covered in the basic document for the consultations.⁸⁹

See also the “Procedures for dealing with new import restrictions applied for balance-of-payments reasons” adopted by the CONTRACTING PARTIES on 16 November 1960,⁹⁰ and earlier procedural decisions on examination of balance-of-payments measures.⁹¹

The first and second reports of the CG-18 to the Council note the discussions in the Group during 1975 through 1977 on procedural improvements concerning examination of balance-of-payments measures.⁹²

3. Notification of balance-of-payments measures

In 1952 the Working Party on “Procedures for Report and Consultations in 1953 on the Discriminatory Application of Import Restrictions” examined intersessional procedures for initiation of consultations under Article XII. The Report of the Working Party notes that “It was ... agreed to amend the procedure for consultations so as to require a contracting party modifying its import restrictions to furnish detailed information promptly to the Executive Secretary for immediate circulation to other contracting parties ... the Working Party recommends that the Executive Secretary be authorized to communicate with any contracting

⁸⁷See L/2824, adopted on 6 November 1967, 15S/195; L/3229, adopted on 23 July 1969, 17S/151; L/3787, adopted on 19 December 1972, 20S/229.

⁸⁸26S/207, para. 6.

⁸⁹L/3388, presented to the Council on 28 April 1970, 18S/48.

⁹⁰9S/18, paras.1-6.

⁹¹Concerning consultations under the pre-Review Session provisions of Articles XII and XIV, see Working Party Reports on “Consultation Procedure under Article XII:4(a)”, GATT/CP.3/30/Rev.1, adopted on 20 June 1949, II/89; “Procedures for Action on Matters Arising Under Articles XII to XIV between Sessions of the CONTRACTING PARTIES”, adopted on 26 October 1952, II/101; “Procedures for Report and Consultations in 1953 on the Discriminatory Application of Import Restrictions”, L/55, adopted on 7 November 1952, 1S/43, section on Article XII at 1S/45-46; “Consultations at the Tenth Session”, L/465, adopted on 2 December 1955, 4S/43-46; “Plans for Consultations in 1957”, L/597, adopted on 17 November 1956, 5S/48-56; and “Consultations under Article XII:4(b); Etc; Implementation of Revised Provisions of Articles XII and XVIII:B”, L/769, adopted on 30 November 1957, 6S/36. On the implementation of the Review Session revision of Articles XII and XVIII, see the last of these reports and the Working Party Report on “Consultations and Review regarding Balance-of-Payments Restrictions”, L/931, adopted on 22 November 1958, 7S/90.

⁹²L/4429, 23S/38, 43-45, paras. 21-25; L/4585, 24S/58, 60, para. 9. The Mandate of the Consultative Group of Eighteen (CG-18), as adopted in 1975 and confirmed in 1979, provides that “The task of the Group is to facilitate the carrying out, by the CONTRACTING PARTIES, of their responsibilities, particularly with respect to ... the international adjustment process ...” L/4204, Decision of the Council of 11 July 1975, 22S/15.

party which he has reason to believe may have significantly modified its restrictions so as to obtain all the information which he and the Chairman require to carry out their responsibilities".⁹³

The "Procedures for dealing with new import restrictions applied for balance-of-payments reasons" adopted in 1960 provide that "any contracting party modifying its import restrictions is required to furnish detailed information promptly to the Executive Secretary, for circulation to the contracting parties." A footnote to this paragraph notes: "Under established procedures, contracting parties should furnish such information not only when they wish to initiate a consultation pursuant to Articles XII:4(a) or XVIII:12(a) but whenever any significant changes are made in their restrictive systems".⁹⁴

The 1972 Decision on simplified procedures for balance-of-payments consultations under Article XVIII:12(b) (cited below *in extenso*) noted that "There are a number of developing contracting parties, mostly the newly independent countries, which maintain import restrictions. ... the adoption of the 'streamlined' procedures set forth in paragraph 3 above should contribute substantially to easing the way for all developing countries to define their position regarding their restrictions in relation to the GATT provisions. It is therefore proposed that, upon approval of the new procedures, the secretariat be instructed to enquire and discuss with each of these developing countries with a view to establishing a complete list of the contracting parties invoking Section B of Article XVIII of the Agreement".⁹⁵

Paragraph 3 of the 1979 Declaration provides: "Contracting parties shall promptly notify to the GATT the introduction or intensification of all restrictive import measures taken for balance-of-payments purposes. Contracting parties which have reason to believe that a restrictive import measure applied by another contracting party was taken for balance-of-payments purposes may notify the measure to the GATT or may request the GATT secretariat to seek information on the measure and make it available to all contracting parties if appropriate".⁹⁶ In addition, paragraph 3 of the 1979 "Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance" provides that "Contracting parties ... undertake, to the maximum extent possible, to notify the CONTRACTING PARTIES of their adoption of trade measures affecting the operation of the General Agreement, it being understood that such notification would of itself be without prejudice to views on the consistency of measures with or their relevance to rights and obligations under the General Agreement. Contracting parties should endeavour to notify such measures in advance of implementation. In other cases, where prior notification has not been possible, such measures should be notified promptly *ex post facto*. Contracting parties which have reason to believe that such trade measures have been adopted by another contracting party may seek information on such measures bilaterally, from the contracting party concerned".⁹⁷

In its Report on the simplified consultation held with Sri Lanka in 1994, the Committee came to the following "interim conclusion": "In the absence of precise information on import restrictions maintained for balance-of-payments purposes, the Committee was unable to conclude the simplified consultation with Sri Lanka. The Committee requested Sri Lanka to notify, by tariff line, import restrictions, if any, maintained for BOP purposes, or to disinvoke Article XVIII:B. ..." Sri Lanka made the requested notification in October 1994.⁹⁸

Paragraphs 9 and 10 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provide as follows:

"A Member shall notify to the General Council the introduction of or any changes in the application of restrictive import measures taken for balance-of-payments purposes, as well as any modifications in time-schedules for the removal of such measures as announced under paragraph 1. Significant changes shall be notified to the General Council prior to or not later than 30 days after their announcement. On a yearly basis, each Member shall make available to the Secretariat a consolidated notification, including all changes

⁹³L/55, adopted on 7 November 1952, 1S/43, 45-56, paras. 10, 11.

⁹⁴Procedures approved on 16 November 1960, 9S/18, para. 2.

⁹⁵L/3772/Rev.1, approved by the Council on 19 December 1972, 20S/47, 49, para. 5.

⁹⁶L/4904, adopted on 28 November 1979, 26S/205, 207, para. 3. See also CG.18/W/9/Rev.1, 22 October 1976. Nigeria began consulting in the Committee on Balance-of-Payments Restrictions in 1984 following a "reverse notification" by another contracting party.

⁹⁷L/4907, adopted on 28 November 1979, 26S/210, 210-211, para. 3.

⁹⁸Report, BOP/R/219; notification, L/7542.

in laws, regulations, policy statements or public notices, for examination by Members. Notifications shall include full information, as far as possible, at the tariff-line level, on the type of measures applied, the criteria used for their administration, product coverage and trade flows affected.

“At the request of any Member, notifications may be reviewed by the Committee. Such reviews would be limited to the clarification of specific issues raised by a notification or examination of whether a consultation under paragraph 4(a) of Article XII or paragraph 12(a) of Article XVIII is required. Members which have reasons to believe that a restrictive import measure applied by another Member was taken for balance-of-payments purposes may bring the matter to the attention of the Committee. The Chairman of the Committee shall request information on the measure and make it available to all Members. Without prejudice to the right of any member of the Committee to seek appropriate clarifications in the course of consultations, questions may be submitted in advance for consideration by the consulting Member.”

For instances of “reverse notification” of restrictions, or requests to the Secretariat to seek information on restrictions maintained by another contracting party, see the 1987 Note by the Secretariat on “Articles XII, XIV, XV and XVIII”.⁹⁹

In 1965, procedures were adopted relating to import restrictions maintained by newly-independent countries; it was suggested to such countries that “even if they were not yet in a position to determine whether they wished to invoke the provisions of Article XVIII as justification for some or all restrictions in force, they might submit descriptive material relative to their entire import control system, without prejudice to the consistency of the measures maintained with their obligations under GATT”.¹⁰⁰

⁹⁹MTN.GNG/NG7/W/14, dated 11 August 1987, para. 36.

¹⁰⁰14S/161.

4. Consultations

(1) *Timing of balance-of-payments consultations*

Sub-paragraph (a) of Articles XII:4 and XVIII:12 provides that “Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under [Article XII or Article XVIII:B respectively] shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance-of-payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties”.

Article XII:4(b) provides that “contracting parties applying import restrictions under this Article shall enter into consultations of the type provided for in sub-paragraph (a) of this paragraph with the CONTRACTING PARTIES annually.” Article XVIII:12(b) provides that “contracting parties applying restrictions under this Section shall enter into consultations of the type provided for in sub-paragraph (a) of this paragraph with the CONTRACTING PARTIES at intervals of approximately, but not less than, two years according to a programme to be drawn up each year by the CONTRACTING PARTIES”.

The 1972 statement on “Procedures for Regular Consultations on Balance-of-Payments Restrictions with Developing Countries”, which introduced the concept of “simplified consultations” for certain consultations under Article XVIII:B, provides that “Consultations under Article XVIII:12(a) will continue to follow the existing rules. Consultations with developed countries acting under Article XII will be held annually in the usual manner.”¹⁰¹ Thus, the “full consultation procedures” agreed in 1970 apply to all consultations under Article XII or Article XVIII:12(a); in certain cases the “simplified consultation procedures” agreed in 1972 apply to periodic consultations under Article XVIII:12(b). See below.

The 1970 “full consultation procedures” provide that “Every January, the secretariat should circulate and submit to the Council a time schedule for the consultations to be held in that year. This should be drawn up in consultation with the contracting parties concerned, and in the light of the programme and progress of the consultations of the International Monetary Fund with the governments concerned, so as to ensure that the most up-to-date and meaningful possible data form part of the Fund’s contribution to these consultations in GATT. The time schedule may be modified as necessary in the light of changing circumstances. Normally the consultations to be held in one year will be grouped so that they can be taken up at two to four continuous sessions of the Committee on Balance-of-Payments Restrictions”.¹⁰² The provisions establishing the Trade Policy Review Mechanism in the Decision of 12 April 1989 on “Functioning of the GATT System” provide that “the Chairman of the Council shall, in consultation with the contracting party or parties concerned, and with the Chairman of the Committee on Balance-of-Payments Restrictions, devise administrative arrangements which would harmonize the normal rhythm of the trade policy reviews with the time-table for balance-of-payments consultations but would

Contracting parties consulting with the BOP Committee: Date of last consultation (Art. XII) or full consultation (Art. XVIII:B)

Bangladesh	none
Egypt	1992
India	1992
Israel*	1993
Nigeria	1993
Pakistan	1989
Philippines	1993
Poland (Art. XII)	1994
South Africa*	1993
Sri Lanka	1971
Tunisia	1992
Turkey	1993
Yugoslavia	1991

Status as of 1 September 1993.

* Israel and South Africa consult with the Committee on Balance-of-Payments Restrictions without specifying whether restrictions are under Article XII or under Article XVIII:B.

¹⁰¹L/3772/Rev.1, adopted on 19 December 1972, 20S/47, 49, para. 4.

¹⁰²18S/50-51, paras. 6-7.

not postpone the trade policy review by more than 12 months”.¹⁰³ The schedule for balance-of-payments consultations is regularly circulated to the Council each January.¹⁰⁴

At the March 1993 Council meeting, the Chairman of the Committee on Balance-of-Payments Restrictions announced that in view of the frequent postponements of balance-of-payments consultations experienced in recent years, the Committee had decided that this matter should be subject to greater discipline. Accordingly, the Committee had decided that if in future, a consulting country wished to request postponement of its consultation, the request should be submitted to the Committee and that the consultation could only be postponed with the consent of the Committee.¹⁰⁵

Paragraphs 6 and 7 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provide as follows:

“A Member applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures shall enter into consultations with the Committee within four months of the adoption of such measures. The Member adopting such measures may request that a consultation be held under paragraph 4(a) of Article XII or paragraph 12(a) of Article XVIII as appropriate. If no such request has been made, the Chairman of the Committee shall invite the Member to hold such a consultation. Factors that may be examined in the consultation would include, *inter alia*, the introduction of new types of restrictive measures for balance-of-payments purposes, or an increase in the level or product coverage of restrictions.

“All restrictions applied for balance-of-payments purposes shall be subject to periodic review in the Committee under paragraph 4(b) of Article XII or under paragraph 12(b) of Article XVIII, subject to the possibility of altering the periodicity of consultations in agreement with the consulting Member or pursuant to any specific review procedure that may be recommended by the General Council.”

(2) *Simplified consultations under Article XVIII:B*

In December 1972 the Council approved modified “Procedures for Regular Consultations on Balance-of-Payments Restrictions with Developing Countries”, and an accompanying statement, as follows:

“At the Council meeting of 6 October 1971, the retiring Chairman of the Committee on Balance-of-Payments Restrictions referred to the difficulties in arranging Article XVIII:12(b) consultations in 1971 ...

“... Some delegations feel that detailed discussions of the external financial justification of the restrictions every two years may not be necessary in all cases and a consultation may become a formality for which adequate preparation may require an amount of energy and attention disproportionate to its value. On the other hand, the consultations are specifically provided for in the General Agreement for well-defined purposes and for sound reasons, and many contracting parties would have serious misgivings if these GATT provisions were to be ignored while there were no insurmountable obstacles to their implementation. ...

“In the light of these considerations, it is proposed that the following modified procedures be adopted for the implementation of Article XVIII:12(b) concerning *regular consultations* on balance-of-payments restrictions with *developing countries*:

“(a) each year, the secretariat establishes a schedule showing the contracting parties acting under Article XVIII:B which are required to consult under paragraph 12(b) that year;

“(b) each of these contracting parties should submit to the CONTRACTING PARTIES a concise written statement on the nature of the balance-of-payments difficulties, the system and methods of restriction

¹⁰³L/6490, adopted on 12 April 1989, 36S/403, 404-405, para. I.C(ii).

¹⁰⁴See, e.g., C/W/727, schedule of consultations for 1993 dated 29 January 1993.

¹⁰⁵C/M/263, p. 7, BOP/R/208.

(with particular reference to any discriminatory features and changes in past two years), the effects of the restrictions and prospects of liberalization;

- “(c) the statements received will be circulated to all contracting parties and presented to the Committee on Balance-of-Payments Restrictions for prior consideration, so that the Committee may determine whether a full consultation is desirable. If it decides that such a consultation is not desirable, the Committee will recommend to the Council that the contracting party be deemed to have consulted with the CONTRACTING PARTIES and to have fulfilled its obligations under Article XVIII:12(b) for that year. Otherwise, the CONTRACTING PARTIES will consult the International Monetary Fund, and the Committee will follow the procedures applicable hitherto for a full consultation; and
- “(d) arrangements will be made with the International Monetary Fund for the supply of balance-of-payments statistics for each country submitting a statement in accordance with paragraph (b) above.”¹⁰⁶

“It should be noted that this proposal relates only to the periodic consultations provided for in Article XVIII:12(b). Consultations under Article XVIII:12(a) will continue to follow the existing rules. Consultations with developed countries acting under Article XII will be held annually in the usual manner.”¹⁰⁷

The 1977 report of the Consultative Group of Eighteen notes that “The Group exchanged views on ... whether the simplified procedures adopted in 1972 were an exception to the full procedures adopted in 1970 in the sense that, while the simplified procedures would in practice normally apply to balance-of-payments consultations with a developing country, another contracting party might nevertheless require as of right that the full procedures be followed”.¹⁰⁸ This question was also discussed in the Council in 1977 where the Chairman of the Committee on Balance-of-Payments Restrictions stated his view that “the simplified procedure was clearly an exception to the general rule, and could only apply if there was a consensus in the Committee. If there was no consensus, i.e. if one or several members requested that a full consultation be held, such consultation would take place automatically. The rule was clear and the practice had so far been in conformity with this rule”. A number of contracting parties expressed their view “that the simplified procedures should be the general rule for consultations with developing countries. Consequently, an absolute consensus to decide that a full consultation was not desirable, should not be required. It did not appear reasonable if, on the basis of the opinion of a single member, the Committee would determine that a full consultation was to be held”.¹⁰⁹

The 1979 Declaration provides with respect to the choice of procedure:

“In the case of consultations under Article XVIII:12(b) the Committee shall base its decision on the type of procedure on such factors as the following:

- “(a) the time elapsed since the last full consultations;
- “(b) the steps the consulting contracting party has taken in the light of conclusions reached on the occasion of previous consultations;
- “(c) the changes in the overall level or nature of the trade measures taken for balance-of-payments purposes;
- “(d) the changes in the balance-of-payments situation or prospects;
- “(e) whether the balance-of-payments problems are structural or temporary in nature.

¹⁰⁶20S/47-49, paras. 1-3.

¹⁰⁷*Ibid.*, para. 4.

¹⁰⁸L/4585, 24S/58, 60, para. 9.

¹⁰⁹C/M/122, p. 4.

“A less-developed contracting party may at any time request full consultations”.¹¹⁰

A 1988 Note by the Secretariat on “Consultations Held in the Committee on Balance-of-Payments Restrictions under Articles XII and XVIII:B since 1975” states that in the period 1975 through June 1988, there had been 106 consultations under Article XVIII:B, of which 77 had taken the simplified form. In 17 of these, the Committee had, in its report on a simplified consultation, recommended full consultations. Before 1979, the reason for such a recommendation was not indicated; since that date it had always done so.¹¹¹

Paragraph 8 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provides as follows:

“Consultations may be held under the simplified procedures approved on 19 December 1972 (BISD 20S/47-49, referred to in this Understanding as ‘simplified consultation procedures’) in the case of least-developed country Members or in the case of developing country Members which are pursuing liberalization efforts in conformity with the schedule presented to the Committee in previous consultations. Simplified consultation procedures may also be used when the Trade Policy Review of a developing country Member is scheduled for the same calendar year as the date fixed for the consultations. In such cases the decision as to whether full consultation procedures should be used will be made on the basis of the factors enumerated in paragraph 8 of the 1979 Declaration. Except in the case of least-developed country Members, no more than two successive consultations may be held under simplified consultation procedures.”

(3) *Documentation used in consultations*

The 1979 Declaration includes the following provisions concerning documentation:

“The GATT secretariat, drawing on all appropriate sources of information, including the consulting contracting party, shall with a view to facilitating the consultations in the Committee prepare a factual background paper describing the trade aspects of the measures taken, including aspects of particular interest to less-developed contracting parties. The paper shall also cover such other matters as the Committee may determine. The GATT secretariat shall give the consulting contracting party the opportunity to comment on the paper before it is submitted to the Committee.”

“The technical assistance services of the GATT secretariat shall, at the request of a less-developed consulting contracting party, assist it in preparing the documentation for the consultations.”¹¹²

Since the entry into force of the 1979 Declaration the material prepared for each full consultation has consisted of three basic documents: (i) a “Basic Document” prepared by the consulting country in case of a full consultation, or a “Written Statement” prepared also by the consulting country in case of a simplified consultation; (ii) a “Background Paper” prepared by the GATT Secretariat; and (iii) a “Recent Economic Developments” document prepared by the IMF.

The 1970 “full consultation procedures” provide that the following points are to be covered in the Basic Document for a full consultation under Articles XII:4(b) or XVIII:12(b):

- “(a) Legal and administrative basis of the import restriction.
- “(b) Methods used in restricting imports.
- “(c) Treatment of imports from different sources including information on the use of bilateral agreements.
- “(d) Commodities, or groups of commodities, affected by the various forms of import restrictions.

¹¹⁰L/4904, adopted on 28 November 1979, 26S/205, 207-208, paras. 8-9.

¹¹¹MTN.GNG/NG7/W/46, dated 24 June 1988, pp. 11-12, paras. 32-33.

¹¹²L/4904, adopted on 28 November 1979, 26S/205, 207-208, paras. 7 and 10.

“(e) State trading, or government monopoly, used as a measure to restrict imports for balance-of-payments reasons.

“(f) Measures taken since the last consultation in relaxing or otherwise modifying import restrictions.

“(g) Effects of the import restriction on trade.

“(h) General policy in the use of restrictions for balance-of-payments reasons”.¹¹³

In 1982-83 discussions took place concerning the treatment in the work of the Committee on Balance-of-Payments Restrictions of balance-of-payments problems confronting heavily-indebted developing countries. A 1984 Statement by the Chairman of the Committee on Balance-of-Payments Restrictions to the Council summarized the result of these discussions, stating *inter alia*, that:

“As regards the preparation of documents for balance-of-payments consultations, it would be advisable for consulting countries which wish to have particular attention paid to their external trading environment to indicate this to the secretariat in good time. In these cases, the consulting country should, in its basic document, provide the Committee with any information on external factors which it deems relevant and indicate specific measures and products, relative to any external market, on which it could consider action to be of particular importance. In this connection it was recalled that the technical assistance of the secretariat is available, under Paragraph 10 of the 1979 Declaration, to any developing country consulting under Article XVIII:B. The secretariat would also provide adequate information on the trading environment, including any relevant measures affecting the trade of a consulting country, as part of its background note. ... While, as at present, background notes would be prepared on the basis of all relevant information available and in full consultation with the consulting country, the secretariat would retain full responsibility for the content of the note. ...”.¹¹⁴

Paragraphs 11 and 12 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provide as follows:

“The consulting Member shall prepare a Basic Document for the consultations which, in addition to any other information considered to be relevant, should include: (a) an overview of the balance-of-payments situation and prospects, including a consideration of the internal and external factors having a bearing on the balance-of-payments situation and the domestic policy measures taken in order to restore equilibrium on a sound and lasting basis; (b) a full description of the restrictions applied for balance-of-payments purposes, their legal basis and steps taken to reduce incidental protective effects; (c) measures taken since the last consultation to liberalize import restrictions, in the light of the conclusions of the Committee; (d) a plan for the elimination and progressive relaxation of remaining restrictions. References may be made, when relevant, to the information provided in other notifications or reports made to the WTO. Under simplified consultation procedures, the consulting Member shall submit a written statement containing essential information on the elements covered by the Basic Document.

“The Secretariat shall, with a view to facilitating the consultations in the Committee, prepare a factual background paper dealing with the different aspects of the plan for consultations. In the case of developing country Members, the Secretariat document shall include relevant background and analytical material on the incidence of the external trading environment on the balance-of-payments situation and prospects of the consulting Member. The technical assistance services of the Secretariat shall, at the request of a developing country Member, assist in preparing the documentation for the consultations.”

For further background on the format and contents of the Background Paper by the Secretariat for full and simplified consultations, and the IMF document on “Recent Economic Developments”, see the 1988 Note by the

¹¹³L/3388, 18S/48, 53, Annex II.

¹¹⁴C/125 dated 13 March 1984, approved by the Council on 15/16 May 1984 (C/M/178, p. 26), 31S/56, 59-60, para. 11.

Secretariat on "Consultations Held in the Committee on Balance-of-Payments Restrictions under Articles XII and XVIII:B since 1975".¹¹⁵

(5) *Secrecy*

The Note *Ad* Article XII provides that "The CONTRACTING PARTIES shall make provision for the utmost secrecy in the conduct of any consultation under the provisions of this Article." The Note *Ad* Article XVIII provides that "The CONTRACTING PARTIES and the parties concerned shall preserve the utmost secrecy in respect of matters arising under this Article".

The text of Article XII:4(e) before the Review Session read: "It is recognized that premature disclosure of the prospective application, withdrawal or modification of any restriction under this Article might stimulate speculative trade and financial movements which would tend to defeat the purposes of this Article. Accordingly, the CONTRACTING PARTIES shall make provision for the utmost secrecy in the conduct of any consultation under the provisions of this Article". The 1949 Report of the Working Party on "Consultation Procedure under Article XII:4(a)" noted concerning this provision that "The working party ... has been impressed with the wisdom of this requirement and records its opinion that, in default of suitable provisions for secrecy, prior consultation with a country which was faced with a crisis would become virtually impossible".¹¹⁶

The same Report also notes with respect to the reports submitted on balance-of-payments consultations to the CONTRACTING PARTIES that "The report should be treated as a secret document. It is suggested, however, that the need for absolute secrecy may only be temporary. Without prejudice to the right of the CONTRACTING PARTIES to organize the distribution of their documents, it is recommended that the Chairman may authorize the distribution of the report or parts of the report as a restricted document, provided that the contracting party which requested the consultation has no objection to such a distribution. The facts and statements communicated by the International Monetary Fund will be kept secret as far and as long as the Fund so desires."¹¹⁷ A General Arrangement for Co-ordination and Consultation concluded between the Chairman of the CONTRACTING PARTIES and the Fund in 1948 provides, *inter alia*, that "Any request for consultation by either the Fund or the CONTRACTING PARTIES shall be accompanied by available information which would contribute to the effectiveness of the consultation. In such cases, due regard shall be paid to the need to safeguard confidential information and to any special obligations of the Fund and the CONTRACTING PARTIES in this respect."¹¹⁸

(6) *Matters discussed in consultations*

As noted above, the 1970 "full consultation procedures" provide a detailed Plan of Consultations with four main headings: balance-of-payments position and prospects; alternative measures to restore equilibrium; system and methods of the restrictions; and effects of the restrictions.¹¹⁹ The statement on these procedures provides:

"Consultations under Article XII:4 and XVIII:12 cover the nature of the balance-of-payments difficulties of the contracting party in question, alternative measures that may be available and the possible effect of the restrictions on the economies of other contracting parties. They are intended to provide an opportunity for a free exchange of views contributing to a better understanding of the problems facing the consulting countries, of the various measures taken by them to deal with these problems, and of the possibilities of further progress in the direction of freer, multilateral trade. ... Having regard to the diversity of circumstances, the Plan should not be regarded as a rigid programme, but might require suitable adaptation in individual cases. The special problems of each consulting country relating to its balance of payments should perforce be given careful consideration. Account should be taken of all factors, both internal and external, which affect the balance-of-payments position of the consulting country".¹²⁰

¹¹⁵ MTN.GNG/NG7/W/46, dated 24 June 1988, p. 6-7, paras. 24-25.

¹¹⁶ GATT/CP.3/30/Rev.1, adopted on 20 June 1949, II/89, 90, para. 5. See also discussion of secrecy in the 1985 Report of the Chairman of the Balance-of-Payments Committee on the Chilean proposal noted above, C/132, 32S/46, 48, para. 6.

¹¹⁷ *Ibid.*, II/94, para. 18.

¹¹⁸ I/120, 121, para. (iv), proposed by the Chairman of the CONTRACTING PARTIES by letter dated September 9, 1948 and agreed to by the Fund by letter dated September 28, 1948.

¹¹⁹ L/3388, 18S/48, 52, Annex I.

¹²⁰ *Ibid.*, 18S/49, para. 2.

Concerning Committee practice regarding the content of discussions, see the 1988 Note by the Secretariat on “Consultations Held in the Committee on Balance-of-Payments Restrictions under Articles XII and XVIII:B since 1975”.¹²¹

(a) *External trade factors relating to the balance of payments*

Article XII:4(e) refers to “special external factors adversely affecting the export trade of the contracting party applying restrictions”. The Report of the Review Working Party on “Quantitative Restrictions” notes that the Working Party agreed

“that ... the scope of consultations under paragraph 12 of Article XVIII was the same as that of consultations under Article XII and that the clarification contained in paragraph 4(e) of Article XII and in the related interpretative note would apply equally to consultations undertaken under Section B of Article XVIII”.¹²²

The full consultation procedures agreed in 1970 provide in paragraph 3 that:

“The CONTRACTING PARTIES have agreed that in the consultations on balance of payments and other trade and development problems of developing countries provided for in GATT, particular attention should be given to the possibilities for alleviating and correcting these problems through measures that contracting parties might take to facilitate an expansion of the export earnings of these countries. Such ‘expanded consultations’ are to be held with any developing contracting party normally consulting under Article XVIII:12(b) which desires that a particular consultation be held on this basis”.¹²³

In 1972 the Director-General confirmed that the procedure for “expanded consultations” with a developing contracting party was voluntary and would not take place if it was not requested by the country itself.¹²⁴

The 1979 Declaration provides that

“... If the Committee finds that the consulting contracting party’s measures ... are in important respects related to restrictive trade measures maintained by another contracting party² ... it shall so report to the Council which shall take such further action as it may consider appropriate. ...

“In the course of full consultations with a less-developed contracting party the Committee shall, if the consulting contracting party so desires, give particular attention to the possibilities for alleviating and correcting the balance-of-payments problem through measures that contracting parties might take to facilitate an expansion of the export earnings of the consulting contracting party, as provided for in paragraph 3 of the full consultation procedures”.¹²⁵

Footnote 2 to the Declaration provides: “It is noted that such a finding is more likely to be made in the case of recent measures than of measures in effect for some considerable time”.

(b) *External factors: general macroeconomic climate and external debt*

In 1982-83 discussions took place concerning the treatment in the work of the Committee on Balance-of-Payments Restrictions of balance-of-payments problems confronting heavily-indebted developing countries. A

¹²¹MTN.GNG/NG7/W/46, dated 24 June 1988, pp. 13-18, paras. 35-52.

¹²²L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 184, para. 49.

¹²³L/3388, 18S/48, 49, para. 3. See also Spec(68)102, Note by the Chairman of the Committee on “Expanded Balance-of-Payments Consultations under Article XVIII”, dated 11 October 1968 (discussing initial experience with such consultations in 1968).

¹²⁴C/M/83, p. 6.

¹²⁵L/4904, adopted on 28 November 1979, 26S/205, 208-209, paras. 11-12.

1984 Statement by the Chairman of the Committee on Balance-of-Payments Restrictions to the Council summarized the result of these discussions.¹²⁶ The Chairman stated, *inter alia*, that:

“In discussing the legal framework for consideration of external factors, there appeared to be no need for a new or extended mandate to enable the Balance-of-Payments Committee to take into account the trading environment facing consulting countries. The following provisions, which so far have been rarely invoked, do not only provide a legal basis but also make it clear that the Committee has a duty to fulfil in this respect:

- “(a) Article XII:4(e) of the General Agreement states that in undertaking consultations, the CONTRACTING PARTIES ‘shall have due regard to any special external factors adversely affecting the export trade of the contracting party applying restrictions’. This principle is also to be found in paragraph 2 of the 1970 consultation procedures, which applies to all consulting contracting parties, where it is stated, *inter alia*, that ‘Account should be taken of all factors, both internal and external, which affect the balance of payments position of the consulting country’.
- “(b) Paragraph 12 of the 1979 Declaration drawing on paragraph 3 of the 1970 procedures, instructs the Committee, if a developing consulting country so desires, to give particular attention to possibilities for alleviating the balance-of-payments problems of that country through measures that other contracting parties might take to facilitate an expansion of the export earnings of the consulting country. These provisions are available to any developing country in full consultations, if it so desires.
- “(c) While preserving the special character of simplified consultations provided for in the procedures agreed in 1972, there is nothing which prevents countries, under these procedures, from drawing attention to any relevant external factors, and appealing to other contracting parties for remedial action. It would then be for the country concerned and the Committee to decide on the desirability of full consultations in such cases”.¹²⁷

The Statement provided further:

“It was recognized that the basic rôle of the Committee remains the examination, in terms of the relevant provisions of the General Agreement, of measures taken for balance-of-payments purposes by a consulting country, and that the widely felt need for more symmetry in the Committee’s discussions should not detract from this basic function”.¹²⁸

“In the present consultations, the general view was taken that the Committee’s task in relation to ‘external factors’ should be to identify, in its reports to the Council, possible areas in which action might be taken by contracting parties, with a view to alleviating the trade aspect of balance-of-payment problems. It would not be the Committee’s intention to duplicate any work in other GATT fora or engage in a negotiating process, but rather, to highlight particular areas and encourage those contracting parties which are in a position to do so, to respond in a positive manner ...”.¹²⁹

(c) *Prior consultations on external factors*

At the November 1984 Council meeting, Chile proposed that prior consultations under Article XVIII:12 and XII:4 be used to create opportunities for a country facing balance-of-payments difficulties, when trade barriers seemed to be an important factor, to request its trading partners to consider elimination of such barriers.¹³⁰ In March 1985 the Chairman of the Committee on Balance-of-Payments Restrictions reported on

¹²⁶C/125 dated 13 March 1984, approved by the Council on 15/16 May 1984 (C/M/178, p. 26), 31S/56. See also discussion at C/M/174, 178, 179, 183, 186.

¹²⁷*Ibid.*, 31S/58-59, para. 7.

¹²⁸*Ibid.*, 31S/59, para. 8.

¹²⁹*Ibid.*, 31S/60, para. 12.

¹³⁰C/M/183.

consultations held on this proposal with members of the Committee and interested contracting parties. The report provides:

“After some discussion, it was recognized that in view of the text and drafting history of Article XII:4(a) and XVIII:12(a) (BISD 3S/171) there was nothing to prevent a contracting party in balance-of-payments difficulties from holding prior consultations with the Committee, under the normal procedures of these Articles. These procedures appeared adequate to accommodate the basic purpose of the Chilean proposal. Consultations in such cases would be full consultations by the Committee to examine the nature of the balance-of-payments difficulties of the consulting country and alternative corrective measures which may be available, and would take due account of all factors, including external factors, affecting the consulting country’s balance-of-payments, as laid down in the relevant procedures established for the Committee’s work, including Paragraphs 2 and 3 of the 1970 consultation procedures (BISD 18S/49) and Paragraph 12 of the 1979 Declaration (BISD 26S/208), also bearing in mind the considerations set out in document C/125 which was approved by the Council in May 1984 (C/M/178, pages 24-26). If, following such consultations, the consulting country found it necessary to introduce import restrictive measures for balance-of-payments purposes, further full consultations should be held. Depending on the time elapsed since the prior consultations these might focus more particularly on the scope and effect of the measures. However, this would be up to the Committee to judge depending on the circumstances of individual cases”.¹³¹

5. Conclusions and recommendations of the Committee

The 1979 Declaration provides that:

“The Committee shall report on its consultations to the Council. The reports on full consultations shall indicate:

- “(a) the Committee’s conclusions as well as the facts and reasons on which they are based;
- “(b) the steps the consulting contracting party has taken in the light of conclusions reached on the occasion of previous consultations;
- “(c) in the case of less-developed contracting parties, the facts and reasons on which the Committee based its decision on the procedure followed; and
- “(d) in the case of developed contracting parties, whether alternative economic policy measures are available.

“If the Committee finds that the consulting contracting party’s measures

- “(a) are in important respects related to restrictive trade measures maintained by another contracting party¹³² or
- “(b) have a significant adverse impact on the export interests of a less-developed contracting party,

“it shall so report to the Council which shall take such further action as it may consider appropriate.

...

“If the Committee finds that a restrictive import measure taken by the consulting contracting party for balance-of-payments purposes is inconsistent with the provisions of Articles XII, XVIII:B or this Declaration, it shall, in its report to the Council, make such findings as will assist the Council in making appropriate recommendations designed to promote the implementation of Articles XII and XVIII:B and this

¹³¹C/132, 32S/46, 47-48, para. 5.

¹³²Footnote 2 to the Decision provides: “It is noted that such a finding is more likely to be made in the case of recent measures than of measures in effect for some considerable time.”

Declaration. The Council shall keep under surveillance any matter on which it has made recommendations".¹³³

Paragraph 13 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provides as follows:

"The Committee shall report on its consultations to the General Council. When full consultation procedures have been used, the report should indicate the Committee's conclusions on the different elements of the plan for consultations, as well as the facts and reasons on which they are based. The Committee shall endeavour to include in its conclusions proposals for recommendations aimed at promoting the implementation of Articles XII and XVIII:B, the 1979 Declaration and this Understanding. In those cases in which a time-schedule has been presented for the removal of restrictive measures taken for balance-of-payments purposes, the General Council may recommend that, in adhering to such a time-schedule, a Member shall be deemed to be in compliance with its GATT 1994 obligations. Whenever the General Council has made specific recommendations, the rights and obligations of Members shall be assessed in the light of such recommendations. In the absence of specific proposals for recommendations by the General Council, the Committee's conclusions should record the different views expressed in the Committee. When simplified consultation procedures have been used, the report shall include a summary of the main elements discussed in the Committee and a decision on whether full consultation procedures are required."

See also the Secretariat Note of 24 June 1988 on "Consultations Held in the Committee on Balance-of-Payments Restrictions under Articles XII and XVIII:B since 1975", which reproduces in full all of the paragraphs of the Balance-of-Payments Committee's reports containing the Conclusions and Recommendations of the Committee from 1975 through 1988.¹³⁴

See also the reference at page 381 above to the "interim conclusion" reached by the Committee in its Report on the simplified consultation held with Sri Lanka in 1994.

6. Discussion and adoption by the GATT Council of reports by the Committee

Reports on all consultations in the Balance-of-Payments Committee are submitted to the Council for discussion and adoption. The Council's adoption of the reports, which are introduced by the Chairman of the Committee, gives effect to the recommendations of the Committee. All reports by the Committee have been adopted by the Council.

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

The corresponding provision in the US/UK *Proposals* appears in Chapter III C-2; in the US Draft in Article 20; in the London and New York Drafts in Article 26; in the Geneva Draft in Article 22; and in the Havana Charter in Article 21. The original US proposal was redrafted at London on the basis of a proposal by the United Kingdom, which largely formed the basis of Article 26 of the London Draft Charter.¹³⁵

Article XII was extensively debated and amended at the Review Session in 1954-55; the 1947 provisions providing for prior consultation were deleted and emphasis was placed on the balance-of-payments consultation process. See the Review Session documents listed below.

¹³³L/4904, adopted on 28 November 1979, 26S/205, 208, paras. 11 and 13.

¹³⁴MTN.GNG/NG7/W/46, Annex I.

¹³⁵See EPCT/C.II/W.22 (UK proposal), EPCT/C.II/QR/PV/1-5, EPCT/C.II/QR/PV/3 p.2ff (explanation of redraft).

IV. RELEVANT DOCUMENTS*London*

Discussion: EPCT/C.II/PV/5, 6, 8, 13;
EPCT/C.II/QR/PV/1, 3, 5, 6;
EPCT/C.II/36, 45, 66
Reports: EPCT/C.II/59; EPCT/30
Other: EPCT/C.II/34, 44

New York

Discussion: EPCT/C.6/17+Corr.1-2,
20+Corr.1-2, 23, 27, 34, 105,
106
Reports: EPCT/C.6/15, 97/Rev.1 (p.62)
Other: EPCT/C.6/W/5, 11, 17+Corr.1,
30+Corr.1, 34, 43, 81

Geneva

Discussion: EPCT/EC/PV.2/22
EPCT/A/SR.27, 28, 29
EPCT/A/PV/28, 41
EPCT/TAC/SR/13
EPCT/TAC/PV/27, 28
Reports: EPCT/135, 163, 171, 180, 186,
189, 196, 212, 214/Rev.1/Add.1
EPCT/W/313
Other: EPCT/W/64, 73, 136, 194, 209,
211, 213, 215, 216, 217, 223, 231,
256, 272, 301, 318+Add.1

Havana

Discussion: E/CONF.2/C.3/SR.19, 21, 24,
38, 46
Reports: E/CONF.2/C.3/57, 82
Other: E/CONF.2/C.3/F/W.8, 11

CONTRACTING PARTIES

Reports: GATT/CP.4/10, 31+Corr.1
GATT/CP.5/24
L/24+Add.1, L/51
Other: Annecy press releases 18, 32, 44
Press release Torquay/19
GATT/96

Review Session:

Discussion: SR.9/14, 15, 25, 26, 40
Reports: W.9/106+Corr.2, 126, 130,
174+Add.1, 208, 219, 225,
236/Add.3
Other: L/189, L/246, L/261/Add.1,
L/271, L/272
W.9/18+Add.1, 22, 23, 25, 29,
31, 47, 52, 60, 73, 74, 77/Rev.1,
79, 80+Corr.1, 82, 106, 112,
115, 126, 130, 132, 136, 139,
179, 181, 226
Sec/137/54+Rev.1; Spec/23/55,
43/55, 45/55, 51/55,
53/55+Rev.1, 58/55, 68/55,
90/55, 148/55, 150/55, 172/55,
182/55
MGT/9/55

V. TABLES

Key:

F = Full consultation

F* = Last full consultation

S = Simplified consultation

P = Postponed

D = Disinvocation of Article XII or XVIII:B.

Numbers in parentheses are BOP/R/ report references.

Reference to last full consultation indicated in boldface.

Notes:

1. All countries listed were invoking balance-of-payments provisions as of 1979, unless otherwise noted. Invocations of Article XII or XVIII:B during the reference period are understood to mean either the first invocation by a particular country or a reinvocation after previous disinvocation of the relevant Article. Greece disinvoked Article XVIII in 1984; later consultations are under Article XII.
2. Italy, New Zealand (consultation on deposit requirement for purchases of foreign currency) and South Africa also consulted with the CONTRACTING PARTIES on an *ad hoc* basis in 1974-76, about their imposition of import deposits for balance of payments purposes, but in special Working Parties established for the purpose.
3. In the case of Israel and South Africa the Article under which the consultations are held is not specified.
4. The Czech and Slovak Federal Republic ceased to exist on 31 December 1992.
5. There were no disinvocations of Article XII or XVIII in 1993-94.

**A. COUNTRIES CURRENTLY INVOKING ARTICLE XII OR XVIII:B:
BALANCE-OF-PAYMENTS CONSULTATIONS CONDUCTED SINCE 1979 DECLARATION**

Country	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994
Bangladesh	S(116)		S(128)		S(147)		S(161)		S(175)		S(188)		S(200)		P
Egypt		S(117)		S(133)		S(157)			F(176)		S(188)		F(201)		P
India	S(112)		S(126)		S(143)		S(163)	F(168)		F(184)		P	F(197)		S(221)
Israel (3)	-113		-129		-142	-155		-170		-187		-195		-210.	-214
Nigeria					F(139)		S(163)		S(179)		P	S(190)		F(209)	
Pakistan	S(112)		S(126)			S(150)		S(169)		F(181)		P	S(198)		S(221)
Philippines	F(115)		S(128)		S(147)		F(164)		S(179)		P	S(190)		F(204)	
Poland (Art.XII)													Art.XII invoked 1992	-206.	-216
S.Africa (3)														-211.	P
Sri Lanka		S(117)		S(133)		S(153)		S(169)		S(186)		P	S(198)		S(219)
Tunisia		S(121)		S(137)		S(157)			S(179)		P	S(190)	F(202)		S(214)
Turkey		S(120)		S(137)		S(153)		S(166)	F(178)		P	S(191)		F(207)	
Yugoslavia		S(117) F(122)			S(143)		S(163)		S(179)		P	F(191)			

B. CONTRACTING PARTIES WHICH HAVE DISINVOKED ARTICLE XII OR XVIII:B SINCE 1979

Country	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992
Argentina							F(159)		S(179)			D	
Brazil	S(116)	F(124)		F(135)	S(157)		F(172)		S(186)		P	D	
Colombia	Art. XVIII:B invoked upon accession 1981					F(156)		S(166)		S(185)		P	D
Czech & Slovak Fed. Rep.											Art. XII invoked 12/90	-193	D
Ghana	S(116)		S(128)	F(136)		S(157)		S(169)		D(186)			
Greece	F(114)	F(123)			D		F(160)	D					
Hungary				F(131)	F(141)	D							
Italy		F(119)	D										
Korea		S(117)		S(133)	F(146)		S(163)	F(171)		D(183)			
Peru		S(120)		S(137)			S(161)	F(173)		S(186)		D	
Portugal	F(111)	F(118)	F(125)	F(134)	F(145)	F(152)	D						

ARTICLE XIII

NON-DISCRIMINATORY ADMINISTRATION OF QUANTITATIVE RESTRICTIONS

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I. TEXT OF ARTICLE XIII AND RELEVANT INTERPRETATIVE NOTES

Article XIII*

Non-discriminatory Administration of Quantitative Restrictions

1. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

2. In applying import restrictions to any product, contracting parties shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions, and to this end shall observe the following provisions:

- (a) Wherever practicable, quotas representing the total amount of permitted imports (whether allocated among supplying countries or not) shall be fixed, and notice given of their amount in accordance with paragraph 3 (b) of this Article;
- (b) In cases in which quotas are not practicable, the restrictions may be applied by means of import licences or permits without a quota;
- (c) Contracting parties shall not, except for purposes of operating quotas allocated in accordance with sub-paragraph (d) of this paragraph, require that import licences or permits be utilized for the importation of the product concerned from a particular country or source;
- (d) In cases in which a quota is allocated among supplying countries, the contracting party applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product. No conditions or formalities shall be imposed which would prevent any contracting party from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.*

3. (a) In cases in which import licences are issued in connection with import restrictions, the contracting party applying the restrictions shall provide, upon the request of any contracting party having an interest in the trade in the product concerned, all relevant information concerning the administration of the restrictions, the import licences granted over a recent period and the distribution of such licences among supplying countries; *Provided* that there shall be no obligation to supply information as to the names of importing or supplying enterprises.

(b) In the case of import restrictions involving the fixing of quotas, the contracting party applying the restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any change in such quantity or value. Any supplies of the product in question which were *en route* at the time at which public notice was given shall not be excluded from entry; *Provided* that they may be counted so far as practicable, against the quantity permitted to be imported in the period in question, and also, where necessary, against the quantities permitted to be imported in the next following period or periods; and *Provided* further that if any contracting party customarily exempts from such restrictions products entered for consumption or withdrawn from warehouse for consumption during a period of thirty days after the day of such public notice, such practice shall be considered full compliance with this sub-paragraph.

(c) In the case of quotas allocated among supplying countries, the contracting party applying the restrictions shall promptly inform all other contracting parties having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value, to the various supplying countries and shall give public notice thereof.

4. With regard to restrictions applied in accordance with paragraph 2 (d) of this Article or under paragraph 2 (c) of Article XI, the selection of a representative period for any product and the appraisal of any special factors* affecting the trade in the product shall be made initially by the contracting party applying the restriction; *Provided* that such contracting party shall, upon the request of any other contracting party having a substantial interest in supplying that product or upon the request of the CONTRACTING PARTIES, consult promptly with the other contracting party or the CONTRACTING PARTIES regarding the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved, or for the elimination of conditions, formalities or any other provisions established unilaterally relating to the allocation of an adequate quota or its unrestricted utilization.

5. The provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party, and, in so far as applicable, the principles of this Article shall also extend to export restrictions.

Interpretative Notes from Annex I

Ad Article XIII

Paragraph 2(d)

No mention was made of “commercial considerations” as a rule for the allocation of quotas because it was considered that its application by governmental authorities might not always be practicable. Moreover, in cases where it is practicable, a contracting party could apply these considerations in the process of seeking agreement, consistently with the general rule laid down in the opening sentence of paragraph 2.

Paragraph 4

See note relating to “special factors” in connexion with the last sub-paragraph of paragraph 2 of Article XI.

Ad Articles XI, XII, XIII, XIV and XVIII

Throughout Articles XI, XII, XIII, XIV and XVIII, the terms “import restrictions” or “export restrictions” include restrictions made effective through state-trading operations.

II. INTERPRETATION AND APPLICATION OF ARTICLE XIII

A. SCOPE AND APPLICATION OF ARTICLE XIII

Concerning the general scope of Article XIII, see also the unadopted 1994 panel report on “EEC - Import Régime for Bananas”.¹

1. Paragraph 1

(1) “of all third countries”

The 1989 Panel Report on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile” examined, *inter alia*, the claim that the administration and allocation of certain quantitative restrictions violated Article XIII.

¹DS38/R, dated 11 February 1994, paras. 141-142.

“The Panel recognized that, given its finding that the EEC measures were a violation of Article XI:1 and not justified by Article XI:2(c)(i) or (ii), no further examination of the administration of the measure would normally be required. Nonetheless, and even though the Panel was concerned with measures which had already been eliminated, in view of the questions of great practical interest raised by both parties it considered it appropriate to examine the administration of the EEC measures in respect of Article XIII.

“The first paragraph of the Article established the general obligation of non-discrimination in the administration of quantitative restrictions. The Panel noted that Commission Regulation 984/88 of 12 April 1988 suspended the issue of import licences in respect only of apples originating in Chile, eight days before the publication of import quotas. The Panel found that this measure constituted a prohibition in terms of Article XIII:1, and that it was applied contrary to that provision since the like products of all third countries had not been similarly prohibited. The Panel then proceeded to consider the EEC administration of the import quotas under Regulation 1040/88 in light of the subsequent provisions which delineated more specific requirements to achieve the aim of Article XIII:1.”²

(2) *“similarly prohibited or restricted”*

The 1980 Panel on “EEC Restrictions on Imports of Apples from Chile” examined EEC protective measures suspending imports of apples from Chile. The Panel Report includes the following finding:

“The Panel examined the EEC measures in relation to Article XIII:1. The Panel found that the EEC suspension applied to imports from Chile was not a restriction similar to the voluntary restraint agreements negotiated with the other Southern Hemisphere suppliers on the basis primarily that:

- “(a) there was a difference in transparency between the two types of action;
- “(b) there was a difference in the administration of the restrictions, the one being an import restriction, the other an export restraint; and
- “(c) the import suspension was unilateral and mandatory while the other was voluntary and negotiated”.³

2. Paragraph 2

(1) *“aim at a distribution of trade”*

It was pointed out during discussions at the Havana Conference that “global quotas not allocated among supplying countries might sometimes operate in a manner unduly favourable to those countries best able for any reason to take prompt advantage of the global quotas at the opening of the quota period; and it was agreed that Members, in administering import restrictions, should pay due regard to the need for avoiding such a result. It was also agreed that, in the case of perishable commodities, due regard should be had for the special problems affecting the trade in these commodities”.⁴

The 1980 Panel Report on “Norway - Restrictions on Imports of Certain Textile Products”, which examined an Article XIX action by Norway, notes as follows:

“The Panel was of the view that the type of action chosen by Norway, i.e. the quantitative restrictions limiting the importation of the nine textile categories in question, as the form of emergency action under Article XIX was subject to the provisions of Article XIII which provides for non-discriminatory administration of quantitative restrictions. In this connexion, the Panel noted the introductory part of paragraph 2 which stipulates that in applying an import restriction on a product, a contracting party ‘shall aim at a distribution of trade in such a product approaching as closely as possible the share which the

²L/6491, adopted on 22 June 1989, 36S/93, 130, paras. 12.20-12.21.

³L/5047, adopted on 10 November 1980, 27S/98, 114, para. 4.11.

⁴Havana Reports, p. 91, para. 28.

various contracting parties might be expected to obtain in the absence of such restrictions ...'. To this end, paragraph 2(a) of Article XIII further prescribes that wherever practicable, quotas representing the total amount of permitted imports (whether allocated among supplying countries or not) shall be fixed".⁵

The 1989 Panel Report on "EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile" notes

"that the first sentence of Article XIII:2 committed contracting parties applying import restrictions to any product to 'aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions', and sub-paragraph (d) provided more specific requirements for the allocation of quota shares. The Panel considered that it would not be useful for it to make a finding regarding the actual size of quota shares ...".⁶

See also the material below regarding choice of reference period for the purpose of allocating quota shares, at page 402.

(2) Paragraph 2(c)

The question was raised at the Geneva session of the Preparatory Committee "whether a Member was permitted to require an import licence or permit to be utilized for the importation of a product from a particular country or source for balance-of-payments reasons". The Sub-Committee on the quantitative restrictions articles of the Charter considered that provisions for such an exception should not appear in Article 27 [corresponding to Article XIII of the General Agreement]; the Sub-Committee on the balance-of-payments articles of the Charter felt that Article 29:8(ii) [corresponding to Article XV:9(b) of the present text of the General Agreement] took due account of this problem.⁷ See also generally Article XIV.

(3) Paragraph 2(d): "in cases in which a quota is allocated among supplying countries"

See the Interpretative Note *Ad* Article XIII:2(d).

(a) Allocation of quotas

The Panel Report on "Norway - Restrictions on Imports of Certain Textile Products" notes that

"In the case before the Panel, Norway had in early 1978 concluded long-term bilateral arrangements with six textile-supplying countries. The Panel noted that Norway had concluded these agreements with the intention of acceding to the MFA and notifying these agreements to the TSB pursuant to the appropriate Article of the MFA. The Panel noted also, however, that in the event Norway had not acceded to the MFA and that for these arrangements no derogation or provision of Parts I-III of GATT had ever been invoked by Norway ... The Panel held that Norway's reservation of market shares for these six countries therefore represented a partial allocation of quotas under an existing régime of import restrictions of the products in question and that Norway must therefore be considered to have acted under Article XIII:2(d). The Panel noted that had the reservation of market shares for the six countries been entered into pursuant to Article XIII:2(d), Norway could have been presumed to have acted under the first sentence of that provision.

"... The Panel was of the view that to the extent that Norway had acted with effect to allocate import quotas for these products to six countries but had failed to allocate a share to Hong Kong, its Article XIX action was not consistent with Article XIII".⁸

⁵L/4959, adopted on 18 June 1980, 27S/119, 125, para. 14.b.

⁶L/6491, adopted on 22 June 1989, 36S/93, 130-131, para. 12.22.

⁷EPCT/163, p. 23.

⁸L/4959, adopted on 18 June 1980, 27S/119, 125-126, paras. 15-16.

The 1980 Panel Report on “EEC Restrictions on Imports of Apples from Chile” notes that

“... notwithstanding the Panel’s conclusions regarding the lack of similarity of the restrictions with reference to Article XIII:1, and in light of XIII:5, the Panel proceeded to consider the EEC import suspension against Chile and the voluntary restraint agreements with other Southern Hemisphere exporters as ‘quotas’ for purposes of the Panel’s examination of the EEC measure under XIII:2”.⁹

The 1984 Report of the “Panel on Newsprint” examined the action of the European Communities in opening a duty-free tariff quota for m.f.n. suppliers of 500,000 tonnes for newsprint for the year 1984 (whereas the EC’s commitment in its schedule provided for an annual duty-free quota of 1.5 million tonnes) as the EFTA countries had obtained full duty-free access for newsprint from 1 January 1984 onward.

“The Panel also noted the EC statement that ... the action taken by the EC was merely a change in the administration or management of the tariff quota which was permissible under Article XIII of the GATT, and that therefore renegotiations under Article XXVIII were not called for. ...

“The Panel considered the arguments advanced by the EC relating to Article XIII, but concluded that the conditions for its application had not been fulfilled. In examining the EEC Regulation 3684/83, the Panel found that it did not in fact constitute a change in the administration or management of the tariff quota from a global quota system to a system of country shares, as had been asserted by the EC ... It does not provide an allocation of country shares to individual m.f.n. suppliers, nor has a separate quota (global or otherwise) for the EFTA countries been established, as Article XIII requires.”¹⁰

(b) *“representative period”*

The Report of the Review Working Party on “Quantitative Restrictions” includes the following agreed interpretation of paragraph 2, agreed during the 1954-55 Review Session:

“The Working Party does not propose any change in the text of Article XIII. It considered, however, a suggestion which was put forward to the effect that an interpretative note should be added to clarify the term ‘previous representative period’ which appears in sub-paragraph 2(d) of Article XIII. The object of this note was to specify that, in cases in which import restrictions on a given product had been enforced for a certain time, the contracting party applying the restriction should grant to the foreign suppliers a share of its market which would correspond to what could reasonably have been expected in the absence of restrictions. The Working Party was not prepared to recommend the inclusion of that note but agreed to recognize that the general rule contained in the introduction to paragraph 2 governed the various sub-paragraphs of that paragraph including those of sub-paragraph (d) to which the note was intended to refer”.¹¹

The 1980 Panel Report on “EEC Restrictions on Imports of Apples from Chile” considered it appropriate, with regard to both Articles XI:2(c) and XIII:2(d), and

“in keeping with normal GATT practice ... to use as a ‘representative period’ a three-year period previous to 1979, the year in which the EEC measures were in effect. Due to the existence of restrictions in 1976, the Panel held that that year could not be considered as representative, and that the year immediately preceding 1976 should be used instead. The Panel thus chose the years 1975, 1977 and 1978 as a ‘representative period’”.¹²

The 1989 Panel Report on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile” includes the following finding:

⁹L/5047, adopted on 10 November 1980, 27S/98, 114, para. 4.12.

¹⁰L/5680, adopted on 20 November 1984, 31S/114, 131-132, paras. 49, 51.

¹¹L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 176, para. 24.

¹²L/5047, adopted on 10 November 1980, 27S/98, 113, 116, paras. 4.8, 4.16.

“... The Panel considered that it would not be useful for it to make a finding regarding the actual size of quota shares. It observed that the previous three years were normally considered to be the appropriate reference period, with due account taken of relevant special factors. The Panel did not construe ‘special factors’ applicable to only one, or some, exporters as sufficient reason to change the base period which applied to all - though these special factors should be taken into account in considering individual quota allocations. Therefore the Panel found that the reference period applied by the EEC for the purpose of allocating quota shares - i.e., the previous three years - was consistent with its obligations under Article XIII”.¹³

(c) “*special factors*”

The Sub-Committee at the Havana Conference which considered Articles 20 and 22 of the Charter (corresponding to Articles XI and XIII of the General Agreement) “agreed that the interpretative note on ‘special factors’ should be retained as a note but should be made more explicit both by the deletion of the cross reference to the note to Article 20 which appears in the Geneva text and by the specific mention of certain additional factors which should be taken into account in the allocation of quotas. The Sub-Committee also agreed that it was desirable to make clear that, in cases where separate import quotas were allotted to the various foreign suppliers, a country whose productive efficiency or ability to export had increased relatively to other foreign suppliers since the representative period on which import quotas were based should receive a relatively larger import quota”.¹⁴ It was accordingly agreed to add the following Interpretative Note to paragraphs 2(d) and 4 of Article 22 of the Charter (which correspond to Article XIII:2(d) and 4):

“The term ‘special factors’ as used in Article 22 includes among other factors the following changes, as between the various foreign producers, which may have occurred since the representative period:

- “1. changes in relative productive efficiency;
- “2. the existence of new or additional ability to export; and
- “3. reduced ability to export”.

It was also agreed that “changes artificially brought about since the representative period (assuming that period to have preceded the coming into force of the Charter) by means not permissible under the provisions of the Charter were not to be regarded as ‘special factors’ for the purposes of paragraph 2(c) and Article 22. The Sub-Committee agreed, however, that it was unnecessary to state this specifically in the text of the Articles or in the interpretative notes.”¹⁵

The 1980 Panel Report on “EEC - Restrictions on Imports of Apples from Chile” refers to these Charter provisions:

“... the Panel noted the fact that exports from Chile into the EEC had been expanding rapidly. ... The Panel believed that Chile’s increased export capacity should have been taken into account by the EEC in its allocation of shares among the Southern Hemisphere suppliers. The Panel felt such a consideration was in line with the interpretative note to the term ‘special factors’ as drafted in the Havana Charter, in particular with reference to the ‘existence of new or additional ability to export’ as between foreign producers. Moreover, the Panel considered that the fact that Chilean exporters had signed commercial contracts with EEC importers to the amount of 60,500 m.t. further demonstrated Chile’s increased export capacity and that these contracts should have been taken into account as a ‘special factor’ as well”.¹⁶

¹³L/6491, adopted on 22 June 1989, 36S/93, 130-131, para. 12.22.

¹⁴Havana Reports, p. 95, para. 52.

¹⁵Havana Reports, p. 94, para. 43.

¹⁶L/5047, adopted on 10 November 1980, 27S/98, 115, para. 4.17.

In the Panel Report on “United States - Imports of Sugar from Nicaragua”

“Nicaragua argued that the United States measures were inconsistent with the provisions of Article XIII of the General Agreement and in particular with paragraph 2 ... The Panel noted that under the sugar quota system established by the United States on 5 May 1982 the share of each supplying country corresponded to its share in the total sugar imports of the United States during a previous representative period, and that Nicaragua had, on this basis, been allocated 2.1 per cent of the total import quota, which amounted in the fiscal year 1982/83 to 58,000 short tons. Nicaragua’s quota for the fiscal year 1983-84 had been reduced to 6,000 short tons, or about one-tenth of its prior allocation, and this reduction had not been motivated by any factor which might have affected or might be affecting trade in sugar. The Panel therefore concluded that the sugar quota allocated to Nicaragua for the fiscal year 1983-84 was inconsistent with the United States obligations under Article XIII:2.”¹⁷

The 1989 Panel Report on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile” includes the Panel findings that:

“Concerning ‘special factors’, the Panel took into account the Interpretative Note to paragraph 4 of Article XIII, which refers to the Note relating to ‘special factors’ in connection with the last sub-paragraph of Article XI:2. This reads:

‘The term “special factors” includes changes in relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement.’

“The Panel further recalled that Article XIII:4 permits the party applying the restriction to initially select the representative period and appraise the special factors. It should subsequently consult, upon their request, with contracting parties seeking reappraisal of these factors. The Panel considered that this requirement for consultation was designed to ensure that due account was taken of special factors in terms of Article XIII:2(d) and in the light of the interpretation noted above. The Panel found that the overall trend towards an increase in Chile’s relative productive efficiency and export capacity had not been duly taken into account, nor had the temporary reduction in export capacity caused by the 1985 earthquake. On the other hand the Panel did not find any basis in the General Agreement for the EEC taking into account as special factors the ‘restraint’ alleged to have been exercised in previous years by other suppliers. Therefore the Panel found that the account taken of special factors by the EEC in allocating Chile’s quota share did not meet the requirements of Article XIII:2(d).”¹⁸

- (d) *“No conditions or formalities shall be imposed which would prevent any contracting party from utilizing fully the share ... which has been allotted to it ...”*

The 1950 Working Party Report on “The Use of Quantitative Import and Export Restrictions for Protective, Promotional and other Commercial Purposes” provides as follows:

“... the Working Party noted that there was evidence of a number of types of misuse of import restrictions, in particular the following ...

“The imposition by a country of administrative obstacles to the full utilization of balance-of-payments import quotas, e.g. by delaying the issuance of licenses against such quotas by establishing license priorities for certain imports on the basis of the competitiveness or non-competitiveness of such imports with the products of domestic industry, in a manner inconsistent with the provisions of Article XII through XIV ... In this connection, the Working Party took note of Article XIII:2(d), which provides that ‘No conditions or formalities shall be imposed which would prevent any contracting party from utilizing fully the share of any

¹⁷L/5607, adopted on 13 March 1984, 31S/67, 73, para. 4.3.

¹⁸L/6491, adopted on 22 June 1989, 36S/93, para. 12.24.

such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate”.¹⁹

(4) “subject to importation being made within any prescribed period to which the quota may relate”

This condition was added to the Charter Article on non-discriminatory administration of quantitative restrictions when it was first discussed during the London session of the Preparatory Committee. The reason given for this addition was that “it would be very difficult to administer any system of quantitative regulation unless you could have some limitation over the time within which imports could be made”.²⁰

3. Paragraph 3(a): Administration of import licensing

In 1950 at the Torquay Session the CONTRACTING PARTIES adopted a Working Party Report on a proposal for a Code of Standard Practices for the Administration of Import and Export Restrictions and Exchange Controls,²¹ including the recommendations therein that the CONTRACTING PARTIES “approve the draft standards set out in the Annex to this Report [and] recommend these practices to the individual contracting parties as a code which they should endeavour to adopt to the maximum practicable extent”. The Report further provides:

“The Working Party considered that the proposed standards ... should be regarded as a code for the guidance of contracting parties and not as additional obligations imposed upon them under the General Agreement ... it was recognised that, where there are clear and overriding considerations, or in individual cases where there is good reason to suspect the bona fides of transactions in question, it may be necessary for contracting parties to depart from the precise terms of these recommendations.

“The Working Party confined its attention principally to the formulation of standard practices to be applied by governments imposing import and export restrictions for balance-of-payment reasons. Since, however, international trade in many products is subject to other regulations and orders, the Working Party was of the opinion that, where possible, the principles underlying the set of standard practices ... should also be observed for such regulations and orders”.

The Annex provides as follows.

“1. The grant of an import licence should imply that the necessary foreign exchange will be obtainable if applied for within a reasonable time. When both import licences and exchange permits are required, the operation of the two requirements should be co-ordinated. If more than one rate of exchange applies in payment for imports, the import licence or exchange permit should indicate the type of exchange which will apply in the settlement of the particular transaction.

“2. Any new or intensified restrictions on importation or exportation should not apply to goods shown to the satisfaction of the control authority to have been en route at the time the change was announced or to have been paid for in substantial part or covered by an irrevocable letter of credit.

“3. Goods proved to have been covered by adequate confirmed prior order at the time new or intensified restrictions are announced, and not marketable elsewhere without appreciable loss, should receive special consideration on an individual case basis, provided their delivery can be completed within a specified period. Such goods, as well as those covered under paragraph 2, should be accountable against any import or export quota or exchange allocation that may have been established for that particular class of goods.

“4. The administrative formalities in connection with the issuance of import and export licences or exchange permits should be designed to allow action upon applications within a reasonably short period. A licence or permit should be valid for a sufficient period to allow for the production or delivery of the goods, taking into account the character of the goods and the conditions of transport from the country of origin.

¹⁹GATT/CP.4/33, adopted on 3 April 1950, para. 21.

²⁰Amendment by New Zealand, EPCT/C.II/PV/13, p. 13.

²¹GATT/CP.5/30/Rev.1; adopted on 30 November 1950, GATT/CP.5/SR.16 p. 2-4; preliminary draft at GATT/CP.5/8, discussion also at GATT/CP.5/SR.8, SR.9.

The control authorities should not withdraw licences or permits unless they are satisfied that exceptional circumstances necessitate such action, and should give sympathetic consideration to requests for renewal or revalidation of licences or permits when exceptional circumstances prevent their utilisation within the original period.

“5. Under a system involving the fixing of quotas for particular classes of goods or of allocations of exchange in payment for them, any period that may be set, within which applications for such quotas or allocations must be made, should be sufficient to allow for the exchange of communications with likely foreign suppliers and the conclusion of purchase contracts.

“6. When foreign products subject to quantitative limitations are apportioned among importers largely in the light of their past participation in the trade, the control authorities, at their discretion and without undue prejudice to the interests of established importers, should give consideration to requests for licences or permits submitted by qualified and financially responsible newcomers.

“7. If an assurance regarding the issue of an import licence is required as a condition of consular legalization of shipping documents in the country of exportation, a reliable communication giving the number of the import licence should suffice.

“8. The authority given to customs officials should be adequate to allow them, at their discretion, to grant reasonable tolerance for variations in the quantity or value of individual shipments as delivered from that specified in the prior import or export authorization, in accordance with the character of the product involved and any extenuating circumstances.

“9. When, owing to exceptional and unforeseen balance-of-payment difficulties, a country is unable to provide foreign exchange for imports immediately payment becomes due to the supplier, transfers of foreign exchange in respect of goods already imported or licensed for importation should have priority over transfers in respect of new orders, or should at least have a definite and equitable share of the total amounts of foreign exchange currently available for imports.”²²

The following supplement to Article 3 of the Torquay Code of Standard Practices was adopted in 1952.

“The CONTRACTING PARTIES recommend to governments imposing or intensifying import or export restrictions that they should authorize, to the fullest extent permitted by the exigencies of their economic and financial position, the importation or exportation of goods covered by firm and legitimate contracts which are proved to their satisfaction to have been concluded in the course of normal business before the announcement of new or intensified import or export restrictions. Governments should give prompt consideration to all individual cases; special consideration should be given to transactions involving perishable or seasonal commodities.”²³

The CONTRACTING PARTIES at their Twenty-eighth Session in November 1972 decided that the data assembled on licensing systems should be kept up to date and that contracting parties should be invited to notify annually by 30 September any changes which should be made concerning the information on their licensing system. The Secretariat has issued annually an airgram inviting contracting parties to communicate any changes in their licensing systems necessary to bring up to date the individual country data, in accordance with a standard questionnaire.²⁴

²²GATT/CP.5/30/Rev.1, paras. 4-5.

²³“Documentary Requirements for Imports, Consular Formalities, Valuation for Customs Purposes, Nationality of Imported Goods and Formalities Connected with Quantitative Restrictions.” Report of the Working Party adopted on 7 November 1952, G/28, 1S/100, 106 para. 22; see also discussion p. 105-106.

²⁴The questionnaire was originally issued as L/1335; the version currently in effect is annexed to L/5640/Rev.8. Up to 1981, notifications appeared as addenda and corrigenda to a document with the dual symbol COM.IND/W/55-COM.AG/W/72. As from 1981, notifications appear in the L/ series (e.g. L/5106/Rev.2, L/5640 and Revisions, and Addenda and Corrigenda thereto). The Annual Report of the Committee on Import Licensing contains a status report on replies by its members to the questionnaire; see 38S/93, L/7109.

See also Secretariat background notes prepared during the Tokyo Round on “Import Documentation”²⁵, “Customs and Administrative Entry Procedures”²⁶ and “Import Licensing Procedures”.²⁷

See also the material below at page 414 on the 1979 Agreement on Import Licensing Procedures. In this connection see also the unadopted 1994 panel report on “EEC - Import Régime for Bananas”.²⁸

4. Paragraph 3(b) and 3(c): Administration of import quotas

(1) “shall give public notice ... of the total quantity or value ... which will be permitted to be imported during a specified time period”: public notice requirements and back-dated quotas

The 1989 Panel on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile” noted in its Report that

“Concerning the notification of quotas and quota shares, ... Article XIII:3(b) requires that ‘in the case of import restrictions involving the fixing of quotas, the contracting party applying the restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period ...’. And Article XIII:3(c) requires that ‘in the case of quotas allocated among supplying countries, the contracting party applying the restrictions shall promptly inform all other contracting parties having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value, to the various supplying countries and shall give public notice thereof’. The Panel also took into account the requirement of Article X:1 to publish trade regulations, including prohibitions or restrictions on imports, promptly in such a manner as to enable governments and traders to become acquainted with them. In the context of Article XIII’s overall concern with the non-discriminatory application of quantitative restrictions, it interpreted Article XIII:3(b) and (c) together as requiring that both the total quota and shares allocated in it be publicly notified for a specified future period. The Article XIII:3(c) requirement to promptly notify other contracting parties with an interest in supplying the product would otherwise be meaningless, as would the Article XIII:3(b) provision for supplies en route to be counted against quota entitlement.

“The Panel therefore considered that the allocation of back-dated quotas, that is, quotas declared to have already been filled at the time of their announcement, did not conform to the requirements of Article XIII:3(b) and Article XIII:3(c). It found that EEC Commission Regulation 1040/88 constituted a back-dated quota in respect of Chile, since although it published a quota share for Chile it simultaneously declared that share to be filled and, in fact, continued the suspension of imports from Chile enacted eight days before quotas were published. The EEC had therefore not observed the notification requirements of Article XIII:3(b) and (c). Moreover, the fact that such a back-dated quota was allocated to only one supplying country, Chile, resulted in the discriminatory administration of the restriction in violation of Article XIII:1”.²⁹

Claims under the publication requirements of Articles XIII and X have been made in panel proceedings but (as subsidiary claims) not ruled upon by the panel in question; see below at page 411.

²⁵MTN/3B/8, MTN/3B/13, MTN/3B/14.

²⁶MTN/3B/2 and Add.

²⁷NTM/W/73, NTM/W/73/Rev.1, NTM/W/73/Corr.1, NTM/W/73/Add.1.

²⁸DS38/R, dated 11 February 1994, paras. 141-142.

²⁹L/6491, adopted on 22 June 1989, 36S/93, 131-132, paras. 12.25-12.26.

(2) “supplies of the good in question which were en route at the time at which public notice were given”

The reference to “goods en route” was inserted into the Charter at the initiative of Chile, in discussions at the London session of the Preparatory Committee in 1946, in connection with the administration of supply-management quotas for agricultural and fisheries products. It was generally agreed at that time that if goods were en route, they must be admitted, but may be counted against a quota.³⁰ The following example was given in the discussion of the operation of the second sentence of paragraph 3(b):

“Supposing a boat is arriving and then it is found that it has all the quantity which is allowed on board, and then the next day another boat arrives, if the second boat-load was en route at the time, the goods cannot be excluded and the country in question would go over its quota. ... after notice has been given then an account has to be taken of the goods en route at the time ...”³¹

This “goods en route” provision was reflected in the London Draft Charter as a proviso to the provision which corresponds to Article XI:2(c) of the General Agreement.³² The Drafting Committee which met at New York between the London and Geneva sessions of the Preparatory Committee moved this proviso to the article of the Charter corresponding to Article XIII. It also inserted the second proviso of paragraph 3(b) “to bring this subparagraph into harmony with the provision concerning publication of certain administrative rulings contained in paragraph 3 of Article 21”.³³ Article 21:3 of the New York Draft Charter (corresponding to Article X:2 of the General Agreement) provided a similar proviso to the requirement of advance publication of trade regulations, which was eliminated in the Geneva Draft Charter and was not included in the General Agreement.³⁴

In the 1980 Panel Report on “EEC - Restrictions on Imports of Apples from Chile”

“The Panel noted that at the time of the suspension, Chilean exporters had signed commercial contracts for 60,500 m.t. of apples with EEC importers. The panel reviewed the Standard Practices for the Administration of Import and Export Restrictions and Exchange Controls (GATT/CP.5/30/Rev.1) that were approved by the CONTRACTING PARTIES in 1950. These guidelines specify, *inter alia*, that:

- (a) ‘any new or intensified restrictions on importation or exportation should not apply to goods shown to the satisfaction of the control authority to have been en route at the time the change was announced or to have been paid for in substantial part or covered by an irrevocable letter of credit’ and
- (b) ‘goods proven to have been covered by adequate confirmed prior order at the time new or intensified restrictions are announced, and not marketable elsewhere without appreciable loss should receive special consideration on an individual case basis, provided their delivery can be completed within a specified period.’

“The Panel noted however that these standard practices ‘should be regarded as a code for the guidance of contracting parties and not as additional obligations imposed upon them under the General Agreement’ and that individual contracting parties ‘should endeavour to adopt them to the maximum practicable extent’.

“With the above in mind, the Panel examined whether the EEC measure against Chile was ‘retroactive’ in the context of XIII:3(b) second sentence. The Panel found the EEC to be consistent therewith, as the EEC had not excluded from entry Chilean apples on board and destined for the EEC, at the time the EEC regulation regarding the import suspension was published”.³⁵

³⁰See EPCT/C.II/QR/PV/4, p. 7-12 and further discussion at EPCT/C.II/QR/PV/5, p. 67-73.

³¹EPCT/C.II/QR/PV/5, p. 71.

³²London Draft Charter Art. 25(f); see also London Report p. 12, section III.C.1(d).

³³New York Report, p. 20, 23.

³⁴Geneva Draft Charter Article 37:3(a).

³⁵L/5047, adopted on 10 November 1980, 27S/98, 116, paras. 4.19-4.20.

In the 1989 Panel Report on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile”

“The Panel went on to examine the EEC’s treatment of goods en route, in the light of Article XIII:3(b)’s stipulation that ‘any supplies of the product in question which were en route at the time at which public notice was given shall not be excluded from entry’. The Panel also took note of the (non-obligatory) Standard Practices for the Administration of Import and Export Restrictions approved by the CONTRACTING PARTIES in 1950. These state in part that ‘any new or intensified restrictions should not apply to goods shown to the satisfaction of the control authority to have been en route at the time the change was announced. ...’ The Panel noted that the EEC, in the preamble to Regulation 962/88, suspending the issue of import licences for Chilean apples, had stated that ‘... no account should be taken of goods being transported to the Community other than those for which import licences have been issued’ but the issue of import licences before sailing was not mandatory under EEC Regulations. The Panel found that by allowing entry only to those goods en route for which an import licence had been issued prior to the Regulation’s entry into force the EEC had added a requirement for which there was no basis in Article XIII. The wording of the Article clearly meant that apples en route - i.e., on board and destined for the EEC - at the time the suspension of Chilean import licences was published should have been admitted to the EEC. The Panel was also aware of the interim decision of the President of the European Court of Justice, dated 10 June 1988, which suspended the operation of the EEC regulations enacting the measures in question in respect of 89,514 cartons of Chilean apples which had been in transit but for which an import licence had not been issued at the time the issue of such licences was suspended for Chile”.³⁶

(3) *Second proviso to paragraph 3(b)*

The material which now appears in the second proviso in paragraph 3(b) was originally inserted into the Charter Article on non-discriminatory administration of quota restrictions, by the Drafting Committee which met in New York between the first and second sessions of the Preparatory Committee. This insertion was made in order to harmonize that provision with paragraph 3 of the New York Draft Charter Article on publication and administration of trade regulations, which provided that no administrative ruling imposing a new or more burdensome requirement, restriction or prohibition on imports would be applied to goods en route as of the date of publication, and had a proviso on the lines of this proviso. In the second session of the Preparatory Committee, the goods en route provision and its proviso was eliminated from the Charter Article on publication, but the proviso was retained in the Charter Article on non-discriminatory administration of quantitative restrictions. The resulting difference between the Charter provisions is reflected in the texts of Articles X:2 and XIII:3 of the General Agreement.³⁷

5. Paragraph 4: “representative period”

See Article XI and material on this issue on page 402.

6. Paragraph 5

(1) *Non-discriminatory administration of tariff quotas*

The “Panel on Newsprint”³⁸ addressed the consistency of an EEC tariff quota on newsprint with the requirements of Article XIII. See also page 402 above. In this connection see also the unadopted 1994 panel report on “EEC - Import Régime for Bananas”.³⁹

³⁶L/6491, adopted on 22 June 1989, 36S/93, 132-133, para. 12.27.

³⁷New York (Drafting Committee) Report, p. 17, 23; Geneva Report, p. 23, 34.

³⁸L/5680, adopted on 20 November 1984, 31S/114.

³⁹DS38/R, dated 11 February 1994, paras. 141-142.

(8) *Non-discriminatory administration of export restrictions*

In 1949, the Czechoslovak government brought a complaint that US export restrictions were administered in a discriminatory manner; see further on page 414 below.

See the discussion under Article XI of the 1950 Working Party Report on “The Use of Quantitative Import and Export Restrictions for Protective, Promotional and other Commercial Purposes”, with regard to the use of export restrictions as selective bargaining leverage. See also the discussion on “voluntary export restraints” in the chapter on Article XIX.

B. RELATIONSHIP BETWEEN ARTICLE XIII AND OTHER GATT PROVISIONS

1. Article I

In the 1980 dispute on “EEC - Restrictions on Imports of Apples from Chile,” Chile maintained that as the quantitative restrictions in question affected exclusively apples of Chilean origin they were inconsistent with the most-favoured-nation treatment prescribed in Article I. The Panel Report notes: “The Panel examined the consistency of the EEC measures with the most-favoured-nation principles of the General Agreement. The Panel considered it more appropriate to examine the matter in the context of Article XIII which deals with the non-discriminatory administration of quantitative restrictions rather than Article I:1”.⁴⁰

In the 1989 dispute concerning the complaint by Chile on “EEC - Restrictions on Imports of Dessert Apples”, the Panel examined a claim made by Chile under Article I with regard to the EEC’s import quota on apples. The Panel findings note: “The Panel considered it more appropriate to examine the consistency of the EEC measures with the most-favoured-nation principles of the General Agreement in the context of Article XIII. ... This provision deals with the non-discriminatory administration of quantitative restrictions and is thus the *lex specialis* in this particular case”.⁴¹

In 1961 Uruguay requested a ruling from the CONTRACTING PARTIES concerning whether the application of variable import duties was compatible with the GATT. A Note by the Executive Secretary stated: “The General Agreement contains no provision on the use of ‘variable import duties’. ... Apart from the question of consistency with Article II it should be noted that the question might arise as to whether a variable import duty is consistent with the provisions of Article I on the most-favoured-nation treatment. This question can, however, hardly be discussed *a priori* without a knowledge of the exact nature of the measure in question or the manner in which it is operated. It should be noted that if a variable levy system should be accompanied by the imposition of restrictions by specified volume, or a prohibition, of imports such measures would of course be subject to the examinations and considerations [concerning Articles XI, XII, XIII, XIV and XVIII:B]”.⁴² In the discussion of this question at the Nineteenth Session of the CONTRACTING PARTIES the following views were expressed:

- (i) “If the variable levy ... had the effect of exactly equalizing the price of the imported goods with the cost of bringing goods onto the market from domestic sources ... the CONTRACTING PARTIES should treat it as if it were a quantitative restriction or quantitative prohibition on imports.”
- (ii) “A levy that varied from source to source would be violation of the provisions of the Agreement dealing with non-discrimination”.⁴³

The 1962 Panel Report on the “Uruguayan Recourse to Article XXIII” notes as follows:

“The Panel was faced with a particular difficulty in considering the status of variable import levies or charges. It noted the discussion which took place at the nineteenth session of the CONTRACTING PARTIES on this subject during which it was pointed out that such measures raised serious questions which had not been

⁴⁰L/5047, adopted on 10 November 1980, 27S/98, 112, para. 4.1.

⁴¹L/6491, adopted on 22 June 1989, 36S/93, 133, para. 12.28.

⁴²L/1636, dated 21 November 1961.

⁴³SR.19/8, pp. 111-120.

resolved. In these circumstances the Panel has not considered it appropriate to examine the consistency or otherwise of these measures under the General Agreement”.⁴⁴

2. Article XI

The 1984 Panel Report on “Japanese Measures on Imports of Leather” dealt with the claim by the United States that the Japanese restrictions were in contravention of Article XI and that, in addition, the restrictions also contravened Articles [X:1 and 3 and] XIII:3.

“The Panel noted that the United States had, as a subsidiary matter, argued that Japan had also nullified or impaired benefits under Articles II, X:1, X:3 and XIII:3. In view of the findings set out in the paragraphs above [concerning inconsistency with Article XI], the Panel found that it was not necessary for it to make a finding on these matters.”⁴⁵

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” examined the claim that import restrictions on several agricultural products were inconsistent with Article XI:1 because each restriction was inconsistent with one or more of seven criteria listed in Article XI:2(c)(i).

“The Panel noted that the United States had, as a subsidiary matter, argued that Japan had also nullified or impaired benefits under Articles [X:1, X:3] and XIII:3. Since these provisions dealt with the administration of quotas that may be applied consistently with the General Agreement, the Panel decided that it was not necessary for it to make a finding on these matters with regard to quantitative restrictions maintained contrary to that Agreement.”⁴⁶

See also references under Article X to similar cases in which claims regarding notice of quota allocations were not reached due to a panel finding that a quantitative restriction was inconsistent with Article XI.

3. Article XXI

See below at page 414.

4. Article XXIV

See material in the chapter on Article XXIV.

5. Part IV

See material in the chapter on Part IV.

6. Protocols of Accession

The Protocol for the Accession of Switzerland provides in its paragraph 4 for a reservation with respect to the application of the provisions of Article XI to the extent necessary to permit Switzerland to apply import restrictions pursuant to certain domestic legislation. However, this paragraph also provides:

“... In applying, under these laws, measures which are not covered by paragraph 1(b) above, Switzerland ... consistently with Article XIII of the General Agreement, shall apply all restrictions imposed under these laws in accordance with the principle of non-discrimination”.⁴⁷

⁴⁴L/1923, adopted on 16 November 1962, 11S/95, 100, para. 17.

⁴⁵L/5623, adopted on 15/16 May 1984, 31S/94, 114, para. 57.

⁴⁶L/6253, adopted on 2 February 1988, 35S/163, 242, para. 5.4.2.

⁴⁷14S/6, 8.

C. RELATIONSHIP BETWEEN ARTICLE XIII AND OTHER AGREEMENTS

In a Decision on “Margins of Preference” of 9 August 1949 the CONTRACTING PARTIES ruled that “The determination of rights and obligations between governments arising under a bilateral agreement is not a matter within the competence of the CONTRACTING PARTIES.” This ruling was subject to a footnote:

“This Decision by its terms clearly refers only to the determination of the rights and obligations as between the parties to the bilateral agreement and arising from that agreement. It is, however, within the competence of the CONTRACTING PARTIES to determine whether action under such a bilateral agreement would or would not conflict with the provisions of the General Agreement”.⁴⁸

The Report of the Review Working Party on “Quantitative Restrictions” records that an amendment was proposed to Article XIV with a view to ensuring that discrimination practised by contracting parties under bilateral agreements was limited to the extent justifiable on currency grounds. “The Working Party considered that this amendment was unnecessary since it was already covered by the provisions of Article XIV which clearly defined the extent to which deviation from the provisions of Article XIII was permitted. ... Moreover it is for the CONTRACTING PARTIES to decide whether the provisions of the Agreement are being complied with and in so far as discrimination is not authorized under the Agreement, it is possible to have recourse to the provisions of Article XII.”⁴⁹

The question of the compatibility with the General Agreement of bilateral trade agreements providing for quotas or differential treatment was again discussed in 1961 at the Nineteenth Session of the CONTRACTING PARTIES.⁵⁰ According to a Note by the Executive Secretary, which was generally supported in the discussion,

“The General Agreement contains no provisions dealing specifically with the use of bilateral agreements. If a contracting party concludes a bilateral agreement with another contracting party or a government not party to the GATT, what is relevant for the General Agreement is the effect on the trade of other contracting parties of any measures affecting trade which that government takes to make effective the provisions of the bilateral agreement. ... it is, therefore, necessary to know the nature of the quota obligation provided for in the bilateral agreement and details of any measures affecting imports which are taken for the fulfilment of that bilateral obligation.

“If the fulfilment of the obligations under the bilateral agreement involves the use of restrictions on imports from any other contracting parties, these restrictions will be matters for examination under the relevant provisions of the Agreement:

“(a) Obviously, if the contracting party is not entitled under any provisions of the General Agreement to apply import restrictions, the application of these restrictions will be contravening the provisions of Article XI.

“(b) If the contracting party is entitled to apply import restrictions (e.g. under Article XII or XVIII:B) but has no justification under the GATT to use discrimination, then the restrictions will not be compatible with the provisions of Article XIII unless the quota restriction and the restrictions on imports from other contracting parties are ‘similar’ (see Article XIII:1) and if the rules and criteria in Article XIII are met”.⁵¹

The Note also stated that these principles were equally applicable to the use of lists of countries in administering quantitative restrictions (according particular treatment to several countries at once). In discussion on the Note, the Executive Secretary stated that “as he saw it, the existence of a bilateral agreement could in no circumstances be justified as a basis for non-observance of the non-discrimination provisions of the General Agreement. ... the

⁴⁸II/11, para. 1.

⁴⁹L/332/Rev.1+Add., adopted on 2, 4, and 5 March 1955, 3S/170, 177, para. 29; see also SR.19/8, p. 112.

⁵⁰SR.19/8, pp. 111-120.

⁵¹L/1636, p. 2-3, paras. 3-4.

[Note] made no distinction between import and export restrictions which were governed in the same way by the provisions of the General Agreement".⁵²

D. EXCEPTIONS AND DEROGATIONS

1. Provisions of Protocols of Accession relating to discriminatory quantitative restrictions

The Protocol for the Accession of Poland provides, *inter alia*, that contracting parties may maintain with respect to imports from Poland, during a transitional period, prohibitions or quantitative restrictions which are inconsistent with Article XIII, provided that the discriminatory element in these restrictions is not increased, and progressively relaxed over the transitional period.⁵³ The Report of the Working Party on the Ninth Review under the Protocol of Accession stated that no agreement had been reached on a date for the termination of the transitional period.⁵⁴

The Protocol for the Accession of Romania provides, *inter alia*, that contracting parties still maintaining prohibitions or quantitative restrictions not consistent with Article XIII shall not increase the discriminatory element in these restrictions, undertake to remove them progressively and shall have as their objective to eliminate them before the end of 1974. "Should this agreed objective not be achieved and, for exceptional reasons, should a limited number of restrictions still be in force as of 1 January 1975, the Working Party provided for in paragraph 5 would examine them with a view to their elimination."⁵⁵ The Report of the Working Party on the Sixth Review under the Protocol of Accession noted that certain discriminatory import restrictions continued to be maintained.⁵⁶

The Protocol for the Accession of Hungary provides, *inter alia*, that contracting parties still maintaining prohibitions or quantitative restrictions not consistent with Article XIII on imports from Hungary shall not increase the discriminatory element in them and undertake to remove them progressively. "If, for exceptional reasons, any such prohibitions or restrictions are still in force as of 1 January 1975, the Working Party provided for in paragraph 6 will examine them with a view to their elimination."⁵⁷ The Report of the Working Party on the Fourth Review under the Protocol of Accession noted that import restrictions not consistent with Article XIII continue to be maintained.⁵⁸ This was reiterated in the Reports of the Working Parties on the Sixth and Seventh Review.⁵⁹

Concerning these Protocols of Accession, see also the material under Article XXIV concerning the relationship between that Article and Article XIII.

2. Waivers under Article XXV:5

There is only one instance of a waiver to the provisions of Article XIII: the Decision of 10 November 1952 on the "Waiver granted in connection with the European Coal and Steel Community". This decision provided that the Governments of the member States of the ECSC Treaty, "notwithstanding the provisions of paragraphs 1 and 2 of Article XIII of the General Agreement, will be free to refrain from imposing any prohibitions or restrictions on the importation or exportation of coal and steel products from or to the territories of any other member State, although instituting or maintaining such prohibitions or restrictions upon the territories of other contracting parties; *provided* that the prohibitions or restrictions are in all other respects consistent with the General Agreement".⁶⁰

⁵²SR.19/8, p. 116.

⁵³15S/46, 47-48, para. 3.

⁵⁴24S/148.

⁵⁵18S/5, para. 3.

⁵⁶35S/337, 339, para. 10.

⁵⁷20S/3, 4, para. 4.

⁵⁸L/5303, adopted on 31 March 1982, 29S/129, 130.

⁵⁹33S/136, 145; 36S/416, 423, para. 43.

⁶⁰1S/17/20, para. 3; see also Working Party report on the waiver, G/35, adopted on 10 November 1952, 1S/85.

A Note by the Executive Secretary on “Questions Relating to Bilateral Agreements, Discrimination and Variable Taxes” mentions “that in no case has a waiver on import restrictions authorized any deviation from the provisions of Article XIII”.⁶¹ In the case of waivers of Article XI it has generally been the case that it has been provided either in the Waiver Decision or in the accompanying working party report that the waiver does not extend to discriminatory measures inconsistent with Article XIII.⁶² For instance, the 1955 Working Party Report on “Import Restrictions Imposed by the United States under Section 22 of the United States Agricultural Adjustment Act” provides, with regard to the waiver granted to the United States for such restrictions: “In particular, as its obligations under Article XIII are not affected, the United States should acquire no right by virtue of this waiver to deviate from the rule of non-discrimination provided for in that Article”.⁶³ Similarly, the 1985 waiver decision on “Caribbean Basin Economic Recovery Act” provides that “The Government of the United States shall ensure that this waiver will not be used to contravene the principle of non-discriminatory allocation of sugar quotas”.⁶⁴

3. Other exceptions

In 1949, the Czechoslovak government brought a complaint that US export restrictions were administered in a discriminatory manner; the US representative cited Article XXI:(b)(iii) in justification. In a decision of 8 June 1949 “The CONTRACTING PARTIES decided to reject the contention of the Czechoslovak delegation that the Government of the United States had failed to carry out its obligations under the Agreement through its administration of the issue of export licences”.⁶⁵

The Panel Report on “United States - Imports of Sugar from Nicaragua” includes the following finding: “The Panel noted that the United States had not invoked any of the exceptions provided for in the General Agreement permitting discriminatory quantitative restrictions contrary to Article XIII. The Panel therefore did not examine whether the reduction in Nicaragua’s quota could be justified under any such provision”.⁶⁶

See also Article XIV (Exceptions to the Rule of Non-discrimination) and accompanying text.

E. AGREEMENT ON IMPORT LICENSING PROCEDURES

The Agreement on Import Licensing Procedures was negotiated during the Tokyo Round of multilateral trade negotiations.⁶⁷ The Agreement sets out detailed rules so as to ensure, *inter alia*, “that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of the GATT including its annexes and protocols, as interpreted by this Agreement, with a view to preventing trade distortions that may arise from an inappropriate operation of those procedures, taking into account the economic development purposes and financial and trade needs of developing countries”.⁶⁸ A list of acceptances of the Agreement appears in the Appendix to this book. Article 4 of the Agreement establishes the Committee on Import Licensing composed of representatives of the parties to the Agreement. The Committee reports annually to the CONTRACTING PARTIES. The basic document for the biennial review conducted by its parties includes information on participation in the Agreement and lists of notifications by parties on their import licensing régimes, public notices of import licensing, and import licensing laws and regulations. The basic document also provides references to information on the automatic and non-automatic licensing systems of parties from the replies to the Questionnaire on Import Licensing Practices.⁶⁹ At its eleventh meeting, the Committee adopted a work programme to help it reach a common understanding on the meaning of certain provisions of the Agreement formulated in vague terms. The Committee has adopted recommendations which were developed on the

⁶¹L/1636, p. 2.

⁶²In addition to examples cited on this page see Decision on “Problems Raised for Contracting Parties in Eliminating Import Restrictions Maintained During a Period of Balance-of-Payments Difficulties” (the “hard-core” waiver decision), 3S/38, 41, para. 2; Working Party Report on the waiver granted under this Decision to Belgium, L/467, adopted on 3 December 1955, 4S/102, 106-107, paras. 18-19; waiver decision on “German Import Restrictions”, 8S/32 and Working Party Report at 8S/160.

⁶³L/339, adopted on 5 March 1955, 3S/144.

⁶⁴L/5779, Decision of 15 February 1985, 31S/22.

⁶⁵GATT/CP.3/SR.22, II/28.

⁶⁶L/5607, adopted on 13 March 1984, 31S/67, 74, para. 4.4.

⁶⁷26S/154. Concerning the negotiation of the Agreement, see documents listed in TA/INF/1/Rev.8, p. 38-44.

⁶⁸26S/155, Article 1:2..

⁶⁹See LIC/22/Rev.1 (1993 basic document).

application of Articles 1.4, 1.6, 3(c), 3(d), 3(e) and 3(g) of the Agreement.⁷⁰ A new Agreement on Import Licensing was agreed in the Uruguay Round and is included in Annex 1A of the WTO Agreement.

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

The corresponding provision in the Havana Charter is contained in Article 22; in the US-UK *Proposals* in Chapter III C-3; in the US Draft Charter in Article 21; in the London and New York Drafts in Article 26; and in the Geneva Draft in Article 22.

Differences between the Havana Charter and the General Agreement: In the first sentence of paragraph 2(d) there is a drafting difference between Article 22 of the Charter and Article XIII of the General Agreement. Also, the Interpretative Note to this paragraph was deleted in Havana and is not included in the Charter.⁷¹ Paragraph 3(d) of the Charter article is not in the GATT text; it was inserted at Havana in order to enable a Member, trading with a non-Member or non-Members, to be released from its obligations to give public notice under paragraph 3(b) and 3(c).⁷² Also, the following Interpretative Note to paragraph 3, which is not in the GATT text, was added at Havana to meet the special case of India:

“The first sentence of paragraph 3(b) is to be understood as requiring the Member in all cases to give, not later than the beginning of the relevant period, public notice of any quota fixed for a specified future period, but as permitting a Member, which for urgent balance-of-payments reasons is under the necessity of changing the quota within the course of a specified period, to select the time of its giving public notice of the change. This in no way affects the obligations of a Member under the provisions of paragraph 3(a), where applicable.”⁷³

In response to proposals in the Sub-Committee on Articles 20 and 22 at Havana, made with regard to the interpretative note on “special factors” (Note Ad Article XIII:4 of the General Agreement, or Ad Article 22:4 of the Charter), the Sub-Committee agreed to the interpretation and the additional interpretative note which appear on page 403 above with reference to “special factors”.

In 1948, the Working Party on “Modifications to the General Agreement” at the Second Session of the CONTRACTING PARTIES considered which of the changes made to the Charter at Havana should be brought into the General Agreement. The Working Party decided to amend the text of paragraph 5.⁷⁴ The amendment deleted a reference to internal quantitative restrictions and licensing regulations, consequential to the replacement of the 30 October 1947 text of Article III by the text of Article 18 of the Havana Charter, including the text of the present Article III:7. These changes were effected through the Protocol Modifying Part II and Article XXVI.

During the Review Session, various proposals for changes to Article XIII were considered and rejected. See the paragraph from the Report of the Review Session Working Party on “Quantitative Restrictions” at page 402 above, and the documents cited below.

⁷⁰See LIC/M/11, paragraphs 29-34 (decision on work programme); LIC/12 (compilation of recommendations adopted); LIC/M/18 (statements made on adoption); and LIC/M/20, para. 13 (later statements referring to the recommendations). See also discussions in the Committee on the definition of “import licensing” under Article 1.1, in LIC/M/20-25.

⁷¹Havana Reports, p. 95, para. 51.

⁷²Havana Reports, p. 96, para. 54.

⁷³Havana Reports, p. 96, para. 53.

⁷⁴GATT/CP.2/22/Rev.1, adopted on 1 and 2 September 1948, II/39, 45, para. 32.

IV. RELEVANT DOCUMENTS

London

Discussion: EPCT/C.II/QR/PV/2, 4 (p. 25), 5
(p. 95), 6 (Part II),
EPCT/C.II/PV/4, 5
Reports: EPCT/30

New York

Discussion: EPCT/C.6/17, 20, 21, 23, 27, 51
Reports: EPCT/C.6/97/Rev.1
Other: EPCT/W.64, 224, 313

Geneva

Discussion: EPCT/EC/PV.2/22
EPCT/A/SR.21, 40(1)
EPCT/TAC/SR.13
EPCT/TAC/PV/27, 28
Reports: EPCT/135, 141, 164, 189, 196,
212, 214/Rev.1/Add.1
EPCT/W/313
Other: EPCT/W/64, 74, 208, 219, 223,
259, 272, 301, 318

Havana

Discussion: E/CONF.2/C.3/SR.21, 37, 41, 42
Reports: E/CONF.2/C.3/54
Other: E/CONF.2/C.3/E/W.19

Review Session

Discussion: SR.9/14, 15, 40
Reports: W.9/174+Add.1, 208,
L/332/Rev.1+Add.
Other: W.9/91, 106, 130, Spec/53/55

ARTICLE XIV

EXCEPTIONS TO THE RULE OF NON-DISCRIMINATION

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I. TEXT OF ARTICLE XIV, RELEVANT INTERPRETATIVE NOTES, AND OTHER RELEVANT PROVISIONS

Article XIV*

Exceptions to the Rule of Non-discrimination

1. A contracting party which applies restrictions under Article XII or under Section B of Article XVIII may, in the application of such restrictions, deviate from the provisions of Article XIII in a manner having § equivalent effect to restrictions on payments and transfers for current international transactions which that contracting party may at that time apply under Article VIII or XIV of the Articles of Agreement of the International Monetary Fund, or under analogous provisions of a special exchange agreement entered into pursuant to paragraph 6 of Article XV.*

2. A contracting party which is applying import restrictions under Article XII or under Section B of Article XVIII may, with the consent of the CONTRACTING PARTIES, temporarily deviate from the provisions of Article XIII in respect of a small part of its external trade where the benefits to the contracting party or contracting parties concerned substantially outweigh any injury which may result to the trade of other contracting parties.*

3. The provisions of Article XIII shall not preclude a group of territories having a common quota in the International Monetary Fund from applying against imports from other countries, but not among themselves, restrictions in accordance with the provisions of Article XII or of Section B of Article XVIII on condition that such restrictions are in all other respects consistent with the provisions of Article XIII.

4. A contracting party applying import restrictions under Article XII or under Section B of Article XVIII shall not be precluded by Articles XI to XV or Section B of Article XVIII of this Agreement from applying measures to direct its exports in such a manner as to increase its earnings of currencies which it can use without deviation from the provisions of Article XIII.

5. A contracting party shall not be precluded by Articles XI to XV, inclusive, or by Section B of Article XVIII, of this Agreement from applying quantitative restrictions:

- (a) having equivalent effect to exchange restrictions authorized under Section 3 (b) of Article VII of the Articles of Agreement of the International Monetary Fund, or
- (b) under the preferential arrangements provided for in Annex A of this Agreement, pending the outcome of the negotiations referred to therein.

Interpretative Notes from Annex I

Ad Article XIV

Paragraph 1

The provisions of this paragraph shall not be so construed as to preclude full consideration by the CONTRACTING PARTIES, in the consultations provided for in paragraph 4 of Article XII and in paragraph 12 of Article XVIII, of the nature, effects and reasons for discrimination in the field of import restrictions.

Paragraph 2

One of the situations contemplated in paragraph 2 is that of a contracting party holding balances acquired as a result of current transactions which it finds itself unable to use without a measure of discrimination.

Ad Articles XI, XII, XIII, XIV and XVIII

Throughout Articles XI, XII, XIII, XIV and XVIII, the terms "import restrictions" or "export restrictions" include restrictions made effective through state-trading operations.

From Annex A:

...

The preferential arrangements referred to in paragraph 5 (b) of Article XIV are those existing in the United Kingdom on 10 April 1947, under contractual agreements with the Governments of Canada, Australia and New Zealand, in respect of chilled and frozen beef and veal, frozen mutton and lamb, chilled and frozen pork and bacon. It is the intention, without prejudice to any action taken under sub-paragraph (h) of Article XX, that these arrangements shall be eliminated or replaced by tariff preferences, and that negotiations to this end shall take place as soon as practicable among the countries substantially concerned or involved.

...

II. INTERPRETATION AND APPLICATION OF ARTICLE XIV

A. SCOPE AND APPLICATION OF ARTICLE XIV

1. General

The Articles of the General Agreement concerning quantitative restrictions for balance-of-payments purposes were redrafted in the 1954-55 Review Session. The principal source concerning the drafting of these provisions is the Report of the Review Working Party on "Quantitative Restrictions"¹, which notes generally concerning the amendments to Article XIV:

"On the one hand, they amount to a deletion of temporary provisions (i.e. sub-paragraphs 1(a) and 3(b)) which are no longer applicable; on the other hand, they provide for the elimination of alternative rules of procedure (sub-paragraphs 1(c) to (h) and Annex J which were necessary so long as a number of

¹L/332/Rev.1 and Addenda., adopted on 2, 4 and 5 March 1955, 3S/170-185.

countries were governed by the provisions of Article XIV of the IMF Agreement but which will be redundant when many of those countries cease to be governed by those provisions”.²

The first of these two groups of amendments to Article XIV entered into effect on 7 October 1957 with the other Review Session amendments. The second group entered into effect on 15 February 1961 when the obligations of Sections 2, 3 and 4 of Article VIII of the Articles of Agreement of the International Monetary Fund became applicable to contracting parties, members of the Fund, the combined foreign trade of which constituted at least 50 per cent of the aggregate foreign trade of all contracting parties.

In 1959, the Tenth Annual Report under Article XIV:1(g) on the discriminatory application of import restrictions noted that external convertibility of most of the major currencies had been established at the end of 1958, and further noted:

“The Board of Executive Directors of the International Monetary Fund on 23 October 1959 approved the following decision with regard to the discriminatory restrictions imposed for balance-of-payments reasons:

‘The following decision deals exclusively with discriminatory restrictions imposed for balance-of-payments reasons.

‘In some countries, considerable progress has already been made towards the elimination of discriminatory restrictions; in others, much remains to be done. Recent international financial developments have established an environment favourable to the elimination of discrimination for balance-of-payments reasons. There has been a substantial improvement in the reserve positions of the industrial countries in particular and widespread moves to external convertibility have taken place.

‘Under these circumstances, the Fund considers that there is no longer any balance-of-payments justification for discrimination by members whose current receipts are largely in externally convertible currencies. However, the Fund recognizes that where such discriminatory restrictions have been long maintained a reasonable amount of time may be needed fully to eliminate them. But this time should be short and members will be expected to proceed with all feasible speed in eliminating discrimination against member countries, including that arising from bilateralism.

‘Notwithstanding the extensive moves toward convertibility, a substantial portion of the current receipts of some countries is still subject to limitations on convertibility, particularly in payments relations with State-trading countries. In the case of these countries the Fund will be prepared to consider whether balance-of-payments considerations would justify the maintenance of some degree of discrimination, although not as between countries having externally convertible currencies. In this connexion the Fund wishes to reaffirm its basic policy on bilateralism as stated in its decision of 22 June 1955.’

“This decision was communicated to the CONTRACTING PARTIES at their fifteenth session where it was welcomed ...”

“The CONTRACTING PARTIES reaffirmed that the removal of discrimination applied under Article XIV is a vital step towards the achievement of the objectives of the General Agreement and the expansion of international trade. There was a consensus that the remaining discrimination applied under Article XIV of the General Agreement should quickly be eliminated”.³

Since 1961, no contracting party has invoked Article XIV.

²*Ibid.*, 3S/176, para. 25.

³L/1096, adopted on 10 November 1959, 8S/66, 72, paras. 24-26.

2. Paragraph 1

(1) *Intent of Paragraph 1*

The Report of the Review Working Party on “Quantitative Restrictions” notes that “As regards the amended text of paragraph 1 of Article XIV, it reproduces the text of sub-paragraph 1(b) of the present Article, except that it refers, not only to Article XIV of the International Monetary Fund as is the case at present, but also to Article VIII. This addition is intended to cover cases where contracting parties are authorized by a decision taken by the International Monetary Fund, in accordance with Article VIII of its Articles of Agreement, to deviate from the rule of non-discrimination”.⁴

See also the Interpretative Note to Article XIV and the discussion of paragraph 5(a) below at page 422.

(2) *“equivalent effect”*

The Report of the Review Working Party on “Quantitative Restrictions” notes:

“For practical reasons, the Working Party has not tried to define the phrase ‘equivalent effect’ in paragraphs 1 and 5 of Article XIV. It agreed, however, to record their view that a contracting party which is deviating from Article XIII will not be considered to be in breach of its obligations under this paragraph if the International Monetary Fund has stated that corresponding restrictions on payments and transfers would have been authorized under the Articles of Agreement of the Fund or approved by the Fund if the contracting party in question had chosen to proceed by way of exchange restrictions rather than trade restrictions ...

“... it was pointed out that under ... paragraph 1 of the proposed new Article XIV, a contracting party could deviate from the provisions of Article XIII only in a manner having equivalent effect to restrictions on payments and transfers for current international transactions which that contracting party might at that time apply under the Articles of Agreement of the International Monetary Fund; it was understood that such restrictions could be applied only on currency grounds”.⁵

Concerning the distinction between exchange restrictions and trade restrictions, see material under Article XV.

(3) *“which that contracting party may at that time apply”*

During the 1954-55 Review Session, the Review Working Party on Quantitative Restrictions established a Special Sub-Group on GATT/Fund relations. The report of this Sub-Group notes as follows regarding discrimination permissible under Articles VIII and XIV of the Fund Articles of Agreement:

“... the Fund representatives explained that Fund members which did not avail themselves of the transitional arrangements of Article XIV of the Fund Articles of Agreement had to seek prior approval from the Fund, under paragraph 2(a) (or in respect of discriminatory currency arrangements or multiple currency practices, under paragraph 3) of Article VIII for the imposition of restrictions on the making of transfers and payments for current international transactions. Fund members which availed themselves of the transitional arrangements under Article XIV could, subject to annual consultations with the Fund, continue to maintain exchange restrictions and adapt them to changing circumstances so long as they were needed for balance of payments purposes. The Fund could, if it deemed such action necessary in exceptional circumstances, make representations to such members that conditions were favourable for the withdrawal of any particular restriction, or for the general abandonment of restrictions inconsistent with the provisions of any other Article of the Fund Agreement.

⁴L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 176-177, para. 26.

⁵*Ibid.*, 3S/177, paras. 28, 29.

“In relation to multiple exchange rates, the Fund representatives recalled that the Executive Board of the Fund in December 1947, took certain decisions relating to such practices ...”.⁶

A copy of the Fund Decision regarding multiple currency practices was annexed to the Sub-Group’s Report.⁷

(4) *Discrimination resulting from bilateral agreements*

A Note by the Executive Secretary on “Questions Relating to Bilateral Agreements, Discrimination and Variable Taxes” of 1961 states, *inter alia*:

“If the fulfilment of the obligations under the bilateral agreement involves the use of restrictions on imports from any other contracting parties, these restrictions will be matters for examination under the relevant provisions of the Agreement” [such as Articles XI to XIV and XVIII:B].

“If the contracting party is entitled to apply import restrictions and, by virtue of Article XIV of the Agreement, is also entitled to use discrimination, then the relative incidence of the bilateral quota restrictions and the restrictions applying to imports from other contracting parties can be the subject of examination under the provisions of that Article. If there is discrimination involved, it will be permitted under this Article provided it does not go beyond the limit laid down in paragraph 1, 2, 3 or 5 of the Article. Under paragraph 1 of that Article, for example, a contracting party is entitled to deviate from the provisions of Article XIII in a manner having equivalent effect to restrictions on payments and transfers for current international transactions which the contracting party is applying under the appropriate provisions of the IMF Agreement”.⁸

3. Paragraph 2

It was noted by the Sub-Committee which redrafted Article 23 of the Charter (corresponding to Article XIV) during the Havana Conference, that after the termination of the transitional period for a Member (as defined in Article XIV of the Fund Articles of Agreement) paragraph 2 would provide “subject to the prior approval of the Organization, for limited departures from the rule of non-discrimination.”⁹ As noted below, the Charter Article was brought into the General Agreement in 1948.

The 1949 Report of the Working Party on “Consultation Procedures under Articles XII, XIII and XIV - other than Article XII:4(a)” notes that a “contracting party applying import restrictions under Article XII may, under the provisions of Article XIV, paragraph 2, with the assent of the CONTRACTING PARTIES, temporarily deviate from the provisions of Article XIII. The working party considered that the consultation procedure adopted for Article XII:4(a) would be appropriate in this case”.¹⁰ Article XII:4(a) in 1949 provided that “Any contracting party which is not applying restrictions under this Article, but is considering the need to do so, shall before instituting such restrictions (or, in circumstances in which prior consultation is impracticable, immediately after doing so), consult with the CONTRACTING PARTIES”.

See also the Interpretative Note to paragraph 2.

4. Paragraph 3

The London Report notes that “It was generally agreed that there must be the following exceptions from the general rule of non-discrimination in the application of quantitative restrictions. ... A group of territories, which have a common quota in the International Monetary Fund, should be able to impose restrictions against imports

⁶*Ibid.*, 3S/196-197, paras. 4-5.

⁷*Ibid.*, 3S/200-205.

⁸L/1636, p. 2, para. 4.

⁹Havana Reports, p. 99, para. 22.

¹⁰GATT/CP.3/50/Rev.1, adopted on 4 July 1949, II/95, 100, para. 24. For the consultation procedure agreed for Article XII:4(a), see para. 3 of the same Report, at II/95-96.

of other countries in order to protect their common monetary reserves”.¹¹ It was stated during discussions at the London session of the Preparatory Committee that this provision “should only apply where the quantitative restrictions are being applied on balance of payments grounds. If the quantitative restrictions are for other purposes the question of whether the countries are in a common unit in the Monetary Fund is irrelevant”.¹²

Article III:1 of the Articles of Agreement of the International Monetary Fund provides that “Each member shall be assigned a quota ...” and under Article II of the Articles of Agreement, membership in the Fund is open only to “countries”. Hence, territories can only have a common quota in the Fund if they are under common sovereignty. Article XIV:3 of the General Agreement provides an exception to the non-discrimination requirements of Article XIII:1 of the General Agreement, which apply as between contracting parties. Under Article XXIV:1 of the General Agreement, each separate customs territory on behalf of which the General Agreement is applied is “treated as though it were a contracting party”, and thus the non-discrimination requirements of Article XIII:1 of the General Agreement, which apply as between contracting parties, apply as between each separate customs territory even if it is under common sovereignty with another customs territory. The records of the London session of the Preparatory Committee in 1946 indicate that in 1946, for instance, the various territories under French sovereignty in the French Union included some colonies treated as part of the metropolitan customs territory of France, and others which constituted separate customs territories later listed in Annex B of the General Agreement; nevertheless all of these territories, even those with different currencies with different exchange rates versus the dollar or sterling, shared a common quota in the Fund represented by France.¹³

5. Paragraph 4

Paragraph 4 was added to the Charter in Havana, and subsequently incorporated into the GATT in 1948. It was stated at the time that Committee III at Havana adopted this provision that “A country might only be able to attain equilibrium in its balance of payments by increasing its exports to hard currency countries. If such a country were allowed to continue to direct its exports, it might very well be able to cease practising import discrimination under paragraph 1 at an earlier date than would otherwise be possible”.¹⁴

6. Paragraph 5

(1) *Quantitative restrictions having equivalent effect to certain authorized exchange restrictions*

Article XIV:5(a) permits quantitative restrictions having equivalent effect to exchange restrictions authorized under Article VII:3(b) of the Articles of Agreement of the International Monetary Fund.

Article VII:3(a) of the Fund Articles provides: “If it becomes evident to the Fund that the demand for a member’s currency seriously threatens the Fund’s ability to supply that currency, the Fund ... shall formally declare such currency scarce and shall thenceforth apportion its existing and accruing supply of the scarce currency ...”. Article VII:3(b) of the Fund Articles provides that “A formal declaration under (a) above shall operate as an authorization to any member, after consultation with the Fund, temporarily to impose limitations on the freedom of exchange operations in the scarce currency. Subject to the provisions of Article IV and Schedule C, the member shall have complete jurisdiction in determining the nature of such limitations, but they shall be no more restrictive than is necessary to limit the demand for the scarce currency to the supply held by, or accruing to, the member in question, and they shall be relaxed and removed as rapidly as conditions permit”.

No formal declaration under Article VII:3(a) has been made by the Fund, and therefore no exchange restrictions have been authorized under Article VII:3(b) of the Fund Articles of Agreement.

The Report of the Review Working Party on “Quantitative Restrictions” notes that during the Review Session, various proposals were made to amend the General Agreement to provide for joint action to restore

¹¹London Report, p. 14, para. III.C.3(d)(ii).

¹²EPCT/C.II/QR/PV/2, p. 21: *see generally* discussion at *ibid.* p. 20-21, and *see also* explanation at EPCT/C.II/PV/4, p. 33.

¹³See description at EPCT/C.II/PV/4 p. 18-20.

¹⁴E/CONF.2/C.3/SR.47, p. 1.

equilibrium in the system of world trade and payments in the event that that system became seriously unbalanced, and to avoid the imposition of unnecessarily severe restrictions on international trade.¹⁵ In relation to two “scarce currency” proposals, designed for a situation where some large and commercially important country might develop a persistent surplus in its balance of payments with the rest of the world, place a strain on other countries’ reserves, and cause a general scarcity of its currency:

“There was general agreement in the Working Party that such a situation might arise from a variety of different circumstances and that the prime responsibility for the state of unbalance might rest either with the surplus or the deficit countries.

“It was noted that provisions are already contained in the General Agreement and also in the Articles of Agreement of the International Monetary Fund to enable consultation to take place on the measures that might appropriately be adopted to meet such situations. ...

“If the CONTRACTING PARTIES were to find that strict application of the non-discrimination provisions of Article XIII would cause an unnecessary contraction in world trade there are already provisions in the GATT and in the International Monetary Fund Agreement which could be invoked to waive temporarily the obligation imposed upon contracting parties under that Article to apply import restrictions in a non-discriminatory manner.

“First, the Fund may, if it finds a general scarcity of a currency under Article VII, Section 1, approve discriminatory measures under Article VIII, Sections 2 and 3. Certain important countries which are members of the Fund and GATT have stated that if they supported a finding under Fund Article VII, Section 1, they would also support appropriate action under Article VIII.

“Secondly, Fund Article VII, Section 3, provides that if it becomes evident that the demand for a member’s currency seriously threatens the Fund’s ability to supply that currency, the Fund shall formally declare such currency scarce and such a declaration authorizes certain discriminatory limitations on the freedom of exchange operations in that currency. Although this provision has not operated in the past because the Fund’s ability to supply a currency has never been threatened, it is to be expected that when the resources of the Fund are being used to support the convertibility of currencies, any serious scarcity of a major currency would be reflected in the holdings of the Fund. These provisions of the Fund Agreement bear directly on the question of trade discrimination; for under Article XIV of the GATT, as at present drafted, a contracting party would be able to apply discriminatory quantitative restrictions having equivalent effect to exchange restrictions authorized by the Fund under Article VIII, Section 3, as well as under Article VII, Section 3(b).¹⁶

(2) *Quota preferences listed in Annex A of the General Agreement*

Both in London and Geneva it was recommended that “certain existing preferential arrangements which were established under international agreements but not effected by the normal method of a difference in rates of duty” and which remained after the conclusion of the Geneva negotiations should be dealt with by a provision in the GATT, to the effect that the member applying these arrangements shall be entitled to continue them or equivalent measures, pending either an international commodity agreement under the Charter, or some other arrangement between the members concerned.¹⁷

“It was agreed that only a very limited number of commodities fell under this heading and that the countries concerned should establish the facts about them so that the above recommendation could be taken into account in the forthcoming negotiations. It was further recognized that the concessions or lack of concessions in respect of the items concerned would, for purposes of assessing the results of the

¹⁵See W.19/18, W.9/22, W.9/82, W.9/136, W.9/139, L/325, GATT/174.

¹⁶L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 174-176, paras. 16-17, 19- 21. See also other Review Session documents on these discussions: W.9/18, W.9/22, W.9/82, W.9/136, W.9/139, L/325, GATT/174.

¹⁷Discussion at EPCT/C.II/QR/PV/1 p. 14, EPCT/C.II/PV/13 p. 26-28; London Report, p. 12, para. n; EPCT/141, p. 2.

negotiations, stand on the same footing as concessions or lack of concessions in respect of particular tariff or preference items".¹⁸

The arrangements in question were certain arrangements existing in the United Kingdom on 10 April 1947, under contractual arrangements with the Governments of Canada, Australia and New Zealand, in respect of chilled and frozen beef and veal, frozen mutton and lamb, chilled and frozen pork, and bacon. These arrangements are listed in Annex A of the General Agreement, the relevant parts of which appear at the head of this chapter. Their contractual basis is noted in the preparatory work of this provision.¹⁹ During the Review Session of 1954-55 the United Kingdom delegation requested that this provision be retained as the negotiations referred to had not yet taken place.²⁰

B. RELATIONSHIP WITH OTHER ARTICLES

1. Article XVIII

The Review Working Party Report on "Quantitative Restrictions" notes that "Appropriate references to Article XVIII have been introduced in the text of Article XIV; through these insertions, the application of balance-of-payments restrictions by under-developed countries are governed by the provisions of Article XIV as regards deviations from the rule of non-discrimination".²¹

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

Corresponding provisions in the Havana Charter are contained in Article 23; in the US-UK *Proposals* in Chapter III C-4; in the US Draft in Article 22; in the London and New York Drafts in Article 28; and in the Geneva Draft in Article 23.

The text of Article XIV and the extent of permissible discrimination in balance-of-payments restrictions were the subject of much negotiation in 1946-48. The Article in the Geneva Draft Charter, which was adopted in the 30 October 1947 text of the General Agreement, was substantially rewritten at Havana; as rewritten, it provided additional flexibility for discriminatory measures in the case of non-convertible currencies. At their First Session, held during the Havana Conference, the CONTRACTING PARTIES decided to replace the original text of Article XIV with the Havana Charter Article.²² This change was effected through the Special Protocol Modifying Article XIV, which entered into effect on 9 May 1949.

The Review Session amendments to paragraph 1 of Article XIV and Annex J, which were provided for in the Protocol Amending the Preamble and Parts II and III, came into effect on 15 February 1961 when the obligations of Sections 2, 3 and 4 of Article VIII of the Articles of Agreement of the International Monetary Fund became applicable to contracting parties, members of the Fund, the combined foreign trade of which constituted at least 50 per cent of the aggregate foreign trade of all contracting parties. Paragraph 1, comprising sub-paragraphs (a) to (h), was replaced by the new paragraph 1, which reproduced, with certain changes, paragraph 1(b) of the previous text. The Interpretative Note to sub-paragraph (g) was replaced by a Note to the new paragraph 1. Annex J and the interpretative Note thereto were deleted.

Other changes agreed upon at the Review Session included the insertion of a reference to Section B of Article XVIII in paragraphs 2, 4 and 5, and a redrafting of paragraph 3; these changes entered into effect on 7 October 1957.

¹⁸London Report, p. 12, para. o.

¹⁹See EPCT/158, Report on Preferential Arrangements Not Effected by the Method of a Difference in Rates of Duty, and annexed note by UK delegation on agreements with Australia, New Zealand and Canada.

²⁰W.9/106, p. 6.

²¹L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 177, para. 27; see also *ibid.* 3S/185, para. 50.

²²See GATT/1/21, GATT/1/27, GATT/1/55, GATT/1/62 Annex 4, and discussion at GATT/1/SR.10+Corr.1, GATT/1/SR.13, GATT/1/SR.14.

IV. RELEVANT DOCUMENTS*London*

Discussion: EPCT/C.II/PV/4 (p. 32ff), 5, 13 (p. 15ff)
 EPCT/C.II/QR/PV/2, 3 (p. 42ff), 6
 Reports: EPCT/30; EPCT/C.II/59

Havana

Discussion: E/CONF.2/C.3/SR.22, 23, 39 (p. 6), 47
 Reports: E/CONF.2/C.3/91
 Other: E/CONF.2/C.3/F/W.7, 11, 31/Revs. 1 and 2, 32

New York

Discussion: EPCT/C.6/21, 27
 Reports: EPCT/C.6/97/Rev.1 (p. 82)

CONTRACTING PARTIES

Discussion: GATT/1/SR.10+Corr.1, 13, 14
 Reports: GATT/1/27, 55, 62 Annex 4
 GATT/CP/6

Geneva

Discussion: EPCT/EC/PV.2/22
 EPCT/A/SR.29
 EPCT/A/PV/29/Corr.2, 41 (pp. 42-64)
 EPCT/TAC/SR.13, 21
 EPCT/PV/21, 27, 28
 Reports: EPCT/135, 158, 163, 171, 186, 189, 196, 212, 214/Add.1/Rev.1
 EPCT/W/313
 Other: EPCT/W/64, 194, 214, 216, 223, 256, 272, 301, 318, 327, 329, 331, 336

Review Session

Discussion: SR.9/14, 15, 26, 40, 47
 Reports: W.9/106, 126, 130, 174+Add.1, 208, 234; L/332/Rev.1+Add., 3S/170
 Other: L/189, 261/Add.1, 264, 277
 W.9/18+Add.1, 22, 23, 82, 90, 115, 133, 136, 139, 190, 226, 236/Add.3
 Spec/53/55, 58/55, 68/55, 74/55, 90/55, MGT/9/55

ARTICLE XV

EXCHANGE ARRANGEMENTS

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I. TEXT OF ARTICLE XV AND INTERPRETATIVE NOTE AD ARTICLE XV**Article XV***Exchange Arrangements*

1. The CONTRACTING PARTIES shall seek co-operation with the International Monetary Fund to the end that the CONTRACTING PARTIES and the Fund may pursue a co-ordinated policy with regard to exchange questions within the jurisdiction of the Fund and questions of quantitative restrictions and other trade measures within the jurisdiction of the CONTRACTING PARTIES.

2. In all cases in which the CONTRACTING PARTIES are called upon to consider or deal with problems concerning monetary reserves, balances of payments or foreign exchange arrangements, they shall consult fully with the International Monetary Fund. In such consultations, the CONTRACTING PARTIES shall accept all findings of statistical and other facts presented by the Fund relating to foreign exchange, monetary reserves and balances of payments, and shall accept the determination of the Fund as to whether action by a contracting party in exchange matters is in accordance with the Articles of Agreement of the International Monetary Fund, or with the terms of a special exchange agreement between that contracting party and the CONTRACTING PARTIES. The CONTRACTING PARTIES in reaching their final decision in cases involving the criteria set forth in paragraph 2 (a) of Article XII or in paragraph 9 of Article XVIII, shall accept the determination of the Fund as to what constitutes a serious decline in the contracting party's monetary reserves, a very low level of its monetary reserves or a reasonable rate of increase in its monetary reserves, and as to the financial aspects of other matters covered in consultation in such cases.

3. The CONTRACTING PARTIES shall seek agreement with the Fund regarding procedures for consultation under paragraph 2 of this Article.

4. Contracting parties shall not, by exchange action, frustrate* the intent of the provisions of this Agreement, nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund.

5. If the CONTRACTING PARTIES consider, at any time, that exchange restrictions on payments and transfers in connection with imports are being applied by a contracting party in a manner inconsistent with the exceptions provided for in this Agreement for quantitative restrictions, they shall report thereon to the Fund.

6. Any contracting party which is not a member of the Fund shall, within a time to be determined by the CONTRACTING PARTIES after consultation with the Fund, become a member of the Fund, or, failing that, enter into a special exchange agreement with the CONTRACTING PARTIES. A contracting party which ceases to be a member of the Fund shall forthwith enter into a special exchange agreement with the CONTRACTING PARTIES. Any special exchange agreement entered into by a contracting party under this paragraph shall thereupon become part of its obligations under this Agreement.

7. (a) A special exchange agreement between a contracting party and the CONTRACTING PARTIES under paragraph 6 of this Article shall provide to the satisfaction of the CONTRACTING PARTIES that the objectives of this Agreement will not be frustrated as a result of action in exchange matters by the contracting party in question.

(b) The terms of any such agreement shall not impose obligations on the contracting party in exchange matters generally more restrictive than those imposed by the Articles of Agreement of the International Monetary Fund on members of the Fund.

8. A contracting party which is not a member of the Fund shall furnish such information within the general scope of section 5 of Article VIII of the Articles of Agreement of the International Monetary Fund as the CONTRACTING PARTIES may require in order to carry out their functions under this Agreement.

9. Nothing in this Agreement shall preclude:
- (a) the use by a contracting party of exchange controls or exchange restrictions in accordance with the Articles of Agreement of the International Monetary Fund or with that contracting party's special exchange agreement with the CONTRACTING PARTIES, or
 - (b) the use by a contracting party of restrictions or controls on imports or exports, the sole effect of which, additional to the effects permitted under Articles XI, XII, XIII and XIV, is to make effective such exchange controls or exchange restrictions.

Interpretative Note *Ad* Article XV from Annex I

Paragraph 4

The word “frustrate” is intended to indicate, for example, that infringements of the letter of any Article of this Agreement by exchange action shall not be regarded as a violation of that Article if, in practice, there is no appreciable departure from the intent of the Article. Thus, a contracting party which, as part of its exchange control operated in accordance with the Articles of Agreement of the International Monetary Fund, requires payment to be received for its exports in its own currency or in the currency of one or more members of the International Monetary Fund will not thereby be deemed to contravene Article XI or Article XIII. Another example would be that of a contracting party which specifies on an import licence the country from which the goods may be imported, for the purpose not of introducing any additional element of discrimination in its import licensing system but of enforcing permissible exchange controls.

II. INTERPRETATION AND APPLICATION OF ARTICLE XV

A. SCOPE AND APPLICATION OF ARTICLE XV

1. Paragraph 1

(1) “*jurisdiction*”

In the London draft of the Charter the word used was “competence”, but was changed to “jurisdiction” at Geneva. The precise difference between the two words was not clearly defined. In the course of the discussion, it was stated that

“it seems ... that there is a real difference here between saying matters within the jurisdiction of the Fund, which relates ... strictly to the powers the Fund has, whereas matters within the competence of the Fund are matters on which the Fund, by reason of the subject matter which it deals with, is competent to provide the facts or to express an opinion. As one might say in a Government department ... which has certain legal powers in relation to a part of its field and no powers in another, certain things are within the jurisdiction of that government department, but a great many more are within its competence”.¹

In 1954-55, the Review Working Party on Quantitative Restrictions set up a Special Sub-Group on GATT/Fund Relations. The Report of this Sub-Group stated that in general,

“... the group felt that the more important problem was not that of defining the respective jurisdictions of the CONTRACTING PARTIES and the Fund but that of establishing more effective machinery for consultation in accordance with Article XV.

“In this connection, the group agreed that there were two problems. The first was that of ensuring that governments who were members of both bodies should themselves pursue a coordinated policy in relation to

¹EPCT/A/PV/29, p. 46; see also *ibid.* p. 40-41.

the Fund and the GATT, taking full account, in particular, of the implications of exchange measures for countries' obligations under the Agreement. Appropriate action here rests with member governments.

"The second problem is one of developing liaison between the two organizations themselves ...".²

Concerning GATT-Fund relations, see also below under paragraph 3.

(2) *Relationship between trade measures and financial system*

The Tokyo Declaration of 1973 which launched the Tokyo Round of multilateral trade negotiations noted that:

"The policy of liberalizing world trade cannot be carried out successfully in the absence of parallel efforts to set up a monetary system which shields the world economy from the shocks and imbalances which have previously occurred. The Ministers will not lose sight of the fact that the efforts which are to be made in the trade field imply continuing efforts to maintain orderly conditions and to establish a durable and equitable monetary system.

"The Ministers recognize equally that the new phase in the liberalization of trade which it is their intention to undertake should facilitate the orderly functioning of the monetary system".³

At their Fortieth Session in 1984, the CONTRACTING PARTIES adopted a Decision on "Exchange Rate Fluctuations and their Effect on Trade" in which they "urge that their concern regarding the relationship between exchange market instability and international trade be taken into account in ongoing efforts within the International Monetary Fund to review the operation of the international monetary system with a view to possible improvements" and "agree that they will keep under consideration through further exchanges of views the relationship between exchange market instability and trade".⁴

Concerning the relationship between the international trading system and the international financial system, and floating exchange rates, see also the 1980 Report of the Working Party on "Specific Duties"⁵ and the 1983 and 1984 Reports of the Consultative Group of Eighteen and associated Secretariat notes.⁶

2. Paragraph 2

(1) *"findings of statistical ... facts presented by the Fund"*

The Report of the Sub-Committee that redrafted the corresponding Article of the Charter during the Geneva session of the Preparatory Committee states:

"The provisions in paragraph 2 ... concerning the responsibility of the Fund in respect of statistical data relating to balances of payment or monetary reserves for the purpose of that Article is independent of any arrangement to be made between the Fund and the United Nations concerning the collection and appreciation of statistical data on balances of payments for other purposes".⁷

In 1978-80 the Working Party on "Specific Duties" examined the modalities for the application of Article II:6(a) in the monetary situation of increased flexibility of exchange rates. Although the Working Party consulted with the International Monetary Fund in this connection, "The representative of the Fund noted that ... the role of the Fund in the activities of the Working Party was to provide technical information to the CONTRACTING PARTIES; the Fund had no mandate to participate in interpreting the General Agreement. The Fund

²L/332/Rev.1 and Addenda, adopted on 2, 4, and 5 March 1955, 3S/170, 198, para. 9-11.

³MIN(73)1, Declaration of Ministers approved at Tokyo on 14 September 1973, 20S/19, 22, para. 7.

⁴L/5761, adopted on 30 November 1984, 31S/15.

⁵L/4858, adopted on 29 January 1980, 27S/149.

⁶L/5572, 30S/96, 98-99, paras. 9-11; L/5721, 31S/52, 53-54, paras. 7-10; CG.18/W/74, "The Relation between the International Trading System and the International Financial System", dated 26 April 1983.

⁷EPCT/163, p. 22.

representative emphasized in particular that it was for the CONTRACTING PARTIES to decide how the provisions of Article II:6 should be applied under the present circumstances”.⁸

(2) “The CONTRACTING PARTIES, in reaching their final decision”

During discussions at the Havana Conference of paragraphs 2 and 3 of the corresponding Charter Article, Article 24, it was stated that “if the provisions of Article 24 were considered with Article 21 [XII], there was no basis for the fears that the ITO would be subservient to the Fund. The provisions of paragraphs 2(a)(ii) and 3(a) of Article 21 [XII] made it clear that the final decision as to whether restrictions would be instituted or maintained rested with the ITO, notwithstanding determinations made by the IMF”.⁹

During Council discussion of the 1973 Report of the Committee on Balance-of-Payments Measures on the consultations with Spain, the representative of Spain stated his view that the Committee, in concluding that in the case of Spain the GATT balance-of-payments provisions were no longer applicable, had followed too strictly the determination of the IMF. The representative of Uruguay stated “that the report of the IMF should be considered as one element, but not the only element to be taken into account. While the IMF report could not be contradicted as to the state of the balance of payments, only the CONTRACTING PARTIES were competent to judge the relationship between the balance-of-payments situation and the necessity for greater liberalization of trade. It was up to GATT to decide whether measures taken were efficient and whether they should be maintained or not”.¹⁰ Some other contracting parties stated that in view of the IMF’s determination and the provisions of Article XV:2 the Committee’s conclusions could not have been different. The Report was adopted by the Council.¹¹

(3) “financial aspects of other matters ...”

In discussions at the Geneva session of the Preparatory Committee concerning the meaning of “financial aspects of other matters covered in consultation in such cases”, one representative gave the example that in the case of imminent threat to the balance of payments of a country

“matters to be taken into consideration may be almost entirely trade questions, such as, for instance, the imminent threat to Australia’s balance of payments through the failure of her wheat crop. I say nothing about what would happen if all the sheep died. Equally there might be, in the case of another country, some financial aspect of the imminent threat on which I should have thought the assistance of the International Monetary Fund would be extremely useful to the ITO.”¹²

(4) Application of paragraph 2: role of the International Monetary Fund

(a) Balance-of-payments consultations

The description of procedures for full consultations on balance-of-payments measures under Article XII:4(b) or Article XVIII:12(b), which was agreed in 1970, provides that

“Under paragraph 2 of Article XV, the CONTRACTING PARTIES are required to consult with the IMF on the points specified in that paragraph. As soon as the programme of consultations for the year is drawn up and taken note of by the Council, the Director-General should send a communication to invite the IMF to consult with the CONTRACTING PARTIES in connexion with each of the GATT consultations. In each case the GATT-IMF consultations will take place in the Committee on Balance-of-Payments Restrictions prior to the GATT consultation”.¹³

⁸L/4858, adopted on 29 January 1980, 27S/149.

⁹E/CONF.2/C.3/SR.24, p. 3.

¹⁰C/M/89, p. 7.

¹¹C/M/89, p. 7-8, C/M/90, p. 2-3.

¹²EPCT/A/PV/41, pp. 69-70.

¹³L/3388, 18S/48, 51, para. 8.

These GATT-IMF consultations take place through the delivery of a statement by the IMF representative to the Committee concerning the economic and financial situation of the consulting contracting party. For each full balance-of-payments consultation, the Fund submits a "Recent Economic Developments" report. The 1970 procedures state that:

"The material supplied by the IMF as part of a consultation between the Fund and GATT should be circulated to the members of the Committee ... A copy may be supplied to any other contracting party which requests it".¹⁴

In "simplified consultations" under Article XVIII:12(b) and the procedures agreed in 1972, the Fund supplies balance-of-payments statistics but is not consulted unless the result of the consultations is a recommendation by the Committee that full consultations be held.¹⁵

In 1982-83 discussions took place concerning the treatment of balance-of-payments problems confronting heavily-indebted developing countries. A 1984 Statement by the Chairman of the Committee on Balance-of-Payments Restrictions to the Council, which summarized the result of these discussions, stated, *inter alia*, that:

"The suggestion, that measures relating to trade policy agreed upon under standby or extended facility arrangements with the IMF could be notified to the GATT, had already been strongly questioned during the discussions in the Consultative Group of 18. During the present informal discussions, there was also clear opposition to the idea that a formal link might be established between commitments undertaken in such a delicate context and the response of other contracting parties in the form of measures designed to facilitate an expansion of the export earnings of the consulting country. It is, however, clear that under Paragraph 4 of the 1970 consultation procedures, consulting parties are required to keep the GATT secretariat regularly informed of any changes in trade measures, whether or not such measures are related to commitments vis-à-vis the Fund. Against this background, there was no evidence of support for the suggestion that there should be greater synchronization between consultations in the Committee and the consultations undertaken by the IMF".¹⁶

Further concerning the role of the Fund in balance-of-payments consultations, see the 1987 Note by the Secretariat on "Articles XII, XIV, XV and XVIII".¹⁷

See also the material under Article XVIII:10 from the three parallel Panel Reports on "Republic of Korea - Restrictions on Imports of Beef," complaints by Australia,¹⁸ the United States,¹⁹ and New Zealand.²⁰

(b) *Consultations on other problems involving financial issues*

The First Report of the Working Party on "United Kingdom Import Deposits", which examined the Import Deposit Scheme introduced by the United Kingdom on 27 November 1968, notes that the Working Party decided, in agreement with the representative of the United Kingdom, to consult with the International Monetary Fund in accordance with the provisions of Article XV. At the consultation, the statement presented by the Fund representative concluded: "In these circumstances, the import deposit scheme does not go beyond the extent necessary, in conjunction with other measures, to achieve a reasonable strengthening of the United Kingdom's reserve position." The Working Party examined matters including the use of the monies collected, the product coverage of the scheme and its trade effect. The Conclusions provided that "The Working Party examined the import deposit scheme ... in the light of the findings of the International Monetary Fund ... Taking into account this finding, the Working Party concluded that the United Kingdom import deposits were not more restrictive than measures that an application of the provisions of Article XII of the General Agreement permits".²¹ When the

¹⁴*Ibid.*, 18S/51, para. 9.

¹⁵L/3772/Rev.1, 20S/47, 49, para. 3; see also section II.C under Article XII.

¹⁶C/125 dated 13 March 1984, approved by the Council on 15/16 May 1984 (C/M/178, p. 26), 31S/56, 59, para. 9.

¹⁷MTN.GNG/NG7/W/14, dated 11 August 1987, p. 17-18, paras. 55-56.

¹⁸L/6504, adopted on 7 November 1989, 36S/202.

¹⁹L/6503, adopted on 7 November 1989, 36S/268.

²⁰L/6505, adopted on 7 November 1989, 36S/234.

²¹L/3193, adopted on 15 April 1969, 17S/144-149, 149, paras. 17-18.

scheme was extended, the Working Party again consulted with the Fund. Its Final Report notes that the United Kingdom terminated the import deposit scheme on 4 December 1970.²²

The Report of the Working Party on the “United States Temporary Import Surcharge” introduced on 16 August 1971 notes that the Working Party consulted with the Fund. The United States representative referred to Article XV, cited a finding by the International Monetary Fund that “in the absence of other appropriate action and in the present circumstances, the import surcharge can be regarded as being within the bounds of what is necessary to stop a serious deterioration in the United States’ balance-of-payments position”, and cited a statement to the Working Party by the Fund representative that the Fund had no other alternative measures to suggest at that time.²³ Other members of the Working Party drew attention to the full findings of the Fund; the Working Party examined as well the modalities of the surcharge and its effects on trade. The Conclusions of the Report state, *inter alia*:

“The Working Party took note of the findings of the International Monetary Fund and recognized that the United States had found itself in a serious balance-of-payments situation which required urgent action. While noting the contrary views of the United States, the other members of the Working Party ... considered that the surcharge, as a trade restrictive measure, was inappropriate given the nature of the United States balance-of-payments situation and the undue burden of adjustment placed upon the import account with consequent serious effects on the trade of other contracting parties”.²⁴

3. Paragraph 3: Arrangements for consultation with the International Monetary Fund

The Havana Conference “Resolution Establishing an Interim Commission for the International Trade Organization” provided that the Interim Commission would have as one of its tasks “to prepare, in consultation with inter-governmental organizations other than the United Nations, for presentation to the first regular session of the Conference, documents and recommendations concerning the implementation of the provisions of paragraphs 1 and 3 of Article 87 of the Charter”.²⁵ In 1948 the Executive Committee of the Interim Commission drew up an agreement between the ITO and the Fund²⁶, but as the Havana Charter did not enter into force, this agreement was never finalized.

In 1948 and 1949 the CONTRACTING PARTIES and the International Monetary Fund agreed on a general “Arrangement for co-ordination and consultation”²⁷, and an arrangement on “Co-ordination of public announcements relating to consultations”.²⁸

In 1954-55, the Review Working Party on Quantitative Restrictions set up a Special Sub-Group on GATT/Fund Relations. The Report of this Sub-Group noted that:

“... the CONTRACTING PARTIES had consulted with the Fund on all matters where consultation was required under Article XV of the General Agreement. It noted that the Articles of the Agreement of the Fund do not contain a comparable requirement for consultation, and also that Fund consultation with the CONTRACTING PARTIES on some exchange matters which might have important trade effects was often not appropriate or feasible for reasons of urgency or secrecy ...

“The group felt that in most cases it would be sufficient that co-ordination would take place between the CONTRACTING PARTIES and the Fund on a staff-to-staff basis. ... This would help not only to ensure that, in appropriate cases, the Fund staff, in preparing its reports to the Executive Directors, would take full

²²L/3526, 18S/210, 212, para. 6.

²³L/3573, adopted on 16 September 1971, 18S/212, 214, para. 8. The section of the Report dealing with the consultations with the Fund has not been derestricted and does not appear in the BISD.

²⁴*Ibid.*, 18S/222, para. 39.

²⁵Paragraph 1 of Article 87 of the Havana Charter mandated the ITO to make arrangements for effective co-operation and the avoidance of unnecessary duplication in the activities of inter-governmental organizations.

²⁶See ICITO/EC.2/2/Add.2 (draft), ICITO/EC.2/14 Annex A (revision), discussion at ICITO/EC.2/SR.5 p. 5-8, approved with amendments at ICITO/EC.2/SR.14 p. 2.

²⁷I/120, proposed by the Chairman of the CONTRACTING PARTIES by letter dated 9 September 1948 and agreed to by the Fund by letter dated 28 September 1948.

²⁸I/120-123.

account of any information brought to their attention by the GATT staff regarding the trade aspects of exchange measures but also to ensure that matters of concern to the CONTRACTING PARTIES were brought to the attention of the Executive Directors before they took their decisions.”²⁹

The Sub-Group recommended that:

- “(a) The CONTRACTING PARTIES should draw the attention of the Fund to their intention to have the GATT staff, in appropriate cases and where practicable, discuss with the Fund staff trade matters which had implications for exchange policy, and should inform the Fund that the GATT staff would be prepared, at the request of the Fund, to enter into similar discussions, where practicable, on the trade effects of exchange matters under Fund consideration.
- “(b) Pursuant to this intention, the Executive Secretary should be authorized to work out with the Fund procedures for ensuring the maximum practicable degree of cooperation between the two staffs on matters of mutual concern to the CONTRACTING PARTIES and the Fund.
- “(c) The Intersessional Committee should be authorized to conduct such consultations with the Fund as might seem appropriate in furtherance of the objectives of paragraph 1 of Article XV.
- “(d) The CONTRACTING PARTIES should draw the attention of the International Monetary Fund to the new arrangements with respect to the Intersessional Committee, should explain that this would make consultation between the CONTRACTING PARTIES and the Fund easier and more expeditious than hitherto, and should express the hope that this should improve progressively the efficiency of consultation both ways between them.
- “(e) The Executive Secretary should be requested to pursue consultations with representatives of the Fund with a view to preparing a formal agreement between the Fund and the proposed Organization [for Trade Cooperation] for consideration by both parties at a suitable future date”.³⁰

These recommendations were drawn to the attention of the Fund by the Executive Secretary in April 1955. At the Tenth Session in November 1955, it was agreed that recommendation (e) would be set aside pending the entry into force of the Agreement Establishing the Organization for Trade Cooperation.³¹ However, informal discussions between GATT and Fund staff did result in arrangements for the transmission to the Secretariat of IMF documentation, especially in connection with balance-of-payments consultations, which were noted and approved at the Eleventh Session in October 1956.³²

See also the discussion above at page 431 on the IMF role in consultations on balance-of-payments measures.³³

The Mandate of the Consultative Group of Eighteen (CG-18), as adopted in 1975 and confirmed in 1979, provides that “The task of the Group is to facilitate the carrying out, by the CONTRACTING PARTIES, of their responsibilities, particularly with respect to ... the international adjustment process and the co-ordination, in this context, between the GATT and the IMF”.³⁴ The first and second reports of the CG-18 to the Council note the discussions in the Group during 1975 through 1977 on measures to improve co-ordination with the Fund.³⁵

²⁹L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 199, paras. 12-13.

³⁰*Ibid.*, 3S/199-200, para. 14. In the Review Session, agreement was reached on institutional arrangements including an Agreement Establishing the Organization for Trade Cooperation, but this agreement never entered into force.

³¹SR.10/8.

³²L/533, SR.11/3.

³³L/3388, 18S/48, 51, paras. 8-9.

³⁴L/4204, Decision of the Council of 11 July 1975, 22S/15.

³⁵L/4429, 23S/38, 45, para. 25; L/4585, 24S/58, 59-60, paras. 7-8.

4. Paragraph 4

(1) “by exchange action frustrate”

In 1977, a panel was established in response to a complaint of the United States stating that in February 1976 Japanese foreign exchange banks had been instructed not to open any new letters of credit for imports of thrown silk yarn from the United States. The complaint claimed, *inter alia*, that the restrictions were inconsistent with Article XV “by using foreign exchange banks to thwart the principles of the General Agreement.” The parties reached a bilateral solution to the dispute.³⁶

(2) *Distinction between trade action and exchange action*

A Special Sub-Group set up in 1954 during the Review Session carried out a thorough examination of GATT provisions on balance-of-payments restrictions and GATT-IMF relations. It concluded that “in many instances it was difficult or impossible to define clearly whether a government measure is financial or trade in character and frequently it is both”.³⁷ The Sub-Group however noted that the division of work between the CONTRACTING PARTIES and the Fund was in practice “based on the technical nature of government measures rather than on the effect of these measures on international trade and finance”.

The 1981 Secretariat Background Paper on the consultation with Italy concerning the Italian deposit requirement for purchases of foreign currency discusses the question of whether the Italian scheme represents a charge on importation or a charge on the transfer of payments:

“If the distinction between import and payments measures were made by taking into account the purpose or the effect of the action, the Italian scheme would probably be both a trade and an exchange measure: it is intended to improve Italy's payments position as well as to restrain imports, and it has had an impact both on payments for imports and the imports themselves. If however the distinction were made by looking at the restrictive technique used, the Italian deposit scheme would probably have to be regarded as an exchange measure since it is formulated and operated as a requirement to be fulfilled for the purchase of foreign exchange rather than for importation.

“The Executive Directors of the International Monetary Fund have decided in 1960 that, for the purposes of Article VIII of the Fund Agreement, the criterion for distinguishing between trade and exchange measures should normally be the technique used. ‘The guiding principle’, they determined, ‘in ascertaining whether a measure is a restriction on payments and transfers for current transactions under Article VIII Section 2, is whether it involved a direct governmental limitation on the availability or use of exchange as such’ (Decision No. 1034 - (60/27) of 1 June 1960). In conformity with this principle the Fund has regarded the Italian measures as constituting a restriction on current international transactions requiring Fund approval under Article VIII Section 2, an approval which it has granted until 30 September 1981 (C/M/149, page 12).”³⁸

“In summary it can be said that the CONTRACTING PARTIES - unlike the IMF - have never formally decided how to distinguish between trade and exchange controls ... Their approach has been to examine particular restrictive measures affecting trade independent of the form that these measures took”.³⁹

The 1981 Report of the Committee on Balance-of-Payments Restrictions on the “Italian Deposit Requirement for Purchases of Foreign Currency” notes the view of the Italian Government “that the GATT rules on trade measures taken for balance-of-payments purposes did not apply to the deposit scheme because it was of a monetary nature and its main and primary effects were financial and monetary”. The Committee concluded, *inter alia*, “that the deposit scheme, though monetary in form, had some effect on trade and that, in so far as

³⁶L/4530 (complaint) and Council discussion at C/M/122, p. 7-9; see also L/4637, Report of the Panel on “Japanese Restrictions on Imports of Thrown Silk Yarn”, adopted on 17 May 1978, 25S/107.

³⁷L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 196, para. 2.

³⁸BOP/W/51, p. 4, paras. 9-10.

³⁹*Ibid.*, p. 5, para. 14.

these trade effects were concerned, the scheme could be considered in the spirit of the Declaration on Trade Measures Taken for Balance-of-Payments Purposes".⁴⁰ The deposit scheme was terminated on 7 February 1982.⁴¹

(3) Trade measures equivalent to exchange rate changes

There are only two known examples of trade measures equivalent to changes in the exchange rate for commercial transactions. In late 1968 Germany instituted a special 4 per cent refund on imports together with a 4 per cent turnover tax levy on exports.⁴² In 1982, Uruguay imposed a 10 per cent import surcharge and a 10 per cent export rebate.⁴³

(4) Trade measures enforcing permissible exchange controls: Note Ad Article XV:4

When the Preparatory Committee examined this article in its Geneva session, one delegation proposed that paragraph 1(c) of Article 28 [XIV] of the New York Draft Charter be transferred to Article 29 [XV], suggesting the following wording: "Nothing in this section is intended to preclude a Member from requiring that its exporters accept only its own currency or the currencies of any one or more members of the International Monetary Fund, as it may specify in payment for exports". The proposal stated that the provision "is misplaced in Article 28, since it does not constitute an exception to the rule of non-discrimination on quotas. As rephrased here, it is clearly an exchange matter rather than a provision involving quantitative restrictions, and would therefore belong most appropriately in Article 29".⁴⁴

The Sub-Committee produced a new text which was approved without any changes and inserted in the Geneva Draft Charter and in the General Agreement.⁴⁵ It was, however, considered essential to include "as an official explanation of the text" the Note *Ad* paragraph 4. The second sentence of the Note covers the case mentioned in the original draft quoted above. The last sentence was inserted to meet a request of the Czechoslovak delegation. In the final Geneva draft, and also in the General Agreement text, the interpretative Note refers only to paragraph 4. At Havana the note was attached to the last paragraph (9 in the General Agreement).

(5) Relationship between paragraph 9(a) and paragraph 4

See material under paragraph 9(a), at page 441 below.

5. Paragraph 5

The Report on the "Review on the Work of the Balance-of-Payments Committee: 1970-1974" noted, *inter alia*, that the "CONTRACTING PARTIES have no authority over exchange restrictions" and that "Conclusions concerning exchange measures have been rare when viewed against the fact that most consulting countries were, at the time of the consultations, using exchange measures to control their foreign trade. Only in one case (1970 Egypt) the Committee recommended a timely reform of the exchange system, and in another (1971 Ghana) it urged the consulting country to consider liberalizing controls on profit and dividend repatriation. The Committee never decided to report on exchange measures to the Fund".⁴⁶

⁴⁰BOP/R/119, adopted on 3 November 1981, C/M/152.

⁴¹L/5162/Add.3.

⁴²L/3171, "Contribution toward Stabilization of the International Monetary System", dated 6 February 1969; see also German announcement at SR.25/9, p. 155.

⁴³L/5355.

⁴⁴EPCT/W/223, p. 35, referring to EPCT/W/216 pp. 5-6.

⁴⁵EPCT/A/PV/41, pp. 72-76.

⁴⁶L/4200, paras. 45-46 (referring to BOP/R/49 (Egypt) and BOP/R/53 (Ghana)).

6. Paragraph 6

(1) “*within a time to be determined*”

It was stated by the rapporteur of the Sub-committee on Quantitative Restrictions and Exchange Control, which drafted the corresponding Charter provisions at the London session of the Preparatory Committee that: “The Organization’s functions relating to the special exchange agreement are to act in collaboration with the International Monetary Fund on all questions which may arise in the working of the agreement. And to seek and accept the opinion of the International Monetary Fund whether the action is permissible”.⁴⁷ The London Report notes as follows:

“It is generally considered appropriate that any member of the Organization, which is not also a member of the Fund, should not have full freedom in exchange matters, since by exchange arrangements it might frustrate its trade obligations. There is wide measure of agreement for the suggestion that such a member should enter into a special agreement with the Organization in exchange matters, which would provide that the purposes common to the Organization and the Fund would not be frustrated as a result of action in exchange matters by the member in question ...”.⁴⁸

A Resolution of the CONTRACTING PARTIES of 20 June 1949 established the time-limit for entering into a special exchange agreement as 1 November 1949, or four months after accession, or thirty days after a contracting party ceases to be a member of the Fund.⁴⁹

(2) “*special exchange agreement*”

The Working Party Report adopted on 20 June 1949 on “Text of Special Exchange Agreement and Time-limit for Acceptance” has annexed to it the text of a standard special exchange agreement as contemplated by paragraph 6 of Article XV.⁵⁰ The standard agreement provides that it will terminate on the day on which the government concerned becomes a member of the Fund or ceases to be a contracting party. In 1994 a draft special exchange agreement was circulated in the working party on accession of Chinese Taipei.⁵¹

Special exchange agreements were accepted in the 1950-1952 period by: Sri Lanka (Ceylon), Haiti, Indonesia, and the Federal Republic of Germany. These countries later became members of the International Monetary Fund.⁵² Consequently, no special exchange agreement under Article XV is currently in force.

(3) *Exceptions and derogations from paragraph 6*

At the Havana Conference, Article 24 of the Charter was revised to include a paragraph to meet “the case of a country which does not use its own currency”.⁵³ This provision does not appear in the GATT, but the case is provided for in a Resolution of 20 June 1949 by the CONTRACTING PARTIES providing that “no contracting party shall be required to enter a special exchange arrangement so long as it uses solely the currency of another contracting party and so long as neither the contracting party in question nor the country whose currency is being used maintains exchange restrictions; provided, however, that any contracting party which defers entering into a special exchange arrangement ... shall thereby be deemed to have consented to consult with the CONTRACTING PARTIES at any time on their request on any exchange problem.”⁵⁴

⁴⁷EPCT/C.II/QR/PV/5 p. 63. See also *ibid.* p. 41-49 concerning origin and purpose of special exchange agreements in UK draft proposal on balance-of-payments measures.

⁴⁸London Report, p. 16, para. III.C.4(f).

⁴⁹II/17.

⁵⁰GATT/CP/3/44, II/117-123.

⁵¹Spec(94)39, Spec(94)31.

⁵²Sri Lanka (Ceylon): agreement at GATT/CP/53, became Fund member 29 August 1950; Haiti: special exchange agreement at GATT/CP/96, Fund membership 8 September 1953; Indonesia: special exchange agreement at GATT/CP/96, became Fund member 15 April 1954 (withdrew effective 17 August 1965, readmitted as Fund member 21 February 1967); Federal Republic of Germany: special exchange agreement at G/12, became Fund member 14 August 1952.

⁵³Havana Reports, p. 101, paras. 35-36 (revision in response to proposal by Liberia).

⁵⁴II/18.

Since 1955, *waivers* of indefinite duration were granted under Article XXV:5 relieving the following contracting parties from the obligation to become a member of the International Monetary Fund or to accept a special exchange agreement: New Zealand,⁵⁵ Czechoslovakia,⁵⁶ Indonesia,⁵⁷ and Cuba.⁵⁸ The waivers for Czechoslovakia and New Zealand were later amended to dispense with a requirement for annual consultations, due to their special nature.⁵⁹ New Zealand subsequently became a member of the International Monetary Fund, and Czechoslovakia and Indonesia resumed their memberships in the Fund.⁶⁰

The protocols of accession of Switzerland,⁶¹ Poland,⁶² Romania,⁶³ and Hungary⁶⁴ each contain a *reservation to Article XV:6*. In each of these cases, the reservation was accompanied by an undertaking that, *inter alia*, “so long as [country] is not a member of the International Monetary Fund, it will act in exchange matters in accordance with the intent of the General Agreement and in a manner fully consistent with the principles laid down in the text of the special exchange agreement as adopted by the CONTRACTING PARTIES in their Resolution of 20 June 1949. [Country] shall report to the CONTRACTING PARTIES promptly on any action taken by it which would have been required to be reported to the CONTRACTING PARTIES had [Country] signed the special exchange agreement. [Country] shall consult with the CONTRACTING PARTIES at any time, subject to thirty days’ notice, upon request of any contracting party which considers that [country] has taken exchange action which may have a significant effect on the application of the provisions of the General Agreement or is inconsistent with the principles and objectives of the special exchange agreement. If, as a result of such consultation, the CONTRACTING PARTIES find that [country] has taken exchange action contrary to the intent of the General Agreement, they may determine that the present reservation shall cease to apply and [country] shall thereafter be bound by the provisions of paragraph 6 of Article XV of the General Agreement”.⁶⁵

Each of these four contracting parties has since become a member or resumed membership in the International Monetary Fund: Switzerland on 29 May 1992, Poland on 12 June 1986, Romania on 15 December 1972, and Hungary on 6 May 1982.

7. Paragraph 8

In 1950 and 1951 the CONTRACTING PARTIES and the International Monetary Fund agreed on arrangements for “Collection of information required by Article XV:8”⁶⁶ and “Rules of procedure for direct consultation between a contracting party and the Fund”⁶⁷ applying to contracting parties which are not members of the Fund.

8. Paragraph 9

See section III below concerning the drafting history of paragraph 9.

During the Review Session in 1954, a Special Sub-Group of the Review Working Party on Quantitative Restrictions discussed the question whether Article XV:9(a), which exempts from all GATT obligations “the use ... of exchange controls ... in accordance with the Articles of Agreement of the International Monetary Fund”, also relieves contracting parties of their obligation not to frustrate the General Agreement’s intent through such actions. The United Kingdom proposed an interpretative note to Article XV:9(a) of the General Agreement which would resolve this issue; however, “the Group agreed that it would be preferable not to try to lay down

⁵⁵3S/42, 6S/32.

⁵⁶3S/43, 6S/28.

⁵⁷14S/33.

⁵⁸13S/23.

⁵⁹Report of the Working Party on “Consultations under Article XII:4(b) etc.”, L/769, adopted on 30 November 1957, 6S/36, 38, paras. 8-10.

⁶⁰New Zealand: Fund membership effective 31 August 1961; Czechoslovakia: readmitted as a member of the Fund 20 September 1990, ceased to be a member 1 January 1993 (succeeded on that date by Czech Republic and Slovak Republic); Indonesia: see preceding note.

⁶¹Protocol for the Accession of Switzerland, 14S/6, 8, para. 5. See also L/598. Report on “Arrangements and Procedures for the Accession of Switzerland”, adopted on 17 November 1956, 5S/40, 43, para. 11 concerning reasons for the Swiss reservation.

⁶²Protocol for the Accession of Poland, 15S/46, 49, para. 8.

⁶³Protocol for the Accession of Romania, 18S/5, 8, para. 9.

⁶⁴Protocol for the Accession of Hungary, 20S/3, 6, para. 8.

⁶⁵See also statement of Switzerland on this reservation at 5S/43, para. 11.

⁶⁶I/123, proposed by the CONTRACTING PARTIES by letter dated 9 February 1951 and agreed to by the Fund by letter dated 26 March 1951.

⁶⁷I/121, proposed by the Fund by letter dated 27 February 1950, and agreed by the CONTRACTING PARTIES by letter dated 22 May 1950.

general principles on the relationship between paragraphs 4 and 9 but to leave this question over for empirical consideration if and when particular points arose which had a bearing on it. ... They further agreed that paragraph 9(a) was not to be interpreted so as to preclude the CONTRACTING PARTIES from discussing with a contracting party the effects on the trade of contracting parties of exchange controls or restrictions imposed or maintained by that contracting party, or from reporting on these matters to the IMF (as indeed was specifically envisaged by paragraph 5 of the Article).⁶⁸

During the Review Session in 1954-55, Italy brought a complaint concerning action by Turkey providing export bonuses for certain agricultural products and levying special import taxes on certain goods deemed less-essential in order to provide the necessary funds for the bonuses. Italy stated that the export subsidies had not been notified as required by Article XVI:1 and that the import taxes were inconsistent with Article II:1(b). Turkey stated that as part of a reform of its foreign exchange system, it had established an Equalization Fund which was financed by the sale of import permits, and that this system had been approved by the International Monetary Fund. A representative of the Fund confirmed that the practices under question were multiple currency practices under the Fund Articles of Agreement and that in a Decision concerning Turkey the Fund had stated that it did not object to the temporary continuance of these practices and would remain in consultation with Turkey on these practices. The complaint was referred to the Panel on Complaints but was withdrawn later in the session.⁶⁹ See also the other material on multiple exchange rate practices under Article XVI in this Index.

In 1976-77, the Working Party on Italian Measures examined a deposit requirement for payments abroad, and a tax on the purchase of foreign exchange, which had been imposed by the Italian government; in accordance with Article XV, the Working Party carried out a consultation with the Fund. The Report on "Monetary Measures" prepared by this Working Party notes that the representative of the EC stressed the monetary and exchange character of the Italian measures, which were applied to all purchases of foreign exchange, whether for imports, services or other purposes. "Members of the Working Party ... noted that Italy was not invoking Article XII. They stressed the importance attached to the careful examination in the appropriate GATT body of all restrictive measures having a direct or indirect effect on trade, be these measures monetary in form or not".⁷⁰

This view prevailed also in the Council discussion leading to the decision to hold consultations in the Balance-of-Payments Committee on the Italian deposit requirement for purchases of foreign currency which was introduced in May 1981.⁷¹

B. RELATIONSHIP BETWEEN ARTICLE XV AND OTHER PROVISIONS OF THE GENERAL AGREEMENT

1. Article III

The record of discussions at the Havana Conference on Article 18 of the Charter (corresponding to Article III of the General Agreement) notes the following understanding:

"The Sub-Committee [A] considered that charges imposed in connection with the international transfer of payments for imports or exports, particularly the charges imposed by countries employing multiple currency practices, where such charges are imposed not inconsistently with the Articles of Agreement of the International Monetary Fund, would not be covered by Article 18 [III]. On the other hand, in the unlikely case of a multiple currency practice which takes the form of an internal tax or charge, such as an excise tax on an imported product not applied on the like domestic product, that practice would be precluded by Article 18. It may be pointed out that the possible existence of charges on the transfer of payments insofar as these are permitted by the International Monetary Fund is clearly recognized by Article 16 [I]."⁷²

⁶⁸Report of the Special Sub-Group, 3S/195, 198, para. 8; text of UK proposed note appears as Annex 2 to this Report at 3S/205.

⁶⁹L/214 (complaint); SR.9/7 (discussion of complaint, statements by Italy, Turkey and the Fund, referral to Panel on Complaints); W.9/8 (written statement by Turkey); SR.9/40 (withdrawal of complaint).

⁷⁰L/4442, adopted on 2 March 1977, 24S/129, 131, para. 6.

⁷¹C/M/149.

⁷²Havana Reports, p. 62, para. 39, repeating an understanding arrived at during the Geneva session of the Preparatory Committee (see EPCT/174, p. 7). See also Havana discussion of this understanding at E/CONF.2/C.3/A/W.33, p. 3. The text of Article 18 as revised at Havana was taken into the GATT; see the discussion of negotiating history in section III under Article III. Article 16 corresponded to Article I of the General Agreement.

In 1952, the standing Panel on Complaints examined a special “contribution” levied by the Greek Government on certain imported goods, which the Greek delegation stated was “a charge imposed on foreign exchange allocated for the importation of goods from abroad equivalent to a multiple currency practice” considered by the Greek Government as indispensable to cover the widening gap between the official exchange rate and the effective purchasing power of the drachma. The Report of the Panel on “Special Import Taxes Instituted by Greece” referred to the passage directly above, observing as follows:

“... the principal question arising for determination was whether or not the Greek tax was an internal tax or charge on imported products within the meaning of paragraph 2 of Article III. If the finding on this point were affirmative, the Panel considered that it would be subject to the provisions of Article III whatever might have been the underlying intent of the Greek Government in imposing the tax ...

“On the other hand, if the contention of the Greek Government were accepted that the tax was not in nature of a tax or charge on imported goods, but was a tax on foreign exchange allocated for the payment of imports, the question would arise whether this was a multiple currency practice, and, if so, whether it was in conformity with the Articles of Agreement of the International Monetary Fund. These matters would be for the determination of the International Monetary Fund. If the Fund should find that the tax system was a multiple currency practice and in conformity with the Articles of Agreement of the International Monetary Fund, it would fall outside the scope of Article III.

“Even if it were found that the tax did not fall within the ambit of Article III the further question might arise under Article XV:4 whether the action of the Greek Government constituted frustration by exchange action of the intent of the provisions of Article III of the General Agreement.”⁷³

The Panel suggested that the CONTRACTING PARTIES seek further information and inquire of the Fund whether the Greek “contribution” was a multiple currency practice, and whether it was in conformity with the Fund Articles of Agreement. This would make it possible to consider whether any question arose under Article XV:4.⁷⁴ The Greek measure in question was terminated following devaluation of the drachma in April 1953.⁷⁵

2. Article XXIII

The Report of the Special Sub-Group on GATT/Fund Relations in the 1954-55 Review Session notes that the Sub-Group rejected as unnecessary a proposal to add a note to Article XV:9(a) confirming the right to invoke Article XXIII with respect to exchange controls or exchange restrictions which were in accordance with the IMF Articles of Agreement.⁷⁶

3. Other GATT provisions

In addition to the broad obligations of Article XV:4 and 9, commitments relating to exchange controls and currency practices also appear in other GATT Articles including I:1; II:3 and 6; VI:2 and 3; VII:4(a) and (c); VIII:1 and 4, as well as Articles XI to XIV and XVIII:B.

⁷³G/25, adopted on 3 November 1952, 1S/48, 49-50, paras. 5, 7, 8.

⁷⁴*Ibid.*, 1S/50-51, paras. 9-12. Concerning multiple currency practices, see also the Decision of the International Monetary Fund annexed to the Report of the Special Sub-Group on GATT/Fund Relations at 3S/200-205.

⁷⁵SR.8/7 p. 9.

⁷⁶L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 198, para. 8, referring to note proposed by UK reprinted at 3S/205.

C. EXCEPTIONS AND DEROGATIONS

See material on exceptions and derogations to the obligation to enter into special exchange agreements, at page 437 above.

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

Corresponding provisions in the Havana Charter are contained in Article 24; in the US-UK *Proposals* in Chapter III F-5; in the US Draft in Article 23-24; in the London and New York Drafts in Article 29; and in the Geneva Draft in Article 24. The title of Charter Article 24 is “Relationship with the International Monetary Fund and Exchange Arrangements”.

The US Draft Charter articles provided for ITO-IMF co-operation, and would have prohibited some exchange restrictions and all restrictions on payments and transfers for current international transactions consisting of payments due in connection with imports of any product. At London this provision was redrafted in the Sub-Committee on Quantitative Restrictions and Exchange Control, which drafted paragraphs 1, 4, 6, 7(a) and 8. At the Geneva session of the Preparatory Committee, further discussion led to insertion of the paragraphs dealing with the relationship between the ITO and the Fund and the relationship between obligations under the Charter and the Fund Articles of Agreement, paragraphs 2, 3, 5, 7(b) and 9. The Geneva Draft Charter Article and the 30 October 1947 text of the General Agreement were substantially identical except that in the Geneva Draft Charter the procedures provided for in paragraph 3 were made subject to approval by the Conference of the ITO. Paragraph 9 began: “Subject to the provisions of paragraph 4 of this Article”.

During the Havana Conference, the third sentence of paragraph 2 of Article 24 was amended in the light of amendments proposed by Australia and New Zealand. The Charter text reads as follows: “When the Organization is examining a situation in the light of relevant considerations under all pertinent provisions of Article 21 [XII] for the purpose of reaching its final decision in cases ...”.⁷⁷ In support of this change it was stated that “It was administratively unsound to separate responsibility for a decision from the responsibility for action arising from it. Good working relations between the IMF and the ITO would be impaired if the ITO had to adopt a decision against its judgement. The proper procedure was for any decision to be preceded by close personal consultation between the officers of the two Organizations, a consultation which would recognize the special fields of competence of each. Moreover, the respect by Members for the provisions of the Charter would be weakened if the ITO were to impose on Members a determination of the IMF with which it disagreed”.⁷⁸ In addition, at Havana a sub-paragraph was added to cover the case of a country which does not use its own currency (see page 437 above). The words “whether or not it has entered into a special exchange agreement” were inserted in the paragraph relating to the provision of information by non-members of the IMF (corresponding to GATT Article XV:8). Finally, it was also agreed to delete the phrase “Subject to paragraph 4 of this Article” from the beginning of the paragraph corresponding to GATT Article XV:9, and to take the interpretative note from paragraph 4 and attach it to that paragraph.

At the Second Session, it was decided to amend paragraph 9 of Article XV to delete the phrase “Subject to paragraph 4 of this Article”, to conform to the text of Article 24:8 of the Havana Charter.⁷⁹ This amendment was effected by the Protocol Amending Part II and Article XXVI, and entered into force on 14 December 1948. During the Review Session Article XV was debated together with the other balance-of-payments Articles, but was not itself revised, except for the addition in paragraph 2 of a reference to paragraph 9(a) of the revised Article XVIII.

⁷⁷Havana Reports, p.101, para.34; E/CONF.2/II/Add.11, pp.2-3.

⁷⁸E/CONF.2/C.3/SR.24, p.1.

⁷⁹Report of the Working Party on “Modifications to the General Agreement”, GATT/CP.2/22/Rev.1, adopted on 1 and 2 September 1948, II/39, 44, para. 28; see also Havana Reports, p. 98, para. 19.

IV. RELEVANT DOCUMENTS

London

Discussion: EPCT/C.II/QR/PV/5 (p. 41)
 EPCT/C.II/PV/13 (p. 16)
 Reports: EPCT/C.II/43, 59; EPCT/30

New York

Discussion: EPCT/C.6/21 (p. 6-7), 23
 Reports: EPCT/C.6/97/Rev.1 (p. 86)

Geneva

Discussion: EPCT/EC/PV.2/22
 EPCT/A/PV/27 (p. 20), 29 (p. 40ff), 41 (p. 64ff)
 EPCT/TAC/SR/11
 EPCT/TAC/PV/27
 Reports: EPCT/135, 163, 171, 189, 196, 212, 214/Add.1/Rev.1
 EPCT/W/313
 Other: EPCT/W/64, 216, 223, 241, 272, 279, 301, 318, 341

Havana

Discussion: E/CONF.2/C.3/SR.23 (p. 5), 24, 25, 47
 Reports: E/CONF.2/C.3/91;
 E/CONF.2/11/Add.11
 Other: E/CONF.2/C.3/F/W/17, 22, 25

CONTRACTING PARTIES

Reports: GATT/CP.2/22/Rev.1, II/39
 GATT/CP/53, CP/96; G/12, G/39

Review Session

Discussion: SR.9/14, 15
 Reports: W.9/106, 130, 174+Add.1, 208, 234, 3S/197
 Other: L/189/Add.1, L/246, L/270
 W.9/18+Add.1, 22, 23, 60, 63, 73, 130, 142, 167
 Spec/46/55, 53/55, 87/55
 MGT/9/55

ARTICLE XVI

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I. TEXT OF ARTICLE XVI AND INTERPRETATIVE NOTE AD ARTICLE XVI

Article XVI*

Subsidies

Section A – Subsidies in General

1. If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.

Section B – Additional Provisions on Export Subsidies*

2. The contracting parties recognize that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.

3. Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.*

4. Further, as from 1 January 1958 or the earliest practicable date thereafter, contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. Until 31 December 1957 no contracting party shall extend the scope of any such subsidization beyond that existing on 1 January 1955 by the introduction of new, or the extension of existing, subsidies.*

5. The CONTRACTING PARTIES shall review the operation of the provisions of this Article from time to time with a view to examining its effectiveness, in the light of actual experience, in promoting the objectives of this Agreement and avoiding subsidization seriously prejudicial to the trade or interests of contracting parties.

Interpretative Note *Ad* Article XVI from Annex I

The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

Section B

1. Nothing in Section B shall preclude the use by a contracting party of multiple rates of exchange in accordance with the Articles of Agreement of the International Monetary Fund.

2. For the purposes of Section B, a “primary product” is understood to be any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.

Paragraph 3

1. The fact that a contracting party has not exported the product in question during the previous representative period would not in itself preclude that contracting party from establishing its right to obtain a share of the trade in the product concerned.

2. A system for the stabilization of the domestic price or of the return to domestic producers of a primary product independently of the movements of export prices, which results at times in the sale of the product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market, shall be considered not to involve a subsidy on exports within the meaning of paragraph 3 if the CONTRACTING PARTIES determine that:

- (a) the system has also resulted, or is so designed as to result, in the sale of the product for export at a price higher than the comparable price charged for the like product to buyers in the domestic market; and
- (b) the system is so operated, or is designed so to operate, either because of the effective regulation of production or otherwise, as not to stimulate exports unduly or otherwise seriously to prejudice the interests of other contracting parties.

Notwithstanding such determination by the CONTRACTING PARTIES, operations under such a system shall be subject to the provisions of paragraph 3 where they are wholly or partly financed out of government funds in addition to the funds collected from producers in respect of the product concerned.

II. INTERPRETATION AND APPLICATION OF ARTICLE XVI

A. SCOPE AND APPLICATION OF ARTICLE XVI

Paragraph 1 of Article XVI was drawn from Article 25 of the draft Charter, and has remained unchanged since the original text agreed in 1947. Section B of Article XVI was drafted in the Review Session, drawing on Articles 26 through 28 of the Havana Charter. The principal sources concerning the drafting of Section B are the Report of the Review Working Party on “Other Barriers to Trade” and the documents of the Review Session.

1. Paragraph 1

(1) “*subsidy*”

In 1959-61, a “Panel on Subsidies” was established and undertook preparatory work for a review to be conducted on the operation of the provisions of Article XVI. The 1961 Report of this group on “Operation of the Provisions of Article XVI” notes that it “considered that it was neither necessary nor feasible to seek an agreed interpretation of what constituted a subsidy. It would probably be impossible to arrive at a definition which would at the same time include all measures that fall within the intended meaning of the term in Article XVI without including others not so intended ... In any event the Panel felt that the lack of a precise definition had not, in practice, interfered with the operation of Article XVI”.¹

General criteria for the determination of the existence of a subsidy have been discussed in the Committee on Subsidies and Countervailing Measures and were discussed in the Committee on Trade in Agriculture.²

(2) “*including any form of income or price support*”

See Interpretative Note 2 *Ad* paragraph 3 of Article XVI; this note corresponds to paragraph 1 of Article 27 of the Havana Charter.

¹L/1442 and Add.1-2, adopted on 21 November 1961, 10S/201, 209, para. 23; see also MTN.GNG/NG10/W/4 at p. 49.

²See, e.g., SCM/35 and 36, and AG/W/5, para. 48.

(a) *Domestic prices fixed above the world price level*

The 1960 Report of the Panel on Subsidies on “Review Pursuant to Article XVI:5” examined the circumstances under which price support systems which fix domestic producer prices at a level higher than the world price level might be considered a subsidy in the meaning of Article XVI.

“It was generally agreed that a system under which a government, by direct or indirect methods, maintains such a price by purchases and resale at a loss is a subsidy. Such purchases would need only to cover part of the production to involve a subsidy and, in determining loss on resale, such expenses as holding stocks should be taken into account. The Panel considered, however, that there could be other cases in which a government maintained a fixed price above the world price without resort to a subsidy. One such case might be that in which a government fixes by law a minimum price to producers which is maintained by quantitative restrictions or a flexible tariff or similar charges. In such a case there would be no loss to the government, and the measure would not be governed by Article XVI.”³

(b) *Subsidies financed by a non-governmental levy*

See Interpretative Note 2 *ad* paragraph 3 of Article XVI; the last sentence of this note provides that operations under price stabilization schemes “shall be subject to paragraph 3 where they are wholly or partly financed out of government funds in addition to funds collected from producers in respect of the product concerned”. On the drafting history of this note, see Section III below.

The 1960 Report on the “Review Pursuant to Article XVI:5” also examined whether subsidies financed by a non-governmental levy were notifiable under Article XVI. The Panel noted that

“The GATT does not concern itself with such action by private persons acting independently of their governments except insofar as it allows importing countries to take action under other provisions of the Agreement. In general there was no obligation to notify schemes in which a group of producers voluntarily taxed themselves in order to subsidize exports of a product ... On the other hand, there was no doubt that there was an obligation to notify all schemes of levy/subsidy affecting imports or exports in which the government took a part either by making payments into the common fund or by entrusting to a private body the functions of taxation and subsidization with the result that the practice would in no real sense differ from those normally followed by governments. In view of these considerations the Panel feels that the question of notifying levy-subsidy arrangements depends upon the source of the funds and the extent of government action, if any, in their collection. Therefore, rather than attempt to formulate a precisely worded recommendation designed to cover all contingencies, the Panel feels that the CONTRACTING PARTIES should ask governments to notify all levy/subsidy schemes affecting imports or exports which are dependent for their enforcement on some form of government action”.⁴

The 1958 Panel Report on “French Assistance to Exports of Wheat and Wheat Flour” concluded that the operation of the French system of price supports, which involved a tax on exporters to partially defray losses in the world market, resulted in the grant of export subsidies because, *inter alia*, governmental budgetary appropriations were necessary to cover at least part of the losses.⁵ See further below at page 453.

(c) *Export credit programmes as subsidies*

The question whether export credit programmes, when in conformity with an international arrangement on official export credits, are to be considered subsidies, was discussed in the Committee on Subsidies and Countervailing Measures during 1982-83. The view that granting of export credits at rates below those which actually prevailed on international capital markets constituted a subsidy to be notified under Article XVI:1 of the General Agreement, was disputed by some contracting parties.⁶

³L/1160, adopted on 24 May 1960, 9S/188, 191, para. 11.

⁴*Ibid.*, 9S/192, para. 12.

⁵L/924, adopted on 21 November 1958, 7S/46, 50-52, paras. 8-14.

⁶SCM/M/11-13, 16.

(d) Internal transport charges

It was agreed during the meetings of the Preparatory Committee at Geneva in 1947 that the granting of reduced internal transport charges on goods for export “would be subject to the provisions of Article [XVI] if it operates directly or indirectly to increase the exports of any product”.⁷

(e) Tax exemptions

It was agreed at Havana that the terms of Article 25 [XVI] were sufficiently wide to cover a system where methods of direct subsidization to domestic industries were not used but whereby “certain domestic industries were exempted from internal taxes payable on imported goods”.⁸ See also the reference to the Panel on “United States Tax Legislation (DISC)” below at page 449.

(f) Multiple exchange rates

See Interpretative Note 1 *Ad* Section B of Article XVI, which was added at the Review Session in 1954-55. The Report of the Review Working Party on “Other Barriers to Trade” notes, concerning the provisions added to Article XVI in the Review Session:

“A number of members of the Working Party were concerned as to the possible effect of the proposed additional provisions on the right of countries to use multiple exchange rates in accordance with the Articles of Agreement of the International Monetary Fund. The Working Party has therefore recommended an interpretative note to cover this case. It wishes also to record the fact that the draft provisions have been considered by the Working Party on the assumption that paragraph 9(a) of Article XV in the present Agreement will not be altered”.⁹

During the Review Session, Italy brought a complaint concerning action by Turkey providing export bonuses for certain agricultural products and levying special import taxes on certain goods deemed less-essential in order to provide the necessary funds for the bonuses. Italy stated that the export subsidies had not been notified as required by Article XVI:1 and that the import taxes were inconsistent with Article II:1(b). Turkey stated that as part of a reform of its foreign exchange system, it had established an Equalization Fund which was financed by the sale of import permits, and that this system had been approved by the International Monetary Fund. A representative of the Fund confirmed that the practices under question were multiple currency practices under the Fund Agreement and that in a Decision concerning Turkey the Fund had stated that it did not object to the temporary continuance of these practices and would remain in consultation with Turkey on these practices. The complaint was referred to the standing Panel on Complaints but was withdrawn later in the session.¹⁰

The 1960 Report on the “Review Pursuant to Article XVI:5” provides that: “The Panel noted that some contracting parties had interpreted approval by the International Monetary Fund of multiple exchange arrangements as absolving them from the obligation to notify such arrangements under Article XVI. The Panel wished to record its view that interpretative note 1 to Section B of Article XVI was intended not to preclude the use by a country of multiple exchange rates which were approved by the International Monetary Fund, but that there was a clear obligation to notify to the CONTRACTING PARTIES multiple exchange rates which have the effect of a subsidy”.¹¹

See also Article XV:9 and the material on it in this Index. See also Note 2 to paragraphs 2 and 3 of Article VI, which provides that “Multiple currency practices can in certain circumstances constitute a subsidy to exports which may be met by countervailing duties under [Article VI:3] or can constitute a form of dumping by

⁷EPCT/127, p. 1; EPCT/B/SR.22. p. 5-6.

⁸Havana Reports, p. 107, paras. 11-12.

⁹L/334 and Addendum, adopted on 3 March 1955, 3S/222, 226, para. 21.

¹⁰L/214 (complaint); SR.9/7 (discussion of complaint, statements by Italy, Turkey and the Fund, referral to Panel on Complaints); W.9/8 (written statement by Turkey); SR.9/40 (withdrawal of complaint).

¹¹L/1160, adopted on 24 May 1960, 9S/188, 192, para. 13.

means of a partial depreciation of a country's currency which may be met by action under [Article VI:2]. By 'multiple currency practices' is meant practices by governments or sanctioned by governments".¹²

(g) *Border tax adjustments and duty drawback*

See the general Interpretative Note *ad* Article XVI. This note, added in the 1954-55 Review Session, was drawn from paragraph 2 of Article 26 of the Havana Charter, the text of which appears below at page 465. The records of the Havana Conference note the understanding that paragraph 2 "covers the case of remission of duties or taxes imposed on raw materials and semi-manufactured products subsequently used in the production of exported manufactured goods".¹³

The relevance of Article XVI to border tax adjustments was examined by the Working Party on "Border Tax Adjustments" in 1968-71; the 1971 Report of the Working Party notes that "It was agreed that GATT provisions on tax adjustment applied the principle of destination identically to imports and exports".¹⁴

The 1977 Report of the Working Party on "Suspension of Customs Liquidation by the United States" examined the compatibility with Article VI:4 of the Japanese practice of exempting exported products from domestic consumption taxes and noted that "All but one member of the Working Party ... agreed that the Japanese tax practices in question were in full accord with the provisions of GATT, its established interpretation as well as established practice of the GATT. They also agreed that ... if countervailing duties were imposed, the imposition of such duties would be in contravention of the provisions of the GATT including Article VI:4 and the note to Article XVI ...".¹⁵

(3) *"directly or indirectly"*

The New York Report notes, with regard to the draft Charter provision corresponding to Article XVI:1, "It will be observed that the provision in this sentence as now drafted applies to cases in which the subsidy operates, 'directly or indirectly', to increase exports or reduce imports of any product and can thus not be interpreted as being confined to subsidies operating directly to affect trade in the product under consideration".¹⁶

(4) *"to increase exports ... or to reduce imports"*

The Report of the Working Party in 1948 on "Modifications to the General Agreement" notes that the Working Party agreed not to amend Article XVI:1 to incorporate the changes made to the corresponding Charter Article at the Havana Conference, *inter alia* in view of the understanding that

"The phrase 'increased exports' in [Article XVI:1] of the General Agreement was intended to include the concept of maintaining exports at a level higher than would otherwise exist in the absence of a subsidy, as made clear in line 3 of Article 25 of the Havana Charter".¹⁷

The 1960 Report on the "Review Pursuant to Article XVI:5" provides:

"In the opinion of the Panel, it is not sufficient to consider increased exports or reduced imports only in a historical sense. In this connexion the Panel had in mind [the interpretation which appears directly above]. *Mutatis mutandis* this interpretation must apply to the effect on imports. The criterion is therefore what would happen in the *absence* of a subsidy. While the Panel agreed that in most cases such a judgment cannot be reached only by reference to statistics, nevertheless, a statistical analysis helps to discern the trends of imports and exports and may assist in determining the effects of a subsidy. The Panel considers it

¹²See also discussion of the drafting of this note at EPCT/A/PV/20, p. 34-36, EPCT/A/PV/24, p. 2-3.

¹³E/CONF.2/C.3/51, p. 4.

¹⁴L/3464, adopted on 2 December 1970, 18S/97, 100, para. 10.

¹⁵L/4508, adopted on 16 June 1977, 24S/134, 138, para. 15.

¹⁶New York Report, p. 26.

¹⁷GATT/CP.2/22/Rev.1, adopted on 1 and 2 September 1948, II/39, 44.

fair to assume that a subsidy which provides an incentive to increased production will, in the absence of offsetting measures, e.g., a consumption subsidy, either increase exports or reduce imports”.¹⁸

This finding was referred to in the 1990 Panel Report on “EEC - Payments and Subsidies paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins”.¹⁹

The Panel Report on “United States Tax Legislation (DISC)” notes: “The Panel considered that, as it had found the DISC legislation to constitute an export subsidy which had led to an increase in exports, it was also covered by the notification obligation in Article XVI:1”.²⁰

(5) “it shall notify the CONTRACTING PARTIES in writing about the extent and nature of the subsidization”

In 1950 the CONTRACTING PARTIES made arrangements for the reporting of existing subsidies and for the notification of modifications therein and of new measures of subsidization.²¹ These arrangements were confirmed in the Report of the Review Working Party on “Other Barriers to Trade”.²² The questionnaire now used for the reporting of subsidies was established in 1960.²³ Procedures for Notifications and Reviews under Article XVI:1, which were adopted in 1962, provide for a new and full notification every third year and, in the intervening years, for a notification of the changes that have occurred.²⁴

The 1961 Report on “Operation of the Provisions of Article XVI”, examining the kinds of notifiable subsidies, the scope of the notification requirement and the adequacy of notifications received, noted:

“The rôle of Article XVI in providing the CONTRACTING PARTIES with accurate information about the nature and extent of subsidies in individual countries has been partly frustrated by the failure of some contracting parties to notify the subsidies they maintain. To the extent that this is based on the reluctance of contracting parties to expose themselves to charges of non-conformity with the Agreement, it reflects a misinterpretation of Article XVI. Moreover, a contracting party can be required to consult concerning a subsidy, whether or not it has been notified. There seems, therefore, no advantage to a contracting party in refraining from notifying its subsidies; on the contrary, notifications may dispel undue suspicions concerning those subsidies not previously notified”.²⁵

The question of notification of subsidies has also been examined at a number of meetings of the Committee on Subsidies and Countervailing Measures. The 1986 Report of the Committee on Subsidies and Countervailing Measures refers to a Note by the Secretariat reproducing all decisions by the CONTRACTING PARTIES with respect to notifications under Article XVI:1 of the General Agreement, and notes: “The decisions reproduced in this note are binding on all contracting parties and should be used as guidelines in the preparation of notifications under Article XVI:1”.²⁶

See also the general notification obligations in paragraphs 2 and 3 of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979, which appear *in extenso* in the section on “Notification in GATT” under Article X.

¹⁸L/1160, adopted on 24 May 1960, 9S/188, 191, para. 10.

¹⁹L/6627, adopted on 25 January 1990, 37S/86, 131, para. 154.

²⁰L/3851, adopted on 7-8 December 1981, 23S/98, 114, para. 77.

²¹II/19.

²²L/334, adopted on 3 March 1955, 3S/222, 225 para. 16.

²³9S/193.

²⁴11S/58. The most recent full notifications under this procedure appear in the addenda to L/7162 of 11 January 1994 (updates in addenda to L/7375 of 11 January 1994 and L/7611 of 11 January 1975).

²⁵L/1442 & Add.1-2, adopted on 21 November 1961, 10S/201, 206, para. 19.

²⁶L/6089, 33S/197, para. 13, referring to SCM/W/98.

(6) “estimated effect”

The New York Report notes that the Drafting Committee changed the words “anticipated effect” to “estimated effect” “in order to remove the possible impression that the effect of a subsidy on export trade could be accurately predicted”.²⁷

(7) “serious prejudice to the interests of any other contracting party is caused or threatened”

The report of the Preparatory Committee on its discussions at London on the ITO Charter notes that, in revising the US Draft Charter, “Wherever the Draft Charter has words such as ‘injury to the trade of a member’, it was thought advisable to say ‘prejudice to the trade of a member’. It was felt that this wording would in practice facilitate application”.²⁸

In the 1979 Panel Report on “European Communities - Refunds on Exports of Sugar - Complaint by Australia”

“The Panel noted ... that the Community system for granting refunds on sugar exports and its application had contributed to depress world sugar prices in recent years and that thereby serious prejudice had been caused indirectly to Australia, although it was not feasible to quantify the prejudice in exact terms.

“The Panel found that the Community system of export refunds for sugar did not comprise any pre-established effective limitations in respect of either production, price or the amounts of export refunds and constituted a permanent source of uncertainty in world sugar markets. It therefore concluded that the Community system and its application constitutes a threat of prejudice in terms of Article XVI:1”.²⁹

In the 1980 Panel Report on “European Communities - Refunds on Exports of Sugar - Complaint by Brazil”

“The Panel concluded that in view of the quantity of Community sugar made available for export with maximum refunds and the non-limited funds available to finance export refunds, the Community system of granting export refunds on sugar had been applied in a manner which in the particular market situation prevailing in 1978 and 1979, contributed to depress sugar prices in the world market, and that this constituted a serious prejudice to Brazilian interests, in terms of Article XVI:1.

“The Panel found that the Community system of export refunds for sugar did not comprise any pre-established effective limitations in respect of either production, price or the amounts of export refunds and that the Community system had not been applied in a manner so as to limit effectively neither exportable surpluses nor the amount of refunds granted. Neither the system nor its application would prevent the European Communities from having more than an equitable share of world export trade in sugar. The Panel, therefore, concluded that the Community system and its application constituted a permanent source of uncertainty in world sugar markets and therefore constituted a threat of serious prejudice in terms of Article XVI:1”.³⁰

(8) “shall, upon request, discuss with the other contracting party or parties concerned”

The Report of the Working Party in 1948 on “Modifications to the General Agreement” notes that the Working Party agreed not to amend Article XVI:1 to incorporate the changes made to the corresponding Charter Article at the Havana Conference, *inter alia* in view of the understanding that

²⁷New York Report p. 26.

²⁸London Report p. 16.

²⁹L/4833, adopted on 6 November 1979, 26S/290, 319, paras. (g) and (h).

³⁰L/5011, adopted on 10 November 1980, 27S/69, 97, paras. (f) and (g).

“The intent of the last sentence of Article XVI of the General Agreement is that consultation shall proceed upon the request of a contracting party when it considers that prejudice is caused or threatened and would not require a prior international determination”.³¹

This understanding was confirmed in the Report of the Review Working Party on “Other Barriers to Trade”³².

The 1961 Panel Report on “Operation of the Provisions of Article XVI” notes:

“If a contracting party decides that it wishes to consult with another concerning a subsidy it may, depending on the circumstances, have recourse to the specific consultation procedures of Article XVI:1 or the provisions of Article XXII or Article XXIII. At the Review Session it was made clear that consultations under Article XVI:1 can be initiated by a contracting party which considers that serious prejudice is being caused or threatened without necessity for prior action by the CONTRACTING PARTIES ...”.³³

Regarding the interpretation of “upon request”, see also the unadopted 1994 panel report on “EEC - Import Régime for Bananas”.³⁴

(9) “the possibility of limiting the subsidization”

The report of the Preparatory Committee on its discussions at London on the ITO Charter notes that “The word ‘limiting’ ... is used in a broad sense to indicate maintaining the subsidization at as low a level as possible, and the gradual reduction in subsidization over a period of time where this is appropriate”.³⁵

A Memorandum by Denmark of 1957 on “Export of Subsidized Eggs and Cattle from the United Kingdom” noted *inter alia* that “serious prejudice is being caused to Danish interests by the British subsidization which, moreover, involves questions of principle bearing upon the cooperation envisaged within the framework of the General Agreement. The Danish Government therefore requests that discussions take place with the CONTRACTING PARTIES in accordance with Article XVI with a view to limiting the effect of the subsidization”.³⁶ Following these discussions, the United Kingdom took measures to prevent exports of subsidized eggs from the United Kingdom to traditional markets of Denmark and the Kingdom of the Netherlands.³⁷

In November 1980, the Council requested the EEC to discuss with the CONTRACTING PARTIES the possibility of limiting the EEC subsidization of exports of sugar. The Report of the Working Party on these discussions notes the view of Australia that “the intention of the final sentence of paragraph 1 of Article XVI was... to obtain a statement from the subsidizing contracting party of what action it intended to take to remove the serious prejudice or the threat of prejudice”³⁸ as well as the view of the EEC that as to “undertakings on the level of internal support prices for sugar or on the limitation of quantities of sugar eligible for export refunds ... contracting parties have no obligation under Article XVI:1 to make such undertakings”.³⁹ In Council discussion on this matter, the representative of the EEC stated that if, following consultations under Article XVI:1, the respective parties did not reach agreement, “there existed no other possibility under Article XVI:1” and “only other provisions of the General Agreement could be invoked, such as Article XXIII”.⁴⁰

2. Paragraph 2: “undue disturbance”

In the 1983 Panel Report on “EEC - Subsidies on Export of Wheat Flour”, which has not been adopted by the Committee on Subsidies and Countervailing Measures, the Panel concluded, *inter alia*, that

³¹GATT/CP.2/22/Rev.1, adopted on 1-2 September 1948, II/39, 44, para. 29(b).

³²L/334, adopted on 3 March 1955, 3S/222, 225 para. 15.

³³L/1442 & Add.1-2, adopted on 21 November 1961, 10S/201, 206, para. 20.

³⁴DS38/R, dated 11 February 1994, paras. 152-153.

³⁵London Report, p. 16, para. (d).

³⁶L/627.

³⁷10S/208.

³⁸L/5113, adopted on 10 March 1981, 28S/80, 83, para. 11.

³⁹*Ibid.*, 28S/85, para. 22.

⁴⁰C/M/143, p. 7.

“The Panel was not convinced ... that the application of EEC export subsidies had not caused undue disturbance to the normal commercial interests of the United States in the sense of Article XVI:2, to the extent that it may well have resulted in reduced sales opportunities for the United States.

“The Panel considered it desirable that the EEC, bearing in mind the provisions of Article XVI:2, make greater efforts to limit the use of subsidies on the exports of wheat flour. The Panel considered that there were a number of practical aspects of the application of the export refund which might be examined to this end”.⁴¹

3. Paragraph 3

For a survey of the drafting history and interpretation of Article XVI:3 in GATT practice see a 1983 Note by the Secretariat.⁴²

(1) “primary product”

See the definition of this term provided in Interpretative Note 2 to Section B of Article XVI. Article XVI:3 and its Interpretative Note 2 were drawn from the provisions of Articles 27 and 28 of the Havana Charter; see the discussion of the Havana Charter in section III below. Articles 27 and 28 applied to subsidies on “primary commodities”, and were linked to the provisions of Chapter VI on inter-governmental agreements on “primary commodities”. The definition of “primary product” in the present interpretative note to the General Agreement is the same as the definition of “primary commodity” in Article 56:1 of the Charter.

The 1958 Panel Report on “French Assistance to Exports of Wheat and Wheat Flour” considered wheat as well as wheat flour to be primary products.⁴³

A request of 24 July 1980 for consultations under Article XXII:1 of the General Agreement on “EEC - Export Refunds for Wheat Flour” states that “The United States considers that wheat flour is a non-primary product, on which no export subsidy may be maintained under Article XVI of the General Agreement”.⁴⁴ In the 1983 Panel Report on “EEC - Subsidies on Export of Wheat Flour”, which has not been adopted by the Committee on Subsidies and Countervailing Measures, the Panel examined the EEC subsidies in relation to Article 10 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII, thereby treating wheat flour as a primary product in the sense of that Article. During the Panel proceedings, the United States had argued that wheat flour is a processed product and not a primary product within the meaning of the Code.⁴⁵

The 1983 Panel Report on “EEC - Subsidies on Export of Pasta Products”, which has not been adopted by the Committee on Subsidies and Countervailing Measures, noted that neither the United States nor the Community “had finally contended that pasta was a primary product”. The Panel “was of the opinion that pasta was not a primary product but was a processed agricultural product”.⁴⁶

(2) “any form of subsidy which operates to increase the export of any primary product”

Interpretative Note 2 *ad* Article XVI:3 specifies under what conditions a domestic price stabilization scheme on a primary product “shall be considered not to involve a subsidy on exports within the meaning of paragraph 3”. It is essentially identical to the text of Article 27:1 of the Havana Charter, except for the addition of the final paragraph of the note, concerning operations wholly or partially financed out of government funds, which was drafted during the Review Session.

⁴¹SCM/42 (unadopted), paras. 5.6-5.7.

⁴²AG/W/4.

⁴³L/924, adopted on 21 November 1958, 7S/46, 52, para. 14.

⁴⁴L/5014.

⁴⁵SCM/42, para. 2.3.

⁴⁶SCM/43, para. 4.2.

The 1958 Panel Report on “French Assistance to Exports of Wheat and Wheat Flour” provides that “The Panel ... found that even if the French system had the characteristics described in paragraph 2 of [Interpretative Note 2 to Article XVI] the exemption provided from the provisions of paragraph 3 of Article XVI would be precluded if operations under such a system were ‘wholly or partly financed out of government funds in addition to funds collected from producers in respect of the products concerned’”. The Panel further found that the operation of the French system involved financial contributions from the government since part of the export losses was covered by Government funds. Accordingly, “the Panel concluded that the operation of the French system did in fact result in the grant of subsidies on the export of wheat and wheat flour within the terms of paragraph 3 of Article XVI”.⁴⁷

(3) “more than an equitable share of world export trade”

The last sentence of Article XVI:3 was based on Article 28 of the Havana Charter, the text of which appears in section III below. Concerning the drafting of this text and the first interpretative note to Article XVI:3 in the Review Session Working Party on Other Barriers to Trade, the Report of the Working Party notes:

“A number of under-developed countries raised the question of whether the criterion concerning an ‘equitable share’ would prevent an exporting country which had no exports during the previous representative period from establishing its right to obtain a share in the trade of the product concerned. Accordingly, the Working Party adopted an interpretative note proposed by the representatives of Brazil and Turkey to cover the case.

“The Working Party also agreed that in determining what are equitable shares of world trade the CONTRACTING PARTIES should not lose sight of:

- (a) the desirability of facilitating the satisfaction of world requirements of the commodity concerned in the most effective and economic manner, and
- (b) the fact that export subsidies in existence during the selected representative period may have influenced the share of the trade obtained by the various exporting countries”.⁴⁸

The 1958 Panel on “French Assistance to Exports of Wheat and Wheat Flour” examined a complaint by Australia that as a result of subsidies granted by the French government on exports of wheat and wheat flour, French exports had displaced Australian trade in these products in Australian traditional wheat flour markets. The Panel found that the operation of the French price equalization scheme did result in the grant of subsidies under Article XVI:3 (see above). It then considered whether this had resulted in France obtaining more than an equitable share in world export trade for these products inconsistent with Article XVI:3. The Panel Report provides as follows:

“... The Panel noted that there was no explicit definition in Article XVI of what constituted an ‘equitable’ share of world export trade in these products. It was recalled, however, that at both Havana and the Review Session when the provisions of this paragraph were discussed it was implicitly agreed that the concept of ‘equitable’ share was meant to refer to share in ‘world’ export trade of a particular product and not to trade in that product in individual markets.”⁴⁹

“The Panel noted that French exports of wheat and wheat flour began to rise in 1954 in absolute quantity to levels very substantially exceeding the quantities exported in any year since 1934 and have since remained considerably higher than in pre-war or early post-war years. This increase in the absolute quantities of wheat and of wheat flour exported by France also represents an increase in France’s share of world exports, especially as regards wheat flour. ... French exporters have been able to quote prices for wheat flour lower than those quoted by other exporters ... Moreover, judging from export unit values, the price charged by French exporters for wheat flour has in recent years barely exceed that charged for wheat ... In these

⁴⁷L/924, adopted on 21 November 1958, 7S/46, 51-52, paras. 8, 13, 14.

⁴⁸L/334, adopted on 3 March 1955, 3S/222, 226, para. 18.

⁴⁹L/924, adopted on 21 November 1958, 7S/46, 52, para. 15.

circumstances, it is reasonable to conclude that, while there is no statistical definition of an 'equitable' share in world exports, subsidy arrangements have contributed to a large extent to the increase in France's exports of wheat and of wheat flour, and that the present French share of world export trade, particularly in wheat flour, is more than equitable".⁵⁰

The Panel then examined French trade in particular markets (Sri Lanka, Malaysia and Indonesia) to consider whether French export subsidies had caused injury to Australia's normal commercial interests, and whether such injury represented an impairment of benefits accruing to Australia under the General Agreement. The Panel concluded that

"While other suppliers of wheat flour have recently begun to play a larger part in the Southeast Asian markets, and although it is difficult to estimate to what extent such incursions as these are displacing traditional exporters, it is nevertheless clear that French supplies have in fact to a large extent displaced Australian supplies in the three markets.

...

"Since it is obviously more profitable to export wheat flour rather than wheat, Australia has suffered a direct damage which could be evaluated by applying the price difference between wheat flour and wheat to the quantity of Australian exports that were displaced by French exports. It would, however, be difficult to assess this displacement quantitatively with any precision. In addition to this direct damage, there were other incidental adverse effects upon Australia which cannot be measured ...⁵¹

"The Panel then directed itself to the question of whether the damage apparent in recent years was likely to recur or be prolonged. ...

"Although the Panel recognized that the French Government's policy [to reduce subsidies] would tend to reduce the effects of the system on world trade, it considered, nevertheless, that the operation of the system was such that when climatic circumstances were favourable there might be substantial quantities of wheat in excess of normal consumption requirements. ... Also experience has shown ... there was no inherent guarantee in the system that it would operate in such a manner as to conform to the limits contemplated in Article XVI:3".⁵²

The 1967 Report of the Working Party under Article XXII:2 on "United States - Subsidy on Unmanufactured Tobacco" contains a discussion of the concept of "equitable share", particularly in relation to the trade of a less-developed country.

"The representative of Malawi stated that ... the concept of equitability in this context ... did not refer to the maintenance by the subsidizing contracting party of a predetermined proportionate share of a growing world market ... in view of the provisions of an Interpretative Note to paragraph 3 which allowed for the entry of new exporters, there were grounds for maintaining that 'equitable shares' could vary ...

"The representative of the United States said that ... the United States Government shared the view of the Malawi Government that it would not be desirable to assume that a particular country's share of a market should remain static. It was not the intention of the United States to increase its share beyond an 'equitable level' but it could not be expected to accept the continued erosion of its relative position".⁵³

In the 1979 Panel Report on "European Communities - Refunds on Exports of Sugar - Complaint by Australia",

⁵⁰*Ibid.*, 7S/53 paras. 17-19.

⁵¹*Ibid.*, 7S/54-55, para. 23(c), 23(e).

⁵²*Ibid.*, 7S/55-56, paras. 24-25.

⁵³L/2925, adopted on 22 November 1967, 15S/116, 122-123 paras. 21-22.

“The Panel considered that its examination should be based not on the concept of ‘free market’ introduced by Australia in presenting its contentions but on the concept of ‘world export trade’ mentioned in Article XVI:3 of the General Agreement the Panel did not consider it necessary for the purpose of determining whether a market share was a ‘more than equitable share of world export trade’ to establish market shares in relation to concepts other than those of total world exports, taking into account the fact that a consideration of shares of the free market involved methodological difficulties that would make any comparison difficult.”⁵⁴

“The Panel noted that no definition of the concept ‘equitable share’ had been provided, and neither had it in the past been considered absolutely necessary to agree upon a precise definition of the concept. The Panel felt that it was appropriate and sufficient in this case to try to analyse main reasons for developments in individual market shares, and to examine market and price developments, and then draw a conclusion on that basis.”⁵⁵

“The Panel was of the opinion that the term ‘more than an equitable share of world export trade’ should include situations in which the effect of an export subsidy granted by a signatory was to displace the exports of another signatory, bearing in mind the developments in world markets. With regard to new markets, traditional patterns of supply of the product concerned to the world market, region or country, in which the new market is situated should be taken into account in determining what would be ‘more than an equitable share of world export trade’.”⁵⁶

The Panel Report on “European Communities - Refunds on Exports of Sugar - Complaint by Brazil” examined a complaint submitted under Article XXIII. The Panel report provides:

“The Panel noted that no complete definition of the concept ‘equitable share’ had been provided, and neither had it in the past been considered absolutely necessary to have an agreed precise definition of the concept. The Panel felt that it was appropriate and sufficient in this case to try to analyze main reasons for developments in individual market shares, and in light of the circumstances related to the present complaint try to determine any causal relationship between the increase in Community exports of sugar, the developments in Brazilian sugar exports and other developments in the world sugar market, and then draw a conclusion on that basis.”⁵⁷

The Report analyses the concept “more than equitable share” in terms of, inter alia, market shares, displacement, “special factors” such as the entry into operation of export quotas under the International Sugar Agreement (1977) as well as other special trading arrangements, and the effects of the operation of Community regulations.⁵⁸

See also the provisions of Article 10 of the 1979 Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement, which provides in paragraph 2:

“For purposes of Article XVI:3 of the General Agreement and paragraph 1 above:

“(a) ‘more than an equitable share of world export trade’ shall include any case in which the effect of an export subsidy granted by a signatory is to displace the exports of another signatory bearing in mind the developments on world markets;

“(b) with regard to new markets traditional patterns of supply of the product concerned to the world market, region or country, in which the new market is situated shall be taken into account in determining ‘equitable share of world export trade’.”⁵⁹

⁵⁴L/4833, adopted on 6 November 1979, 26S/290, 307, para. 4.9.

⁵⁵*Ibid.*, 26S/308, para. 4.11.

⁵⁶*Ibid.*, 26S/310, para. 4.17.

⁵⁷L/5011, adopted on 10 November 1980, 27S/69, 88, para. 4.6.

⁵⁸*Ibid.*, 27S/88-96, paras. 4.6-4.31.

⁵⁹26S/56, 69.

(4) *“previous representative period”*

The term “previous representative period” is also used elsewhere in the General Agreement. See discussion of base periods under Articles XI:2, XIII:2(d) and XXVIII.

The 1958 Panel on “French Assistance to Exports of Wheat and Wheat Flour” made no specific reference to “previous representative period” in terms of Article XVI:3. It reviewed trade statistics from the pre-war (1934-1938) and post-war (1948-1958) periods, including statistics available for part of the year in which the Panel had been established.⁶⁰

In the 1979 Panel proceeding on the complaint of Australia concerning “European Communities - Refunds on Exports of Sugar”, the appropriate “previous representative period” was at issue. The representative of Australia argued that its complaint concerned the post-1975 period (i.e. 1976 to 1978, preliminary data only being available for 1978) and that the entire period 1969-1975 should be considered as a “previous representative period”. Reference was also made to the “precedent of the Canadian lead/zinc case” interpreting Article XXVIII, in which case “the Panel did not consider that full statistics for the applicable base period had to be available at the very beginning of the negotiations, provided the data became available later on in the negotiations and that their submission was not unduly delayed”.⁶¹ “The representative of the European Communities considered that the years chosen as ‘previous representative period’ should reflect, if possible, a normal market situation ... one suggestion would be to compare the average for the years 1972-1974 with that for 1975-1977 ... the provisions of Article XVI:3 must be understood to mean that estimates for recent periods, forecasts or projections for future periods of whatever duration must not be used”.⁶² The Panel findings provide as follows:

“The Panel noted that the Australian complaint referred to the post-1975 period. ... In view of the difficulties involved in selecting what could be considered to be the ‘previous representative period’, the Panel felt it necessary to consider various alternatives and to make a set of comparisons”.⁶³

The Panel Report on “European Communities - Refunds on Exports of Sugar - Complaint by Brazil” notes the suggestion by Brazil to compare shares in two periods, 1973-75 and 1976-78.⁶⁴ The EC had proposed that the two reference averages be those for 1972-74 and 1975-77 and that the year 1978 be considered separately.⁶⁵ The Panel considered the two periods 1971-73 and 1972-74 to qualify as previous representative periods and compared these with shares for the years 1976 to 1979 (preliminary data being available for 1979). The Panel found that whichever of the two previous representative periods was used for comparison, the outcome would be fairly similar.⁶⁶

The 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement provides in paragraph 2(c) of its Article 10 that for purposes of Article XVI:3 of the General Agreement and paragraph 1 of Article 10, “‘a previous representative period’ shall normally be the three most recent calendar years in which normal market conditions existed”.⁶⁷

(5) *“special factors”*

The 1979 and 1980 Panel Reports on the complaints of Australia and Brazil respectively concerning “European Communities - Refunds on Exports of Sugar” took note of, as “special factors” affecting world sugar trade, the coming into operation of the 1977 International Sugar Agreement, in which Australia and Brazil were members but the EEC was not.⁶⁸

⁶⁰L/924, adopted on 21 November 1958, 7S/46, 52, paras. 15-17.

⁶¹L/4833, adopted on 6 November 1979, 26S/290, 298, paras. 2.22-2.23; reference is to the 1978 Panel Report on “Canada - Withdrawal of Tariff Concessions”, L/4636, adopted on 17 May 1978, 25S/42 (see material from this Report under Article XXVIII).

⁶²*Ibid.*, 26S/299, paras. 2.24-2.25.

⁶³*Ibid.*, 26S/307-308, para. 4.10.

⁶⁴L/5011, adopted on 10 November 1980, 27S/69, 74, para. 2.8.

⁶⁵*Ibid.*, 27S/74, para. 2.10.

⁶⁶*Ibid.*, 27S/89-90, para. 4.9.

⁶⁷26S/69.

⁶⁸26S/305, paras. 3.21, 4.13, 4.15; 27S/86, paras. 3.21, 4.16, 4.17.

See also the 1983 Panel Report on “EEC - Subsidies on Export of Wheat Flour”, which has not been adopted.⁶⁹

4. Paragraph 4

Article XVI:4 was added as a result of discussions in the Review Session of 1954-55.⁷⁰ This paragraph does not specify a date for the entry into force of the first sentence and has entered into force only for the seventeen countries which have accepted the Declaration Giving Effect to the Provisions of Article XVI:4.⁷¹ See below.

(1) “shall cease to grant ... any form of subsidy on the export”

Article XVI:4 states in its first sentence that the cessation of certain export subsidies called for will apply “as from 1 January 1958 or the earliest practicable date thereafter”. The second sentence provides for a standstill on such export subsidies in the interim. The Interpretative Note to this provision states that “The intention of paragraph 4 is that the contracting parties should seek before the end of 1957 to reach agreement to abolish all remaining subsidies as from 1 January 1958; or, failing this, to reach agreement to extend the application of the standstill until the earliest date thereafter by which they can expect to reach such agreement”.

The Report of the Working Party in 1960 on “Provisions of Article XVI:4” reports on the consideration of what steps should be taken by the CONTRACTING PARTIES to implement this paragraph. It notes that “The only question which was ... left open in paragraph 4 of Article XVI was the date from which the prohibition on subsidies on any product other than a primary product should become effective. Since no agreement on that date has so far been reached by contracting parties, the standstill provision contained in paragraph 4 of Article XVI has ceased to be operative, but a number of contracting parties have agreed to extend it beyond that date by means of a declaration”.⁷² This same Working Party drafted the “Declaration Giving Effect to the Provisions of Article XVI:4”⁷³, which provides that the governments subscribing to it “agree that the date on which the aforementioned provisions of paragraph 4 of Article XVI come into force shall be, for each party to this Declaration, the date on which this Declaration enters into force for that party”.⁷⁴

Accordingly, the first sentence of Article XVI:4 entered into force on 14 November 1962 and is now in force for the seventeen contracting parties the governments of which have accepted this Declaration. Those contracting parties are Austria, Belgium, Canada, Denmark, France, Federal Republic of Germany, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Sweden, Switzerland, the United Kingdom, the United States and Zimbabwe.⁷⁵ The acceptance of the Declaration by the United States was made “with the understanding that this Declaration shall not prevent the United States, as part of its subsidization of exports of a primary product, from making a payment on an exported processed product (not itself a primary product), which has been produced from such primary product, if such payment is essentially limited to the amount of the subsidy which would have been payable on the quantity of such primary product, if exported in primary form, consumed in the production of the processed product”.

The “standstill clause” contained in the second sentence of Article XVI:4, which had been extended by a number of declarations,⁷⁶ expired on 31 December 1967.

(a) Illustrative lists of export subsidies

The Report of the Working Party in 1960 on “Provisions of Article XVI:4” which prepared the Declaration Giving Effect to the Provisions of Article XVI:4 contains a “detailed list of measures which are considered as forms of export subsidies by a number of contracting parties ... the question was raised whether it was clear that

⁶⁹SCM/42.

⁷⁰See U.K. compromise proposal at W.9/240.

⁷¹9S/32.

⁷²L/1381, adopted on 19 November 1960, 9S/185, 186, para. 2.

⁷³9S/32.

⁷⁴9S/32, 33 para. 1.

⁷⁵Status of Legal Instruments, p. 11-4.1ff.

⁷⁶6S/24, 7S/30, 8S/25, 9S/33, 12S/50.

these measures could not be maintained if the provisions of the first sentence of paragraph 4 of Article XVI were to become fully operative”.⁷⁷ With respect to this “1960 Illustrative List” of eight items, “The Working Party agreed that this list should not be considered exhaustive or to limit in any way the generality of the provisions of paragraph 4 of Article XVI. It noted that the governments prepared to accept the declaration ... agreed that, for the purpose of that declaration, these practices generally are to be considered as subsidies in the sense of Article XVI:4 or are covered by the Articles of Agreement of the International Monetary Fund”.⁷⁸ The 1960 Illustrative List was based on a Decision of the Council of the Organization for European Economic Cooperation (OEEC) and was adopted in order to ensure that GATT obligations on export subsidies would match obligations under the OEEC.⁷⁹

The 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement, Article 9 of which prohibits export subsidies on products other than certain primary products, contains an Annex with an Illustrative List of twelve items defined as export subsidies subject to this prohibition.⁸⁰

At its meeting in May 1980 the Committee on Subsidies and Countervailing Measures which was established under this Agreement set up a Group of Experts on the Calculation of the Amount of a Subsidy which drew up guidelines on various issues for adoption by the Committee. See the discussion of these guidelines under Article VI.

(b) *Tax deferral*

The Panel on “United States Tax Legislation (DISC)” examined legislation providing for deferral of the corporate income tax payable on export profits as long as such profits were held in a Domestic International Sales Corporation (DISC). The Panel Report⁸¹, which was adopted subject to an understanding, provides:

“The Panel noted that the DISC legislation was intended, in its own terms, to increase United States exports and concluded that, as its benefits arose as a function of profits from exports, it should be regarded as an export subsidy.

“The Panel examined whether a deferral of tax was ‘a remission’ in terms of item (c) or ‘an exemption’ in terms of item (d) of the illustrative list of 1960.

“The Panel was not convinced that a deferral, simply because it was given for an indeterminate period, was equal to a remission or an exemption. In addition, it noted that the DISC legislation provided for the termination of the deferral under specified circumstances. The Panel further noted, however, that the deferral did not attract the interest component of the tax normally levied for late or deferred payment and therefore concluded that, to this extent, the DISC legislation constituted a partial exemption which was covered by one or both of paragraphs (c) and (d) of the Illustrative List”.⁸²

After this and the panel reports referred to below on French, Belgian and Netherlands tax practices were circulated in November 1976, discussions continued for some time, both in the Council and in the context of the negotiation in the Tokyo Round of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII. The Illustrative List of Export Subsidies annexed to that Agreement includes various kinds of tax deferrals (see items (e) and (h)). In Note 2 to item (e) of the 1979 Illustrative List, “The signatories recognize that deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected”.⁸³

⁷⁷L/1381, adopted on 19 November 1960, 9S/185, 186-187, para. 5.

⁷⁸*Ibid.*

⁷⁹L/1260 (Proposal by France identifying the source of the list as OEEC document C(59)202); discussion on adoption, SR.17/3.

⁸⁰26S/56, 80-83. Concerning Article 9 see page 461 below.

⁸¹L/4422, adopted on 7-8 December 1981, 23S/98.

⁸²23S/112-113, paras. 69-71.

⁸³26S/82. The note also states that “noting in this text prejudices the disposition by the CONTRACTING PARTIES of the specific issues raised in GATT document L/4422” [the panel report on US Tax Legislation].

(c) *Taxation of transactions outside the territorial limits of the exporting country*

In 1976, the three Panels on “Income Tax Practices Maintained by France”⁸⁴, “Income Tax Practices Maintained by Belgium”⁸⁵ and “Income Tax Practices Maintained by the Netherlands”⁸⁶ examined corporate income tax systems. In the case of France and Belgium the corporate tax system examined was based on the territoriality principle, which in general taxes income earned domestically but not income arising abroad; in the case of the Netherlands, in effect a credit was provided for Dutch tax on foreign income. The Panel found in each case that the tax principles as applied “allowed some part of export activities, belonging to an economic process originating in the country, to be outside the scope of ... taxes. In this way [these contracting parties] had foregone revenue from this source and created the possibility of a pecuniary benefit to exports in those cases where income and corporation tax provisions were significantly more liberal in foreign countries.

“... however much the practices may have been an incidental consequence of [the contracting party’s] taxation principles rather than a specific policy intention, they nonetheless constituted a subsidy on exports because the above-mentioned benefits to exports did not apply to domestic activities for the internal market. The Panel also considered that the fact that the practices might also act as an incentive to investment abroad was not relevant in this context.

“The Panel also noted that the tax treatment of dividends from abroad ensured that the benefits referred to above were fully preserved.

“In circumstances where different tax treatment in different countries resulted in a smaller total tax bill in aggregate being paid on exports than on sales in the home market, the Panel concluded that there was a partial exemption from direct taxes. [...] The Panel further concluded that the practices were covered by one or both items (c) and (d) of the illustrative list of 1960”.⁸⁷

Note 2 to item (e) of the Illustrative List of Export Subsidies annexed to the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII also provides as follows:

“The signatories reaffirm the principle that prices for goods in transactions between exporting enterprises and foreign buyers under their or under the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm’s length. Any signatory may draw the attention of another signatory to administrative or other practices which may contravene this principle and which result in a significant saving of direct taxes in export transactions. In such circumstances the signatories shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of signatories under the General Agreement, including the right of consultation created in the preceding sentence.

“Paragraph (e) is not intended to limit a signatory from taking measures to avoid the double taxation of foreign source income earned by its enterprises or the enterprises of another signatory.

“Where measures incompatible with the provisions of paragraph (e) exist, and where major practical difficulties stand in the way of the signatory concerned bringing such measures promptly into conformity with the Agreement, the signatory concerned shall, without prejudice to the rights of other signatories under the General Agreement or this Agreement, examine methods of bringing these measures into conformity within a reasonable period of time.”⁸⁸

⁸⁴L/4423, adopted on 7-8 December 1981, 23S/114.

⁸⁵L/4424, adopted on 7-8 December 1981, 23S/127.

⁸⁶L/4425, adopted on 7-8 December 1981, 23S/137.

⁸⁷*Ibid.*, at 23S/125, paras. 47-50 (France); 23S/135, paras. 34-37 (Belgium); 23S/145, paras. 34-37 (Netherlands).

⁸⁸26S/82.

At its meeting on 7-8 December 1981, the Council adopted the four Panel Reports on “United States Tax Legislation (DISC)” and on income tax practices in France, Belgium and the Netherlands on the following understanding:

“The Council adopts these reports on the understanding that with respect to these cases, and in general, economic processes (including transactions involving exported goods) located outside the territorial limits of the exporting country need not be subject to taxation by the exporting country and should not be regarded as export activities in terms of Article XVI:4 of the General Agreement. It is further understood that Article XVI:4 requires that arm’s-length pricing be observed, i.e., prices for goods in transactions between exporting enterprises and foreign buyers under their or the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm’s length. Furthermore, Article XVI:4 does not prohibit the adoption of measures to avoid double taxation of foreign source income.”

“Following the adoption of these reports the Chairman noted that the Council’s decision and understanding does not mean that the parties adhering to Article XVI:4 are forbidden from taxing the profits on transactions beyond their borders, it only means that they are not required to do so. He noted further that the decision does not modify the existing GATT rules in Article XVI:4 as they relate to the taxation of exported goods. He noted also that this decision does not affect and is not affected by the Agreement on the Interpretation and Application of Articles VI, XVI and XXIII. Finally, he noted that the adoption of these reports together with the understanding does not affect the rights and obligations of contracting parties under the General Agreement”.⁸⁹

A communication from the United States of 20 April 1982 stated that “in the light of the Understanding adopted by the GATT Council when it adopted the panel reports on DISC and the tax practices of Belgium, France and the Netherlands, the United States does not believe that the DISC is a subsidy”.⁹⁰ At the July 1982 meeting of the Council, the Chairman stated that “it was the opinion of the majority of the Council members that the United States should take appropriate action to ensure that the DISC legislation was brought into conformity with the General Agreement”.⁹¹ In July 1984 the United States announced enactment of a statute replacing the DISC tax provisions with Foreign Sales Corporation provisions.⁹²

(d) *Export inflation insurance schemes*

The 1977 Report of the Working Party on “Export Inflation Insurance Schemes” discussed certain export inflation insurance schemes of contracting parties. Several members of the Working Party held the view that export inflation insurance schemes under examination were subsidies in contravention of Article XVI:4 and should be notified under Article XVI:1. Several other members, especially those operating such schemes, considered that schemes operating in long-term financial equilibrium were not subsidies, and did not believe that any indication of dual pricing had been shown. The Working Party could not reach consensus on whether exchange rate guarantee schemes fell under its terms of reference.⁹³

The 1979 Panel on “Export Inflation Insurance Schemes” then examined, pursuant to Article XVI:5, and taking into account the 1977 Report, whether and under what conditions such schemes are export subsidies within the meaning of Article XVI:4. The Report of the Panel notes: “... The Panel agreed that a scheme charging premiums at rates which were ‘manifestly inadequate to cover its long-term operating costs and losses’ would be a subsidy within the terms of Article XVI:4”. The Report discusses criteria for evaluating whether such a scheme is an export subsidy.⁹⁴ Item (j) of the Illustrative List of Export Subsidies annexed to the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII classifies as an export subsidy “The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the costs of exported products

⁸⁹L/5271, 28S/114; see also Council discussion at C/M/154.

⁹⁰SCM/19.

⁹¹C/M/160 p. 9.

⁹²C/M/180 p. 5.

⁹³L/4552, adopted on 11 November 1977, 24S/116, conclusions 24S/125-126.

⁹⁴L/4813, adopted on 25 July 1979, 26S/330, 333, para. 14.

or of exchange risk programmes, at premium rates, which are manifestly inadequate to cover the long-term operating costs and losses of the programmes.”⁹⁵

(2) “of any product other than a primary product”

“Primary product” is defined in Note 2 *ad* Article XVI, Section B, paragraph 2. The same definition of “primary product” appeared in paragraph 1 of Article 56 of the Havana Charter. See also the discussion of Article XVI:3 above.

Article 9 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade provides that “1. Signatories shall not grant export subsidies on products other than certain primary products. 2. The practices listed in points (a) to (l) in the Annex are illustrative of export subsidies”. A footnote to Article 9 states that “for purposes of this Agreement ‘certain primary products’ means the products referred to in Note *ad* Article XVI of the General Agreement, Section B, paragraph 2, with the deletion of the words ‘or any mineral’”.⁹⁶

The Panel Report on “EEC - Subsidies on Export of Pasta Products”, which has not been adopted by the Committee on Subsidies and Countervailing Measures, noted that neither the United States nor the Community “had finally contended that pasta was a primary product”. The Panel “was of the opinion that pasta was not a primary product but was a processed agricultural product”.⁹⁷ See also the Panel Report on “Canada - Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC”, which has not been adopted by the Committee on Subsidies and Countervailing Measures.⁹⁸

As regards the possibility of subsidizing the primary product component of a processed product, the United States proposed at the Twelfth Session of the CONTRACTING PARTIES in 1957 that Article XVI:4 should not prevent a contracting party, in this particular case the United States, from subsidizing exports of processed products (cotton textiles) if such subsidy was essentially the payment that would have been made on the raw material (cotton) used in the production of this processed product had the raw material been exported in its natural form. This interpretation was rejected by several contracting parties.⁹⁹ The “Declaration Extending the Standstill Provisions of Article XVI:4 of the General Agreement on Tariffs and Trade”¹⁰⁰ was accepted by the United States in November 1958 “with the understanding that this Declaration shall not prevent the United States as part of its subsidization of exports of a primary product, from making a payment on an exported processed product (not in itself a primary product), which has been produced from such primary product, if such payment is essentially limited to the amount of the subsidy which would have been payable on the quantity of such primary product, if exported in primary form, consumed in the production of the processed product”. This understanding was repeated by the United States when in 1961 it signed the “Declaration Giving Effect to the Provisions of Article XVI:4”.¹⁰¹ A discussion of the legal effect of this understanding appears in the Panel Report on “EEC - Subsidies on Export of Pasta Products”, which has not been adopted by the Committee on Subsidies and Countervailing Measures.¹⁰²

(3) “at a price lower than the comparable price charged for the like product to buyers in the domestic market”

In the three 1976 Panel Reports on income tax practices maintained by France, Belgium and the Netherlands, which were adopted on 7-8 December 1981,

“The Panel noted that the contracting parties that had accepted the 1960 Declaration had agreed that the practices in the illustrative list were generally to be considered as subsidies in the sense of

⁹⁵26S/81.

⁹⁶26S/68.

⁹⁷SCM/43 (unadopted), para. 4.2.

⁹⁸SCM/85 (unadopted), dated 13 October 1987.

⁹⁹SR.12/22, p. 192-194.

¹⁰⁰6S/24.

¹⁰¹9S/32.

¹⁰²SCM/43 (unadopted).

Article XVI:4. The Panel further noted that these contracting parties considered that, in general, the practices contained in the illustrative list could be presumed to result in bi-level pricing and that this presumption could therefore be applied to the [French, Belgian and Netherlands'] practices. The Panel concluded, however, from the words 'generally to be considered' that these contracting parties did not consider that the presumption was absolute.

"The Panel considered that, from an economic point of view, there was a presumption that an export subsidy would lead to any or a combination of the following consequences in the export sector: (a) lowering of prices, (b) increase of sales effort, and (c) increase of profits per unit. Because [France, Belgium and the Netherlands] were an important supplier in certain export sectors it was to be expected that all of these effects would occur and that, if one occurred, the other two would not necessarily be excluded. A concentration of the subsidy benefits on prices could lead to substantial reductions in prices. The Panel did not consider that a reduction in prices in export markets needed automatically to be accompanied by similar reductions in domestic markets. The Panel added that the extent to which tax havens existed was well known and that they considered this some evidence of the extent to which bi-level pricing had probably occurred.

"The Panel therefore concluded that the ... tax practices in some cases had effects which were not in accordance with ... obligations under Article XVI:4".¹⁰³

Similar findings were made by the Panel on United States Tax Legislation (DISC).¹⁰⁴

In the 1979 Panel Report on "Export Inflation Insurance Schemes",

"The Panel noted the conclusions of the Panels on United States Tax Legislation (DISC), on Income Tax Practices Maintained by France, by Belgium and by the Netherlands, as presented to the CONTRACTING PARTIES, according to which the contracting parties which had accepted the 1960 Declaration 'considered that, in general, the practices contained in the illustrative list could be presumed to result in bi-level pricing, and considered that this presumption could therefore be applied to' the DISC legislation and to the French, Belgian and Netherlands' practices, while concluding, however, that those contracting parties did not consider that the presumption was absolute. The Panel held the view that the presumption mentioned above applied equally to practices which were not contained in the 1960 list but which had clearly been identified as export subsidies".¹⁰⁵

(4) *Developing countries*

The Report of the Working Party on the "Accession of Venezuela" discusses, *inter alia*, Venezuelan export subsidies and the view of certain members of the Working Party that Venezuela should undertake specific commitments to observe all of Article XVI, and to eliminate its export subsidies, especially in sectors which in their view could not be considered as "developing" within the meaning of Article XVIII or the Enabling Clause. "Some members expressed concern with respect to the proposal aimed at the progressive elimination of all export subsidies granted by Venezuela ... The concept of sectoral development would deny the rights and obligations provided by the General Agreement for certain industries of developing countries. These members recalled that subsidies were governed in the main by Article XVI which does not include the concept of sectoral development. In their opinion there were no economic, legal or practical grounds for accepting the early application of the concept of sectoral development for developing countries even though some discussions were proceeding in the Negotiating Group on Subsidies in the framework of the Uruguay Round".¹⁰⁶ See also Article 14 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII.

¹⁰³L/4423, 23S/114, 125-126, paras. 51-53; L/4424, 23S/127, 135, paras. 38-40; L/4425, 23S/137, 145, paras. 38-40; all adopted on 7-8 December 1981 with understanding, L/5271, 28S/114.

¹⁰⁴L/4422, 23S/98, 113, paras. 72-74. See also paragraphs 25-26 and 51-59 of this report for a discussion of whether the burden of demonstrating bi-level pricing lies with the complainant country adversely affected by subsidies.

¹⁰⁵L/4813, adopted on 25 July 1979, 26S/330, 332, para. 12.

¹⁰⁶L/6696, adopted on 11 July 1990, 37S/43, 62-63, para. 62.

5. Paragraph 5

In 1958 the CONTRACTING PARTIES appointed a Panel to undertake the preparatory work for a review envisaged in paragraph 5. The Panel submitted three reports which were adopted by the CONTRACTING PARTIES in 1960 and 1961, but the conduct of the review was postponed and has never taken place.¹⁰⁷

The GATT Ministerial Declaration of November 1982 provided for the establishment of a Committee on Trade in Agriculture to examine, *inter alia*, “The operation of the General Agreement as regards subsidies affecting agriculture, especially export subsidies, with a view to examining its effectiveness, in the light of actual experience, in promoting the objectives of the General Agreement and avoiding subsidization seriously prejudicial to the trade or interests of contracting parties. Other forms of export assistance will be included in this examination”.¹⁰⁸

B. RELATIONSHIP BETWEEN ARTICLE XVI AND OTHER GATT PROVISIONS

1. Article II

The Report of the Review Working Party on “Other Barriers to Trade” provides that “The Working Party also agreed that there was nothing to prevent contracting parties, when they negotiate for the binding or reduction of tariffs, from negotiating on matters such as subsidies, which might affect the practical effects of tariff concessions and from incorporating in the appropriate schedule annexed to the Agreement, the results of such negotiations; provided that the results of such negotiations should not conflict with other provisions of the Agreement”.¹⁰⁹ See also the discussion on “Subsidies in Negotiations” in the 1961 Report on “Operation of the Provisions of Article XVI,”¹¹⁰ the material on negotiations on non-tariff measures under Article XXVIII*bis*, the material on concessions on non-tariff measures under Article II, and the material on modification or withdrawal of such concessions under Article XXVIII.

2. Article VI

See under Article VI.

3. Article XXIII

See the material on Article XXIII:1(b), and on the relationship between Article XVI and XXIII, under Article XXIII.

4. Part IV

See under Part IV.

5. Protocol of Provisional Application

By virtue of the “Resolution of 7 March 1955 Expressing the Unanimous Agreement of the CONTRACTING PARTIES to the Attaching of a Reservation on Acceptance pursuant to Article XXVI”¹¹¹ and the Declaration of 15 November 1957 on “Statements which Accompanied the Acceptance of the Protocol Amending the Preamble and Parts II and III”,¹¹² Part II of the General Agreement as amended by the 1955 amendments (which were effected by this Protocol) applies to the fullest extent not inconsistent with “existing legislation” on the relevant date. See the chapter on provisional application of the General Agreement.

¹⁰⁷9S/188, 10S/201.

¹⁰⁸Adopted on 29 November 1982, 29S/9.

¹⁰⁹3S/225, para. 14.

¹¹⁰L/1442 and Add.1-2, adopted on 21 November 1961, 10S/201, 209, paras. 24-28.

¹¹¹3S/48.

¹¹²6S/13.

The three Panel Reports on income tax practices maintained by Belgium, France and the Netherlands note the argument by the United States that the 1955 amendments to the General Agreement (including Article XVI:4), and the 1960 Declaration giving effect to Article XVI:4, as well as the Standstill Declaration, meant that the contracting parties adhering to the 1960 Declaration had an obligation to cease granting any subsidies whether or not the subsidies were granted pursuant to legislation existing in 1947, unless a specific reservation was made. The Panel reports state in this respect:

“The Panel considered that the fact that these arrangements might have existed before the General Agreement was not a justification for them and noted that Belgium [France, Netherlands] had made no reservation with respect to the standstill agreement or to the 1960 Declaration”.¹¹³

C. EXCEPTIONS AND DEROGATIONS

Article XVI has been the subject of a waiver under Article XXV:5 in one instance: “United Kingdom: Special Problems of Dependent Overseas Territories of the United Kingdom”.¹¹⁴

D. AGREEMENT ON INTERPRETATION AND APPLICATION OF ARTICLES VI, XVI AND XXIII

The Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement was negotiated in the Tokyo Round of multilateral trade negotiations, and entered into force for the parties thereto on 1 January 1980.¹¹⁵ The preamble of this Agreement expresses the desire “to apply fully and to interpret the provisions of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade only with respect to subsidies and countervailing measures and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation”. See also the Appendix table of acceptances of the Tokyo Round agreements.

In Council discussion of Brazil’s request for a panel on “United States - Denial of Most-favoured-nation Treatment as to Imports of Non-rubber Footwear from Brazil”¹¹⁶, in relation to a measure concerning which Brazil had earlier pursued dispute settlement under the Agreement on Interpretation and Application of Articles VI, XVI and XXIII, the representative of Brazil stated that

“a contracting party could not be prevented from seeking a remedy before the GATT Council because it had also sought protection of its interests under a particular Code ... this would mean accepting that the Code Committees somehow bound the Council and the contracting parties, many of which were not signatories to the Codes. ... To lend further support to his arguments, he quoted from a letter of 11 April 1979 sent by the Chairman of the Tokyo Round sub-group on subsidies and countervailing measures to a certain number of negotiators, as follows: ‘The provisions of the Agreement on Subsidies and Countervailing Measures interpret and apply the provisions of the GATT in Article XXIII as among signatories to the Agreement with respect to disputes concerning subsidies and countervailing measures under the GATT and in this connection will be used by these signatories to resolve any such dispute. However, delegations pointed out that in their view rights and obligations of the contracting parties under Article XXIII of the GATT are not limited thereby.’ He recalled that several other Tokyo Round Codes contained similar provisions under which parties were to complete the dispute settlement procedure under the respective Codes before availing themselves of any rights under the General Agreement”.¹¹⁷

In the panel proceeding on “EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins” the EEC argued that as between the parties that signed it, the Agreement on Interpretation and Application of Articles VI, XVI and XXIII created an expectation as to the criteria that would be used to judge a complaint of non-violation nullification or impairment of tariff concessions. The Panel Report adopted in 1990 provides:

¹¹³Reports adopted on 7 December 1981, L/4423, 23S/114,126, para. 56; L/4424, 23S/127, 136, para. 43; L/4425, 23S/137,146, para.43.

¹¹⁴3S/21, 22.

¹¹⁵Text of the Agreement appears at 26S/56. On the drafting history, see documents listed in TA/INF/1/Rev.8, p. 45-50.

¹¹⁶C/M/248, p.9.

¹¹⁷C/M/248, p. 15.

“The Panel was established to make findings ‘in the light of the relevant GATT provisions’; it therefore does not have the mandate to propose interpretations of the provisions of the Subsidies Code which the Community invokes to justify its position. However, the following may be noted in this respect. ... The Panel noted that the purpose of the Subsidies Code is, according to its preamble, ‘to apply fully and interpret’ provisions of the General Agreement. In the view of the Panel this speaks in favour of interpreting Article 8:4 in conformity with the decisions of the CONTRACTING PARTIES rather than, as the Community suggests, revising these decisions in the light of a particular interpretation of a Code accepted by a portion of the contracting parties”.¹¹⁸

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

The provisions on subsidies in the Havana Charter were in Articles 25-28; in the US-UK *Proposals* in Chapter III D-1; in the US Draft in Article 25; in the London and New York Drafts in Articles 30; and in the Geneva Draft in Articles 25-29.

Havana Charter text and the GATT: Although many of the articles in the General Agreement were adapted directly from the corresponding provisions in the Geneva Draft Charter, Article XVI in the 30 October 1947 text of the General Agreement was drawn only from Article 25 of the Geneva Draft Charter, and included only one paragraph, the present-day Article XVI:1. The Geneva Draft Charter Articles 26 through 29, which dealt in more detail with export subsidies, were omitted from the General Agreement.

Article 25 of the Geneva Draft Charter, with some changes, became Article 25 of the Havana Charter. The text of Charter Article 25 reads “... which operates directly or indirectly to *maintain or* increase exports of any product from or to reduce *or prevent an increase in* imports ...”, the italicized words having been added at Havana because “it was felt that the Geneva text of the Article failed to cover subsidies which, whilst not increasing a Member’s exports nor reducing its imports, might nevertheless affect a Member’s share of total trade”.¹¹⁹ Also, at the end of Article 25 the words “it is determined that serious prejudice” were changed in the Charter text to “a Member considers that serious prejudice” because “it was thought that this change was consistent with similar changes in Chapter VI [of the Charter] and would expedite procedure”.¹²⁰

The Havana Charter also included Articles 26 through 28. Paragraphs 1 and 2 of Article 26 provided:

“1. No Member shall grant, directly or indirectly, any subsidy on the export of any product, or establish or maintain any other system, which subsidy or system results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market, due allowance being made for differences in the terms and conditions of sale, for differences in taxation, and for other differences affecting price comparability.

“2. The exemption of exported products from duties or taxes imposed in respect of like products when consumed domestically, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be in conflict with the provisions of paragraph 1. The use of the proceeds of such duties or taxes to make payments to domestic producers in general of these products shall be considered as a case under Article 25”.

Paragraph 3 of Article 26 provided for Members to give effect to the provisions of paragraph 1 no later than two years from the entry into force of the Charter; paragraph 4 permitted export subsidies “to the extent and for such time as may be necessary to offset a subsidy granted by a non-Member affecting the Member’s exports of the product”.

¹¹⁸L/6627, adopted on 25 January 1990, 37S/131.

¹¹⁹Havana Reports, p. 108, para. 13.

¹²⁰*Ibid.*, para. 14.

Articles 27 and 28 applied to subsidies on “primary commodities”, which were defined in Article 56:1 of the Charter. Article 27 provided an exception to Article 26 for certain price stabilization schemes, and other provisions linked to the Charter chapter on negotiation of commodity agreements, including a standstill on new or increased export subsidies on a commodity during negotiation of a commodity agreement. Article 28 provided as follows.

“1. Any Member granting any form of subsidy, which operates directly or indirectly to maintain or increase the export of any primary commodity from its territory, shall not apply the subsidy in such a way as to have the effect of maintaining or acquiring for that Member more than an equitable share of world trade in that commodity.

“2. As required under the provisions of Article 25, the Member granting such subsidy shall promptly notify the Organization of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected commodity exported from its territory, and of the circumstances making the subsidization necessary. The Member shall promptly consult with any other Member which considers that serious prejudice to its interests is caused or threatened by the subsidization.

“3. If, within a reasonable period of time, no agreement is reached in such consultation, the Organization shall determine what constitutes an equitable share of world trade in the commodity concerned and the Member granting the subsidy shall conform to this determination.

“4. In making the determination referred to in paragraph 3, the Organization shall take into account any factors which may have affected or may be affecting world trade in the commodity concerned, and shall have particular regard to:

- “(a) the Member country's share of world trade in the commodity during a previous representative period;
- “(b) whether the Member country's share of world trade in the commodity is so small that the effect of the subsidy on such trade is likely to be of minor significance;
- “(c) the degree of importance of the external trade in the commodity to the economy of the Member country granting, and to the economies of the Member countries materially affected by, the subsidy;
- “(d) the existence of price stabilization systems conforming to the provisions of paragraph 1 of Article 27;
- “(e) the desirability of facilitating the gradual expansion of production for export in those areas able to satisfy world market requirements of the commodity concerned in the most effective and economic manner, and therefore of limiting any subsidies or other measures which make that expansion difficult.”

Amendments: At the Second Session of the CONTRACTING PARTIES, after the close of the Havana Conference, a Working Party considered which of the changes made at Havana should be taken into the General Agreement in advance of the anticipated supersession of Part II which would take place under Article XXIX upon entry into force of the Charter. It was proposed that the changes made at Havana to Article 25 be inserted in Article XVI; the Working Party “agreed that the differences between Article XVI of the General Agreement and Article 25 of the Havana Charter are not of a substantive nature”¹²¹ and the text was kept unchanged in light of understandings reached concerning the meaning of “increased exports” and concerning the prerequisites for consultation under Article XVI, noted above at pages 448 and 450 respectively. It was also proposed that Articles 26, 27 and 28 of the Charter be taken into the GATT. The 1948 Working Party Report on “Modifications to the General Agreement” notes in this connection:

¹²¹Working Party Report on “Modifications to the General Agreement”, GATT/CP.2/22/Rev.1, adopted on 1-2 September 1948, II/39, 44, para. 29.

“While agreeing in principle that insertion of these articles would be desirable, the majority of the working party felt that, in view of practical difficulties, they could not usefully recommend such inclusion at the present stage. It was of course understood that, in the light of Article XXIX, paragraph 1, the CONTRACTING PARTIES undertake to apply the principles of the Havana Charter relating to export subsidies to the full extent of their executive authority.”¹²²

At the Review Session in 1954-55, various proposals were made for amendment to Article XVI, including conforming the text to Article 25 of the Charter, and incorporating the text of Articles 26, 27 and 28 into the GATT.¹²³ The outcome is discussed in the Report of the Review Working Party on “Other Barriers to Trade”.¹²⁴ Paragraph 3 of Article XVI was based on paragraphs 1 and 4 of Article 28; paragraph 4 was based on paragraphs 1 and 3 of Article 26; the general Note *ad* Article XVI was taken from paragraph 2 of Article 26; the first paragraph of Note 2 *ad* Article XVI:3 was drawn from paragraph 1 of Article 27; and the definition of “primary product” in Note 2 *ad* Section B was taken from paragraph 1 of Article 56 in the Charter chapter on commodity agreements. Paragraph 2 as well as Note 1 *ad* Section B and the final paragraph of Note 2 *ad* paragraph 3 were originally drafted in the Review Session, and the final text of Article XVI:4 and its interpretative note emerged as a compromise proposal during final adoption of the Working Party’s report.¹²⁵ See the proposals and documents listed below under the Review Session. These amendments were effected through the 1955 Protocol Amending the Preamble and Parts II and III of the General Agreement, which entered into force on 7 October 1957 and is in force for all contracting parties.

As noted above on page 457, under the Declaration of 19 November 1960 “Giving Effect to the Provisions of Article XVI:4”,¹²⁶ the prohibition of certain export subsidies in Article XVI:4 entered into force on 14 November 1962 and is in force only for the seventeen countries which have accepted the Declaration. These countries are Austria, Belgium, Canada, Denmark, France, Federal Republic of Germany, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Sweden, Switzerland, United Kingdom, United States and Zimbabwe. The “standstill clause” contained in the second sentence of Article XVI:4, which had been extended by a number of declarations,¹²⁷ expired on 31 December 1967.

¹²²*Ibid.*, II/43, para. 24. See discussion at GATT/CP.2/SR.5, p. 4-5; GATT/CP.2/SR.6, p. 4.

¹²³See Note on “Subsidies”, W.9/20 dated 18 November 1954, summarizing initial proposals.

¹²⁴L/334, adopted 3 March 1955, 3S/222. See also discussion on adoption of the amendments to Article XVI, in SR.9/41, SR.9/43, and SR.9/47.

¹²⁵See W.9/240 (compromise proposal by the United Kingdom delegation), and discussion and adoption at SR.9/41, SR.9/43, SR.9/47.

¹²⁶9S/32.

¹²⁷6S/24, 7S/30, 8S/25, 9S/33, 12S/50.

IV. RELEVANT DOCUMENTS

London

Discussion: EPCT/C.II/37
 Reports: EPCT/30

New York

Discussion: EPCT/C.6/23, 24, 46, 105
 Reports: EPCT/34 (p.25)

Geneva

Discussion: EPCT/EC/PV.2/22
 EPCT/A/PV/22+Corr.1-5,
 23+Corr.1-2, 26+Corr.1-3
 EPCT/B/SR.10, 11, 22
 EPCT/TAC/SR.11
 EPCT/TAC/PV/27
 Reports: EPCT/124, 127, 130, 135, 180,
 186, 189, 212, 214/Add.1/Rev.1
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 Reports: E/CONF.2/C.3/51

CONTRACTING PARTIES

Discussion: GATT/CP.2/SR.6
 Reports: GATT/CP.2/22/Rev.1

Review Session

Discussion: SR.9/17, 23, 24, 41, 42, 43, 47
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ARTICLE XVII

STATE TRADING ENTERPRISES

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Article XVII

State Trading Enterprises

1.* (a) Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges,* such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.

(b) The provisions of sub-paragraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales

solely in accordance with commercial considerations,* including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.

(c) No contracting party shall prevent any enterprise (whether or not an enterprise described in sub-paragraph (a) of this paragraph) under its jurisdiction from acting in accordance with the principles of sub-paragraphs (a) and (b) of this paragraph.

2. The provisions of paragraph 1 of this Article shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods* for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment.

3. The contracting parties recognize that enterprises of the kind described in paragraph 1 (a) of this Article might be operated so as to create serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis designed to limit or reduce such obstacles are of importance to the expansion of international trade.*

4. (a) Contracting parties shall notify the CONTRACTING PARTIES of the products which are imported into or exported from their territories by enterprises of the kind described in paragraph 1 (a) of this Article.

(b) A contracting party establishing, maintaining or authorizing an import monopoly of a product, which is not the subject of a concession under Article II, shall, on the request of another contracting party having a substantial trade in the product concerned, inform the CONTRACTING PARTIES of the import mark-up* on the product during a recent representative period, or, when it is not possible to do so, of the price charged on the resale of the product.

(c) The CONTRACTING PARTIES may, at the request of a contracting party which has reason to believe that its interests under this Agreement are being adversely affected by the operations of an enterprise of the kind described in paragraph 1 (a), request the contracting party establishing, maintaining or authorizing such enterprise to supply information about its operations related to the carrying out of the provisions of this Agreement.

(d) The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises.

Interpretative Note *Ad* Article XVII from Annex I

Paragraph 1

The operations of Marketing Boards, which are established by contracting parties and are engaged in purchasing or selling, are subject to the provisions of sub-paragraphs (a) and (b).

The activities of Marketing Boards which are established by contracting parties and which do not purchase or sell but lay down regulations covering private trade are governed by the relevant Articles of this Agreement.

The charging by a state enterprise of different prices for its sales of a product in different markets is not precluded by the provisions of this Article, provided that such different prices are charged for commercial reasons, to meet conditions of supply and demand in export markets.

Paragraph 1 (a)

Governmental measures imposed to insure standards of quality and efficiency in the operation of external trade, or privileges granted for the exploitation of national natural resources but which do not empower the government to exercise control over the trading activities of the enterprise in question, do not constitute "exclusive or special privileges".

Paragraph 1 (b)

A country receiving a "tied loan" is free to take this loan into account as a "commercial consideration" when purchasing requirements abroad.

Paragraph 2

The term "goods" is limited to products as understood in commercial practice, and is not intended to include the purchase or sale of services.

Paragraph 3

Negotiations which contracting parties agree to conduct under this paragraph may be directed towards the reduction of duties and other charges on imports and exports or towards the conclusion of any other mutually satisfactory arrangement consistent with the provisions of this Agreement. (See paragraph 4 of Article II and the note to that paragraph.)

Paragraph 4 (b)

The term "import mark-up" in this paragraph shall represent the margin by which the price charged by the import monopoly for the imported product (exclusive of internal taxes within the purview of Article III, transportation, distribution, and other expenses incident to the purchase, sale or further processing, and a reasonable margin of profit) exceeds the landed cost.

UNDERSTANDING ON THE INTERPRETATION OF ARTICLE XVII
OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members,

Noting that Article XVII provides for obligations on Members in respect of the activities of the state trading enterprises referred to in paragraph 1 of Article XVII, which are required to be consistent with the general principles of non-discriminatory treatment prescribed in GATT 1994 for governmental measures affecting imports or exports by private traders;

Noting further that Members are subject to their GATT 1994 obligations in respect of those governmental measures affecting state trading enterprises;

Recognizing that this Understanding is without prejudice to the substantive disciplines prescribed in Article XVII;

Hereby *agree* as follows:

1. In order to ensure the transparency of the activities of state trading enterprises, Members shall notify such enterprises to the Council for Trade in Goods, for review by the working party to be set up under paragraph 5, in accordance with the following working definition:

"Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports."

This notification requirement does not apply to imports of products for immediate or ultimate consumption in governmental use or in use by an enterprise as specified above and not otherwise for resale or use in the production of goods for sale.

2. Each Member shall conduct a review of its policy with regard to the submission of notifications on state trading enterprises to the Council for Trade in Goods, taking account of the provisions of this Understanding. In carrying out such a review, each Member should have regard to the need to ensure the maximum transparency possible in its notifications so as to permit a clear appreciation of the manner of operation of the enterprises notified and the effect of their operations on international trade.

3. Notifications shall be made in accordance with the questionnaire on state trading adopted on 24 May 1960 (BISD 9S/184-185), it being understood that Members shall notify the enterprises referred to in paragraph 1 whether or not imports or exports have in fact taken place.

4. Any Member which has reason to believe that another Member has not adequately met its notification obligation may raise the matter with the Member concerned. If the matter is not satisfactorily resolved it may make a counter-notification to the Council for Trade in Goods, for consideration by the working party set up under paragraph 5, simultaneously informing the Member concerned.

5. A working party shall be set up, on behalf of the Council for Trade in Goods, to review notifications and counter-notifications. In the light of this review and without prejudice to paragraph 4(c) of Article XVII, the Council for Trade in Goods may make recommendations with regard to the adequacy of notifications and the need for further information. The working party shall also review, in the light of the notifications received, the adequacy of the above-mentioned questionnaire on state trading and the coverage of state trading enterprises notified under paragraph 1. It shall also develop an illustrative list showing the kinds of relationships between governments and enterprises, and the kinds of activities, engaged in by these enterprises, which may be relevant for the purposes of Article XVII. It is understood that the

Secretariat will provide a general background paper for the working party on the operations of state trading enterprises as they relate to international trade. Membership of the working party shall be open to all Members indicating their wish to serve on it. It shall meet within a year of the date of entry into force of the WTO Agreement and thereafter at least once a year. It shall report annually to the Council for Trade in Goods.¹

Note 1: The activities of this working party shall be coordinated with those of the working group provided for in Section III of the Ministerial Decision on Notification Procedures adopted on 15 April 1994.

II. INTERPRETATION AND APPLICATION OF ARTICLE XVII

A. SCOPE AND APPLICATION OF ARTICLE XVII

1. General: “State trading enterprises”

Article XVII makes a distinction between various types of enterprises: a “State enterprise” or “any enterprise” that has been granted “formally or in effect, exclusive or special privileges” (paragraph 1(a)) including “Marketing Boards” (interpretative note to paragraph 1); “any enterprise” under the jurisdiction of a contracting party (paragraph 1(c)); and an “import monopoly” (paragraph 4(b)).

In March 1964, in reaction to a proposal of the representative of Egypt seeking an interpretation of Article XVII, the Committee on the Legal and Institutional Framework of the GATT in Relation to Less-Developed Countries agreed that “there was nothing in Article XVII which prevents a contracting party from establishing or maintaining State-trading enterprises, nor does the General Agreement sanction discrimination against State-trading enterprises which are, in this regard, placed on the same basis as any other enterprise”.¹

The 1989 Panel Report on “Republic of Korea - Restrictions on Imports of Beef - Complaint by the United States” notes the argument made by the US that the Livestock Products Marketing Organization (LPMO), which was established to administer import restrictions on beef, constituted an import monopoly controlled by domestic producers and was in itself a separate “import restriction” within the meaning of Article XI, aside from the restrictions administered by the LPMO. Korea stated that the LPMO administered but did not itself determine quota levels.

“The Panel ... examined the further claim by the United States that the existence, or use, of producer-controlled import monopolies to restrict imports was inconsistent with the provisions of Articles XI:1 and XVII. Korea contested that the existence of a producer-controlled import monopoly in itself constituted an additional barrier to trade. The Panel noted that the LPMO had been granted exclusive privileges as the sole importer of beef. As such, the LPMO had to comply with the provisions of the General Agreement applicable to state-trading enterprises, including those of Articles XI:1 and XVII.

“Article XI:1 proscribed the use of ‘prohibitions or restrictions other than duties, taxes or other charges’, including restrictions made effective through state-trading activities, but Article XVII permitted the establishment or maintenance of state-trading enterprises, including enterprises which had been granted exclusive or special privileges. The mere existence of producer-controlled import monopolies could not be considered as a separate import restriction inconsistent with the General Agreement. The Panel noted, however, that the activities of such enterprises had to conform to a number of rules contained in the General Agreement, including those of Article XVII and Article XI:1. The Panel had already found that the import restrictions presently administered by the LPMO violated the provisions of Article XI:1. As the rules of

¹L/2281, paras. 9-10 (referring to proposal at L/2147, p. 7, and Secretariat Note at LEGAL/W/3). The proposal, made during the preliminary work on the drafting of Part IV of the General Agreement, was designed to ensure that “in interpreting the provisions contained in Article XVII of the General Agreement, contracting parties should give sympathetic consideration to the need for developing contracting parties to make use of State-trading enterprises as one means of overcoming their difficulties in their early stages of development”.

the General Agreement did not concern the organization or management of import monopolies but only their operations and effects on trade, the Panel concluded that the existence of a producer-controlled monopoly could not in itself be in violation of the General Agreement.”²

See also Article II:4, which applies to “a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement”.

2. Paragraph 1

(1) “State enterprise”

The US Draft Charter contained the following definition in the section on State trading: “For the purposes of this Article, a State enterprise shall be understood to be any enterprise over whose operations a Member government exercises, directly or indirectly, a substantial measure of control”. The London Report states that certain delegates at the London session of the Preparatory Committee wished to add a reference to “effective control over the trading operations of such enterprise” but others “considered that in such circumstances it would be proper that the government conferring the exclusive or special privileges should assume the responsibility of exercising effective control over operations affecting the external trade of such enterprise”. Also, “It was agreed that when marketing boards buy or sell they would come under the provisions relating to State-trading; where they lay down regulations governing private trade their activities would be covered by the relevant articles of the Charter. It was understood that the term ‘marketing boards’ is confined to boards established by express governmental action.”³

In the London and New York Drafts of the Charter, the article on non-discriminatory administration of State trading enterprises included an explicit definition of “State enterprise”. This definition was deleted at Geneva in the view that such enterprises are defined as precisely as practicable in sub-paragraph 1(a).⁴ The Sub-Committee at the Havana Conference which considered the Charter articles on state trading noted as follows:

“In the opinion of the Sub-Committee, the term ‘state enterprise’ in the text did not require any special definition; it was the general understanding that the term includes, *inter alia*, any agency of government that engages in purchasing or selling.”⁵

In 1959-60 a Panel on Subsidies and State Trading examined the notifications made under Article XVII:1(a) and made recommendations on improving the procedure for such notifications. The 1959 interim report of this group on “Notifications of State-Trading Enterprises” discusses the scope of paragraph 1(a) in connection with the notification requirements contained in paragraph 4(a).⁶ Its Final Report of 1960 notes that

“In discussing which enterprises were covered by Article XVII it was thought that there was sufficient guidance in the Article itself and in the Interpretative Notes. The Panel, however, drew special attention to the following points:

“(a) not only State enterprises are covered by the provisions of Article XVII, but in addition any enterprises which enjoy ‘exclusive or special privileges’;

“(b) marketing boards engaged directly or indirectly in purchasing or selling are enterprises in the sense of Article XVII, paragraphs 1(a) and 1(b), but the activities of marketing boards which do not purchase or sell must be in accordance with the other provisions of GATT;

“(c) the requirements in paragraph 4(a) of Article XVII that contracting parties should notify products ‘imported into or exported from their territories’ should be interpreted to mean that countries should notify

²L/6503, adopted on 7 November 1989, 36S/268, 301-302, paras. 114-115.

³London Report, p. 17.

⁴EPCT/160, pp. 4, 6; EPCT/A/PV.15, pp. 9-24.

⁵Havana Reports, p. 114, para. 10.

⁶L/970, adopted on 13 May 1959, 8S/142, 143, para. 16.

enterprises which have the statutory power of deciding on imports and exports, even if no imports or exports in fact have taken place”.⁷

With regard to this reference to ‘enterprise’ in sub-paragraph (c) directly above,

“... the Panel did not use the word ‘enterprise’ to mean any instrumentality of government. There would be nothing gained in extending the scope of the notification provisions of Article XVII to cover governmental measures that are covered by other articles of the General Agreement. The term ‘enterprise’ was used to refer either to an instrumentality of government which has the power to buy or sell, or to a non-governmental body with such power and to which the government has granted exclusive or special privileges. The activities of a marketing board or any enterprise defined in paragraph 1(a) of Article XVII should be notified where that body has the ability to influence the level or direction of imports or exports by its buying or selling.

“It is clear from the interpretative note to paragraph 1 of Article XVII that the activities of a marketing board or any enterprise covered by paragraph 1(a) of the Article and not covered by paragraph 21 of this report would not be notifiable solely by virtue of a power to influence exports or imports by the exercise of overt licensing powers; where such measures are taken they would be subject to other Articles of the General Agreement.

“Where, however, an enterprise is granted exclusive or special privileges, exports or imports carried out pursuant to those privileges should be notified even if the enterprise is not itself the exporter or importer.”⁸

See also the discussion of the term “State enterprise” in the unadopted 1981 Panel Report on “Spain - Measures Concerning Domestic Sale of Soyabean Oil”.⁹

The definition of “State enterprise” within the scope of Article XVII:1(a) was also discussed in the Committee on Trade in Industrial Products in 1970 and 1971¹⁰, in the Group on Quantitative Restrictions and Other Non-Tariff Measures in 1985¹¹ and in the Council in 1986.¹²

Paragraph 1 of the Uruguay Round Understanding on the Interpretation of Article XVII of GATT 1994 provides the following “working definition” for the purposes of notification under Article XVII:

“Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports.”

See also the Interpretative Note *ad* paragraph 1, and, as regards monopolies, paragraph 4 of Article II and paragraph (d) of Article XX.

(2) “exclusive or special privileges”

See the Interpretative Note.

The report of a Sub-Committee which considered the articles of the Charter on State trading during the Geneva session of the Preparatory Committee records that: “It was the understanding of the Sub-Committee that governmental measures imposed to ensure standards of quality and efficiency in the execution of external trade, or privileges granted for the exploitation of national natural resources, did not constitute ‘exclusive or special privileges’” and that “It was the understanding of the Sub-Committee that if a Member Government exempted an

⁷L/1146, adopted on 24 May 1960, 9S/179, 180-181, para. 8.

⁸*Ibid.*, 9S/183-184, paras. 21-23.

⁹L/5142.

¹⁰L/3496.

¹¹NTM/W/13 p. 39.

¹²L/5955, C/W/495, C/M/195 p. 24-25, C/M/196 p. 6-7, C/M/198 p. 11-12.

enterprise from certain taxes, as compensation for its participation in the profits of this enterprise, this procedure should not be considered as 'granting exclusive privileges'.¹³

(3) *"involving either imports or exports"*

The same Sub-Committee report also records that

"It was the understanding of the Sub-Committee that the intent of these words is to cover, within the terms of this Article, any transactions by a State enterprise through which such enterprise could intentionally influence the direction of total import or export trade in the commodity in a manner inconsistent with the other provisions of the Charter".¹⁴

(4) *"act in a manner consistent with the general principles of non-discriminatory treatment"*

Under Article 26 of the US Draft Charter, State enterprises were to accord to the commerce of other Members "non-discriminatory treatment, as compared with the treatment accorded to the commerce of any country other than that in which the enterprise is located". In the London Draft Charter, the non-discrimination obligation was reformulated to read: "the commerce of other Members shall be accorded treatment no less favourable than that accorded to the commerce of any country, other than that in which the enterprise is located".¹⁵ At Geneva, the present words "act in a manner consistent with the general principles of non-discriminatory treatment" were inserted in order to allay the doubt that "commercial considerations" (in paragraph 1(b)) meant that exactly the same price would have to exist in different markets.¹⁶ This point is covered in the third paragraph of the interpretative note to paragraph 1.¹⁷ During discussions at Geneva, it was stated that the Article on State trading referred only "to most-favoured-nation treatment and not to national treatment".¹⁸

The 1952 Panel Report on "Belgian Family Allowances" notes: "As regards the exception contained in paragraph 2 of Article XVII, it would appear that it referred only to the principle set forth in paragraph 1 of that Article, i.e. the obligation to make purchases in accordance with commercial considerations and did not extend to matters dealt with in Article III".¹⁹

The Working Party Report which examined the "Haitian Tobacco Monopoly" in 1955 found, with respect to an import licensing scheme operated in connection with an import and production monopoly, that "As the representative of Haiti informed the Working Party that the import licenses issued by the Régie may be used for purchases from any source, it was considered that the measure did not conflict with the provisions of Article XVII calling for non-discriminatory treatment."²⁰

In the panel proceeding relating to Canada's administration of its Foreign Investment Review Act, arguments were presented concerning both the issue of whether Article XVII:1 requires national treatment, and the distinct question of whether (even if this is not the case) contracting parties are required to conform to Article III in the administration of any laws or regulations bearing on State trading enterprises. The 1984 Panel Report on "Canada - Administration of the Foreign Investment Review Act" notes:

"The Panel saw great force in Canada's argument that only the most-favoured-nation and not the national treatment obligations fall within the scope of the general principles referred to in Article XVII:1(a). However, the Panel did not consider it necessary to decide in this particular case whether the general reference to the principles of non-discriminatory treatment referred to in Article XVII:1 also comprises the national treatment principle since it had already found the purchase undertakings at issue to be inconsistent

¹³EPCT/160, p. 3 and p. 4.

¹⁴*Ibid.*, p. 4.

¹⁵London Report, p. 32.

¹⁶EPCT/160, p. 5-6; EPCT/A/PV.14, p. 24.

¹⁷EPCT/A/SR.14, p. 3.

¹⁸EPCT/A/SR.10, p. 34.

¹⁹G/32, adopted on 7 November 1952, 1S/59, 60, para. 4.

²⁰L/454, adopted on 22 November 1955, 4S/38, 39, para. 8; see also earlier decision and report on the same measure, II/27, II/87.

with Article III:4 which implements the national treatment principle specifically in respect of purchase requirements”.²¹

The 1988 Panel Report on “Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies” also examined this issue:

“The Panel ... turned its attention to the relevance of Article XVII and in particular to the contention of the European Communities that the practices under examination contravened a national treatment obligation contained in paragraph 1 of that Article. The Panel noted that two previous panels had examined questions related to this paragraph The Panel considered, however, that it was not necessary to decide in this particular case whether the practices complained of were contrary to Article XVII because it had already found that they were inconsistent with Article XI”.²²

(5) “having due regard to the other provisions of this Agreement”

It was agreed in discussions at Geneva in 1947 that this phrase “covers also differential customs treatment maintained consistently with the other provisions of the Charter”.²³

(6) “commercial considerations”

(a) Relationship of sub-paragraphs (b) and (c) to sub-paragraph (a)

The 1984 Panel Report on “Canada - Administration of the Foreign Investment Review Act” includes the following finding:

“The Panel takes the view that, through its reference to sub-paragraph (a), paragraph 1(c) of Article XVII of the General Agreement imposes on contracting parties the obligation to act in their relations with state-trading and other enterprises ‘in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders’. This obligation is defined in sub-paragraph (b), which declares, *inter alia*, that these principles are understood to require the enterprises to make their purchases and sales solely in accordance with commercial considerations. The fact that sub-paragraph (b) does not establish a separate general obligation to allow enterprises to act in accordance with commercial considerations, but merely defines the obligations set out in the preceding sub-paragraph, is made clear through the introductory words ‘The provisions of sub-paragraph (a) of the paragraph shall be understood to require ...’. For these reasons, the Panel considers that the commercial considerations criterion becomes relevant only after it has been determined that the governmental action at issue falls within the scope of the general principles of non-discriminatory treatment prescribed by the General Agreement”.²⁴

(b) Charging of different prices

See the Interpretative Note to paragraph 1.

(c) Tied loans

The London Report provides: “The view was generally held that a country receiving a loan would be free to take this loan into account as a ‘commercial consideration’ when purchasing its requirements abroad. The position of countries making such ‘tied loans’ was another question”.²⁵

²¹L/5504, adopted on 7 February 1984, 30S/140, 163, para. 5.16.

²²L/6304, adopted on 22 March 1988, 35S/37, 90, para. 4.27 (citing the material above from the Panel Reports on “Belgian Family Allowances” and “Canada - Administration of the Foreign Investment Review Act”).

²³EPCT/160, p. 5; EPCT/183, p. 3.

²⁴L/5504, adopted on 7 February 1984, 30S/140, 163, para. 5.16.

²⁵London Report, p. 17, para. 1(a)(v).

See the Interpretative Note to paragraph 1(b).

(d) *“customary business practice”*

The report of a Sub-committee which considered the articles of the Charter on State trading during the Geneva meetings of the Preparatory Committee notes that “It was the understanding of the Sub-Committee that the expression ‘customary business practice’ was intended to cover business practices customary in the respective line of trade”.²⁶

(7) ***Paragraph 1(c): “No contracting party shall prevent any enterprise ... within its jurisdiction”***

The 1984 Panel Report on “Canada - Administration of the Foreign Investment Review Act” includes the following treatment of a claim under this paragraph relating to undertakings concerning purchases of goods, submitted to the Canadian government by prospective foreign investors, which became legally binding on the investor if the investment were allowed:

“The United States requested the Panel to find that the purchase undertakings obliging investors to give less favourable treatment to imported products than to domestic products prevent the investors from acting solely in accordance with commercial considerations and that they therefore violate Canada’s obligations under Article XVII:1(c).

“The Panel takes the view that, through its reference to sub-paragraph (a), paragraph 1(c) of Article XVII of the General Agreement imposes on contracting parties the obligation to act in their relations with state-trading and other enterprises ‘in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders’. This obligation is defined in sub-paragraph (b), which declares, *inter alia*, that these principles are understood to require the enterprises to make their purchases and sales solely in accordance with commercial considerations. The fact that sub-paragraph (b) does not establish a separate general obligation to allow enterprises to act in accordance with commercial considerations, but merely defines the obligations set out in the preceding sub-paragraph, is made clear through the introductory words ‘The provisions of sub-paragraph (a) of the paragraph shall be understood to require ...’. For these reasons, the Panel considers that the commercial considerations criterion becomes relevant only after it has been determined that the governmental action at issue falls within the scope of the general principles of non-discriminatory treatment prescribed by the General Agreement. The Panel saw great force in Canada’s argument that only the most-favoured-nation and not the national treatment obligations fall within the scope of the general principles referred to in Article XVII:1(a). However, the Panel did not consider it necessary to decide in this particular case whether the general reference to the principles of non-discriminatory treatment referred to in Article XVII:1 also comprises the national treatment principle since it had already found the purchase undertakings at issue to be inconsistent with Article III:4 which implements the national treatment principle specifically in respect of purchase requirements.

“The United States requested the Panel to find that the undertakings which oblige investors to export specified quantities or proportions of their production - are inconsistent with Article XVII:1(c) because the export levels of companies subject to such undertakings cannot be assumed to be the result of a decision-making process based on commercial considerations.

“As explained in paragraph 5.16 above, Article XVII:1(b) does not establish a separate obligation to allow enterprises to act in accordance with commercial considerations but merely defines the obligation of the enterprises, set out in sub-paragraph (a) of Article XVII:1, to ‘act in a manner consistent with the general principles of non-discriminatory treatment’ prescribed in the General Agreement. Hence, before applying the commercial considerations criterion to the export undertakings, the Panel first had to determine whether Canada, in accepting investment proposals on the condition that the investor export a certain quantity or proportion of his production, acts inconsistently with any of the general principles of

²⁶EPCT/160, p. 4.

non-discriminatory treatment prescribed in the General Agreement. The Panel found that there is no provision in the General Agreement which forbids requirements to sell goods in foreign markets in preference to the domestic market. In particular, the General Agreement does not impose on contracting parties the obligation to prevent enterprises from dumping. Therefore, when allowing foreign investments on the condition that the investors export a certain amount or proportion of their production, Canada does not, in the view of the Panel, act inconsistently with any of the principles of non-discriminatory treatment prescribed by the General Agreement for governmental measures affecting exports by private traders. Article XVII:1(c) is for these reasons not applicable to the export undertakings at issue”.²⁷

The 1988 Panel Report on “Japan - Trade in Semi-conductors” includes the following treatment of a claim under Article XVII:1(c):

“The Panel ... turned to the contention of the EEC that the measures by the Japanese Government were contrary to Article XVII:1(c), according to which “no contracting party shall prevent any enterprise under its jurisdiction from acting in accordance with the general principles of non-discriminatory treatment prescribed in [the General] Agreement”. The Panel considered that, once a measure had been found to be inconsistent with a specific provision of the General Agreement, it was no longer meaningful to address the question of whether or not the measure was also contrary to principles underlying that Agreement and therefore the Panel, having already found the Japanese measures to be inconsistent with Article XI, did not consider it necessary to examine them in the light of Article XVII:1(c)”.²⁸

(8) *State trading enterprises in countries maintaining a complete monopoly of their import trade*

The US Draft Charter contained a separate Article 28 concerning expansion of trade by any Member establishing or maintaining a complete or substantially complete monopoly of its import trade. This Article envisaged the negotiation by each such Member of an arrangement providing for a minimum periodic value of imports from the other Members. This Article was kept with the same wording provisionally in the London and New York Draft Charters, and was deleted at Geneva. The Geneva Report states that the Preparatory Committee believed that the text of the revised Article 31 (requiring negotiations to limit or reduce protection afforded by import or export monopolies) would be sufficiently flexible to permit any appropriate negotiations with a Member which maintained a complete or substantially complete monopoly of its external trade, and that since no representative of such a country had attended the sessions of the Committee, the matter remained open for the Havana Conference.²⁹

The Report of the Working Party on the “Accession of Poland” noted “that the foreign trade of Poland was conducted mainly by State enterprises and that the Foreign Trade Plan rather than the customs tariff was the effective instrument of Poland’s commercial policy. The present customs tariff was applicable only to a part of imports effected by private persons for their personal use and it was in the nature of a purchase tax rather than a customs tariff”. The Working Party agreed “that due consideration had to be given to these facts in drawing up the legal instruments relating to Poland’s accession”.³⁰ The Working Party further noted that “Poland would grant to each contracting party, in respect of imports into Poland and purchases by Polish agencies, treatment no less favourable than that accorded to any other country”.³¹ Paragraphs 5 through 7 and Annex A of the Protocol of Accession of Poland provide for annual consultations with the CONTRACTING PARTIES with a view to reaching agreement on Polish targets for imports from the territories of the contracting parties as a whole in the following year; for an annual review of trade in the preceding year between contracting parties and Poland; and for a bilateral consultation mechanism.³² Schedule LXV and the Polish

²⁷L/5504, adopted on 7 February 1984, 30S/140, 163, paras. 5.15-5.18.

²⁸L/6309, adopted on 4 May 1988, 35S/116, 159-160, para. 123.

²⁹London Report, p. 18, New York Report p. 29, Geneva Report p. 29. See also Secretariat Note of 1988 on this issue in MTN.GNG/NG7/W/15/Add.1 p. 1-3. The USSR was appointed as a member of the Preparatory Committee for the ITO Charter by the ECOSOC Resolution which called the UN Conference on Trade and Employment, but according to the Geneva Report (p. 6) the USSR “indicated that it did not feel able to participate in the work of the Preparatory Committee as it had not found it possible to devote sufficient preliminary study to the important questions which were the subject of the Committee’s discussion”.

³⁰L/2806, adopted on 26 June 1967, 15S/109, 110, para. 7.

³¹*Ibid.*, 15S/110, para. 9.

³²15S/46, 49, 51-52. For Reviews under this Protocol see 16S/67; 17S/96; 18S/188; 18S/201; 19S/109; 20S/209; 21S/112; 22S/63; 24S/139. See also L/5396, C/W/401 and discussion at SR.38/1 p. 8-10, C/M/165, C/M/167. See also references to this Protocol under

import commitment were modified on 5 February 1971.³³ In December 1989, Poland announced its intention to request renegotiation of its terms of accession in view of the entry into force 1 January 1990 of laws establishing a market economy for which the customs tariff would be the effective instrument of commercial policy.³⁴ At the February 1990 Council meeting a Working Party was established to examine the request of the Government of Poland to renegotiate the terms of accession of Poland.³⁵

The Report of the Working Party on the "Accession of Romania" notes that "Romania stressed that the Romanian producing units and foreign trade enterprises operated on international markets like similar enterprises in market-economy countries, in accordance with criteria of an exclusively commercial character. It was agreed that because of the absence of a customs tariff in Romania the main concession to be incorporated in its Schedule would be a firm intention of increasing imports from contracting parties at a rate not smaller than the growth of total Romanian imports provided for in its Five-Year Plans".³⁶ This commitment is included in Annex B of the Protocol of Accession of Romania, which also provides for biennial consultations, and for a bilateral consultation mechanism.³⁷ In 1991, Romania was granted a temporary waiver of its obligations under Article II in order to enable it to implement a new customs tariff in the context of measures for transition to a market economy, and pending renegotiation of its Schedule; Romania also requested renegotiation of its accession protocol in the light of, *inter alia*, the abolition of its former system of central planning.³⁸ At the February 1992 Council meeting a Working Party was established to examine the request of the Government of Romania to renegotiate the terms of accession of Romania.³⁹

The Report of the Working Party on the "Sixth Review of Trade with Hungary under the Protocol of Accession" records, *inter alia*, the question of the Canadian representative why Hungary made no notifications under Article XVII and what it considered to be state trading and the observation that at the very least foreign trade enterprises under administrative supervision would qualify for notifications under Article XVII.⁴⁰ In response

"the representative of Hungary said that the trade pattern was shaped by the competitive position of firms, that it was not decided or organized by the State and that it was not under any administrative supervision. Article XVII referred to state-owned enterprises or private enterprises having exclusive privileges in foreign trade matters; it referred to enterprises not to countries. At the preparatory phase of the Havana Charter negotiations, there had been proposals to draw up special provisions for countries with a complete monopoly of foreign trade, but these proposals died away and were not discussed in Havana. The GATT consequently did not contain any special provision for countries with complete monopoly of foreign trade; there was no such category as state-trading country in the GATT legal system and any existing legislation based on this notion was not in conformity with the GATT. The monopoly of foreign trade in Hungary or the form of ownership of production means had no relevance to Article XVII".⁴¹

3. Paragraph 2

Article 8 of the US Draft Charter (the most-favoured-nation clause) included within its scope "all matters relating to internal taxation or regulation referred to in Article 9" (the national treatment clause of the US Draft Charter, which included in turn "laws and regulations governing the procurement by governmental agencies of supplies for public use other than by or for the military establishment"). The last sentence of

Article II.

³³L/3416 (notification by Poland of intent to renegotiate); C/M/64, p. 17-18; L/3475, "Third Review under the Protocol of Accession", adopted on 2 February 1971, 18S/188, section C, "Renegotiation of Schedule LXV - Poland", 18S/198-200 (noting adoption 5 February 1971 of modification of Schedule LXV by postal ballot).

³⁴SR.45/ST/II, L/6634, C/M/238 p. 10-13.

³⁵C/M/239, p. 5. The Working Party has not yet presented its report.

³⁶L/3557, adopted on 6 October 1971, 18S/94, 95, paras. 6-7.

³⁷18S/5, 7-8, 10. For reviews under this Protocol see 20S/217, 24S/149, 27S/166, 30S/194, 32S/85, 35S/337. See also references to this Protocol under Article II.

³⁸L/6967, Decision of 4 December 1991, 38S/80.

³⁹C/M/254 p. 5-6; see also L/6838 and Add.1, L/6981, SR.47/2 p. 15-16. The Working Party has not yet presented its report.

⁴⁰L/5977, adopted on 22 May 1986, 33S/136, 147-148, para. 36.

⁴¹*Ibid.*, 33S/148, para. 37.

paragraph 1 of the proposed Article 8 provided: “The principle underlying this paragraph shall also extend to the awarding by Members of governmental contracts for public works, in respect of which each Member shall accord fair and equitable treatment to the commerce of the other Members.” During the first session of the Preparatory Committee in London, it was agreed to change the most-favoured-nation clause, the national treatment clause and the provisions on state trading as follows.

“Under the revision recommended by the Preparatory Committee [the awarding of government public works contracts and the purchase of supplies for governmental use] are removed from the scope of the most-favoured-nation clause.”⁴²

“The Preparatory Committee is of the opinion that the awarding of public works contracts is more closely related to the question of the treatment of foreign nationals and corporations than to the treatment of the trade in goods. It is considered that Chapter V of the Charter should be confined to matters affecting trade and that questions relating to the treatment of nationals, etc., should be the subject of future agreements developed under the auspices of the International Trade Organization ...”.⁴³

“The Preparatory Committee considered the provision in Article 9 of the United States Draft Charter for national, as distinct from most-favoured-nation, treatment in respect of governmental purchases of supplies for governmental use. Such provision would require the elimination of the many ‘buy-national’ laws under which national governments are required to give preference to domestic products in purchasing their administrative supplies. As it appears to the Preparatory Committee that such a commitment would lead to exceptions almost as broad as the commitment itself, the Preparatory Committee has omitted this commitment.”⁴⁴

“Since paragraph 1 of Article 8 of the United States Draft Charter had been amended by deletion of the provision relating to governmental contracts, it was felt necessary to insert a new paragraph in Article 31 dealing with the subject. A distinction was made as between governmental purchases for resale, which are covered by this paragraph, and purchases for governmental use and not for resale. The discussion on this latter point was prompted by the consideration that in some countries purchases of industrial and other equipment of various types from abroad might well be effected through the medium of state enterprise and that, while it might be difficult in certain circumstances to observe the rule of ‘commercial considerations’ for such purchases, it was at least necessary to provide that the rule of ‘fair and equitable treatment’ should apply but that in applying it full regard should be given to all relevant circumstances.”⁴⁵

The 1952 Panel Report on “Belgian Family Allowances” notes: “As regards the exception contained in paragraph 2 of Article XVII, it would appear that it referred only to the principle set forth in paragraph 1 of that Article, i.e. the obligation to make purchases in accordance with commercial considerations and did not extend to matters dealt with in Article III.”⁴⁶

See also generally the 1979 Agreement on Government Procurement as amended.⁴⁷

(1) “imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale ...”

Concerning the definition of “governmental” and “resale”, see the material collected under Article III:8(a).

⁴²London Report, p. 9, Chapter III para. A.1((d)(i). See also discussion at EPCT/C.II/PV/13 p. 50-52.

⁴³*Ibid.*, para. A.1(d)(ii).

⁴⁴*Ibid.*, para. A.1(d)(iv).

⁴⁵London Report, p. 17, para. 1(a)(v).

⁴⁶G/32, adopted on 7 November 1952, 1S/59, 60, para. 4.

⁴⁷26S/33, as amended by Protocol of amendment done on 2 February 1987, which entered into force on 14 February 1988, 34S/12.

(2) “goods”

The US Draft Charter provisions regarding non-discriminatory administration of State trading enterprises applied to “purchases or sales of any product or service”. It was considered during discussions at the London session of the Preparatory Committee that this article, in conformity with certain others in the Charter, should refer to goods only and not to services. This point is made clear in the interpretative note.⁴⁸

(3) “fair and equitable treatment”

During discussions at London, the US delegate explained the original draft of this clause by saying:

“that most-favoured-nation treatment should also apply to the awarding of government contracts. But it could not be applied to government purchases with the same precision which was possible in the case of fiscal measures. That was why the phrase ‘fair and equitable treatment’ had been used in the Draft Charter”.⁴⁹

4. Paragraph 3

See the Interpretative Note, as well as paragraph 4 of Article II and its Interpretative Note. See also the discussion below at page 486 of the addition of paragraph 3 in the 1954-55 Review Session.

In the 1989 Panel Report on “United States - Restrictions on Imports of Sugar”

“The Panel ... examined the issue in the context of the provisions of the General Agreement related to Article II. It noted that negotiations on obstacles to trade created by the operation of state-trading enterprises may be conducted under Article XVII:3 and that a note to that provision provides that such negotiations

‘may be directed towards the reduction of duties and other charges on imports and exports or towards the conclusion of *any other mutually satisfactory arrangement consistent with the provisions of this Agreement* (See paragraph 4 of Article II and the note to that paragraph).’ (emphasis added).

“The negotiations foreseen in Article XVII:3 are thus not to result in arrangements inconsistent with the General Agreement, in particular not quantitative restrictions made effective through state-trading that are not justified by an exception to Article XI:1. The Panel saw no reason why a different principle should apply to quantitative restrictions made effective by other means”.⁵⁰

5. Paragraph 4**(1) “Contracting parties shall notify the CONTRACTING PARTIES”**

During the 1954-55 Review Session, when it recommended the addition of paragraph 4 requiring contracting parties to provide the CONTRACTING PARTIES with information concerning trade by State enterprises, the Review Session Working Party on Other Barriers to Trade agreed that “a contracting party would not be expected to supply information which it is unable to obtain without amending its legislation existing at the time of the adoption of this amendment”.⁵¹

The CONTRACTING PARTIES agreed that the first notifications under paragraph 4 should be submitted not later than 1 February 1958 and any new notifications, or information to bring prior notifications up to date, annually thereafter.⁵² In 1958 the CONTRACTING PARTIES appointed a Panel to examine the notifications

⁴⁸London Report, p. 17, para. 1(a)(i).

⁴⁹EPCT/C.II/25, p. 5. See also EPCT/C.II/PV/13, p. 50-51.

⁵⁰L/6514, adopted on 22 June 1989, 36S/331, 342, para. 5.4.

⁵¹L/334 and Addendum, adopted on 3 March 1955, 3S/222, 228, para. 28.

⁵²6S/23, para. (a).

received from governments and to consider improvements in the procedure for notification. Paragraphs 8(c) and 20 to 23 of the 1960 Final Report of the Panel, reproduced above on page 473, discuss the scope of notification. That Report also drew up the questionnaire on state trading notifications under Article XVII:4(a) which is still in force.⁵³ The presently used procedures for notifications and reviews under Article XVII were adopted on 9 November 1962. Under these procedures, contracting parties have been invited to submit by the end of January 1963, and subsequently every third year, new and full responses to the questionnaire at 9S/184, and to notify changes to the basic notifications in the intervening years.⁵⁴

The Committee III Report in 1962 on “Obstacles to Trade of Less-developed Countries” set out a “Supplementary Questionnaire on State-Trading Enterprises” in order to elaborate aspects of State trading operations relevant to the work of Committee III for the liberalization of trade barriers to exports of less-developed countries.⁵⁵

Notification obligations under Article XVII were subsequently discussed in the Committee on Trade in Industrial Products in 1970 and 1971,⁵⁶ and in the Council in 1986.⁵⁷

The Uruguay Round Understanding on the Interpretation of Article XVII of the GATT 1994 provides *inter alia* for improvements in notification under Article XVII:

“Each Member shall conduct a review of its policy with regard to the submission of notifications on state trading enterprises In carrying out such a review, each Member should have regard to the need to ensure the maximum transparency possible in its notifications so as to permit a clear appreciation of the manner of operation of the enterprises notified and the effect of their operations on international trade.

“Notifications shall be made in accordance with the questionnaire on state trading adopted on 24 May 1960 ... it being understood that Members shall notify the enterprises referred to in paragraph 1 whether or not imports or exports have in fact taken place.

“Any Member which has reason to believe that another Member has not adequately met its notification obligation may raise the matter with the Member concerned. If the matter is not satisfactorily resolved it may make a counter-notification to the Council for Trade in Goods, for consideration by the working party set up under paragraph 5, simultaneously informing the Member concerned.”⁵⁸

See also the notification requirements under the Resolution of 4 March 1955 on “Liquidation of Strategic Stocks”.⁵⁹

(2) “import mark-up”

See the Interpretative Note. A 1987 Note by the Secretariat on “Article XVII (State-trading Enterprises)” notes with regard to Article XVII:4(b) that this provision has been rarely used, and with regard to Article XVII:4(c) that this provision does not appear to have been used.⁶⁰

⁵³9S/184.

⁵⁴IIS/58. The most recent full notifications under this procedure can be found in the addenda to L/7161 of 11 January 1993 (updates in addenda to L/7374 of 11 January 1994 and L/7623 of 11 January 1995). A list of notifications received by the CONTRACTING PARTIES under the 1962 procedure up to 1987 can be found in Annex V of the Note by the Secretariat on Article XVII dated 11 August 1987, MTN.GNG/NG7/W/15. The CONTRACTING PARTIES to GATT 1947 decided in December 1994 that if a measure is subject to a notification obligation both under the WTO Agreement and the GATT 1947, the notification of such a measure to the WTO shall, unless otherwise indicated in the notification, be deemed to be also a notification of that measure under the GATT 1947 (L/7582).

⁵⁵L/1768, adopted on 16 November 1962, IIS/176, 187.

⁵⁶L/3496.

⁵⁷L/5955, C/W/495, C/M/195 p. 24-25, C/M/196 p. 6-7, C/M/198 p. 11-12.

⁵⁸Paras. 2-4.

⁵⁹3S/51.

⁶⁰MTN.GNG/NG7/W/15 p. 10. For an instance of use of Article XVII:4(b) see C/M/205, p. 15-16; C/M/206, p. 15; L/5937/Add.2/Suppl.2.

B. RELATIONSHIP BETWEEN ARTICLE XVII AND OTHER GATT PROVISIONS

The report of discussions at the London session of the Preparatory Committee notes that “It was agreed that when marketing boards buy or sell they would come under the provisions relating to State-trading; where they lay down regulations governing private trade their activities would be covered by the relevant articles of the Charter. It was understood that the term ‘marketing boards’ is confined to boards established by express governmental action”.⁶¹ See the second Note *Ad* paragraph 1 of Article XVII, as well as Article 30 of the Havana Charter.

1. Article II

See the discussion of Article II:4 above.

2. Article III

See the discussion of “non-discriminatory treatment” above at page 475.

The 1988 Panel Report on “Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies”

“... examined the contention of the European Communities that the practices complained of were contrary to Article III. The Panel noted that Canada did not consider Article III to be relevant to this case, arguing that the Interpretative Note to Articles XI, XII, XIII, XIV and XVIII made it clear that provisions other than Article XVII applied to state-trading enterprises by specific reference only. The Panel considered that it was not necessary to decide in this particular case whether the practices complained of were contrary to Article III:4 because it had already found that they were inconsistent with Article XI. However, the Panel saw great force in the argument that Article III:4 was also applicable to state-trading enterprises at least when the monopoly of the importation and monopoly of the distribution in domestic markets were combined, as was the case of the provincial boards in Canada”.⁶²

The 1992 Panel Report on “Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies” examined the practices of Canadian provincial liquor boards with regard to the internal transportation of beer. The Report notes in this connection:

“The Panel ... turned to Canada’s argument that its right to deliver imported beer to the points of sale was an inherent part of Canada’s right to establish an import monopoly in accordance with Article XVII of the General Agreement which was not affected by its obligations under Article III:4. The Panel noted that the issue before it was not whether Canada had the right to create government monopolies for the importation, internal delivery and sale of beer. The Panel fully recognized that there was nothing in the General Agreement which prevented Canada from establishing import and sales monopolies that also had the sole right of internal delivery. The only issue before the Panel was whether Canada, having decided to establish a monopoly for the internal delivery of beer, might exempt domestic beer from that monopoly. The Panel noted that Article III:4 did not differentiate between measures affecting the internal transportation of imported products that were imposed by governmental monopolies and those that were imposed in the form of regulations governing private trade. Moreover, Articles II:4, XVII and the Note *Ad* Articles XI, XII, XIII, XIV and XVIII clearly indicated the drafters’ intention not to allow contracting parties to frustrate the principles of the General Agreement governing measures affecting private trade by regulating trade through monopolies. Canada had the right to take, in respect of the privately delivered beer, the measures necessary to secure compliance with laws consistent with the General Agreement relating to the enforcement of monopolies. This right was specifically provided for in Article XX(d) of the General Agreement. The Panel recognized that a beer import monopoly that also enjoyed a sales monopoly might, in order properly to carry out its functions, also deliver beer but it did not for that purpose have to prohibit unconditionally the private delivery of imported beer while

⁶¹London Report, p. 17.

⁶²L/6304, adopted on 22 March 1988, 35S/37, 90, para. 4.26.

permitting that of domestic beer. For these reasons the Panel *found* that Canada's right under the General Agreement to establish an import and sales monopoly for beer did not entail the right to discriminate against imported beer inconsistently with Article III:4 through regulations affecting its internal transportation".⁶³

3. Article XI

See the Interpretative Note *Ad* Articles XI-XIV and XVIII.

The 1988 Panel Report on "Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies"

"... examined the contention of the European Communities that the application by provincial liquor boards of practices concerning listing/delisting requirements and the availability of points of sale which discriminate against imported alcoholic beverages was inconsistent with Canada's obligations under Articles III:4, XI or XVII of the General Agreement. ... The Panel observed that the Note to Articles XI, XII, XIII, XIV and XVIII provided that throughout these Articles 'the terms "import restrictions" and "export restrictions" include restrictions made effective through state-trading operations'. The Panel considered it significant that the Note referred to 'restrictions made effective through state-trading operations' and not to 'import restrictions'. It considered that this was a recognition of the fact that in the case of enterprises enjoying a monopoly of both importation and distribution in the domestic market, the distinction normally made in the General Agreement between restrictions affecting the importation of products and restrictions affecting imported products lost much of its significance since both types of restriction could be made effective through decision by the monopoly. The Panel considered that systematic discriminatory practices of the kind referred to should be considered as restrictions made effective through 'other measures' contrary to the provisions of Article XI:1".⁶⁴

The 1988 Panel Report on "Japan - Restrictions on Imports of Certain Agricultural Products" examined arguments by Japan responding to a claim by the United States regarding import restrictions maintained through the operation of a state enterprise.

"The Panel noted the view of Japan that Article XI:1 did not apply to import restrictions made effective through an import monopoly. According to Japan, the drafters of the Havana Charter for an International Trade Organization intended to deal with the problem of quantitative trade limitations applied by import monopolies through a provision under which a monopoly of the importation of any product for which a concession had been negotiated would have 'to import and offer for sale such quantities of the product as will be sufficient to satisfy the full domestic demand for the imported product' (Article 31:5 of the Havana Charter). Japan contended that that provision had not been inserted into the General Agreement and that quantitative restrictions made effective through import monopolies could therefore not be considered to be covered by Article XI:1 of the General Agreement. ...

"The Panel examined this contention and noted the following: Article XI covers restrictions on the importation of any product, 'whether made effective through quotas, import ... licences or *other measures*' (emphasis added). The wording of this provision is comprehensive, thus comprising restrictions made effective through an import monopoly. This is confirmed by the note to Articles XI, XII, XIII, XIV and XVIII, according to which the term 'import restrictions' throughout these Articles covers restrictions made effective through state-trading operations. The basic purpose of this note is to extend to state-trading the rules of the General Agreement governing private trade and to ensure that the contracting parties cannot escape their obligations with respect to private trade by establishing state-trading operations. This purpose would be frustrated if import restrictions were considered to be consistent with Article XI:1 only because they were made effective through import monopolies. The note to Article II:4 of the General Agreement specifies that that provision 'will be applied in the light of the provisions of Article 31 of the Havana Charter'. The obligation of a monopoly importing a product for which a concession had been granted 'to

⁶³DS17/R, adopted on 18 February 1992, 39S/27, 79-80, para. 5.15.

⁶⁴L/6304, adopted on 2 February 1988, 35S/37, 89, paras. 4.22, 4.24.

import and offer for sale such quantities of the product as will be sufficient to satisfy the full domestic demand for the imported product' is thus part of the General Agreement. The Panel could therefore not follow the arguments of Japan based on the assumption that Article 31:5 of the Havana Charter was *not* included in the General Agreement. The Panel found for these reasons that the import restrictions applied by Japan fell under Article XI independent of whether they were made effective through quotas or through import monopoly operations".⁶⁵

See also the material excerpted from the 1989 Panel Report on "Republic of Korea - Restrictions on Imports of Beef - Complaint by the United States" above at page 472 on whether the maintenance of a producer-controlled import monopoly is as such a "restriction" under Article XI.

See also the material under Article II:4, and the material on State trading under Article III and Article XI.

4. Articles XII and XVIII

The use of State trading to administer balance-of-payments restrictions has been noted in a number of instances: see, for instance, certain of the measures examined in the 1962 "Uruguayan Recourse to Article XXIII". The 1970 "full consultation procedures" for balance-of-payments restrictions include "State trading, or government monopoly, used as a measure to restrict imports for balance-of-payments reasons" among the measures to be covered in the Basic Document for a full consultation under Articles XII:4(b) or XVIII:12(b).⁶⁶

5. Part IV

Article XXXVII:3 of the General Agreement provides:

"The developed contracting parties shall:

- (a) make every effort, in cases where a government directly or indirectly determines the resale price of products wholly or mainly produced in the territories of less-developed contracting parties, to maintain trade margins at equitable levels ...".

C. EXCEPTIONS AND DEROGATIONS

See Article XVII:2 and accompanying text.

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

Provisions corresponding to Article XVII appear in Article 29 of the Havana Charter; in the US-UK *Proposals* in Chapter III-E; in the US Draft Charter in Articles 26-27; in the London and New York Drafts in Article 31; and in the Geneva Draft in Article 30. Provisions on State trading appear in Articles 29-32 of the Havana Charter; in the US Draft Charter in Articles 26-28; in the London and New York Drafts in Articles 31-33; and in the Geneva Draft in Articles 30-31. Article XVII in the 30 October 1947 text of the General Agreement consisted *mutatis mutandis* of the provisions of Article 29 of the Geneva Draft Charter and its interpretative notes, and corresponded to the present paragraphs 1 and 2 of Article XVII. The other provisions on State trading in the Charter were not taken into the General Agreement at that time.

Concerning the drafting history on treatment in the Charter of State trading by countries maintaining a complete or substantially complete monopoly of their import trade, see above at page 478.

At Havana, paragraph 2 of the Geneva Draft Article 30 (corresponding to paragraph 2 of GATT Article XVII) was amended, (1) to conform the language to the wording of Article 18:8(a) (corresponding to Article III:8(a) of GATT) "to avoid difficulties of interpretation" and (2) to extend the "fair and equitable

⁶⁵L/6253, adopted on 22 March 1988, 35S/163, 229, paras. 5.2.2.1-5.2.2.2.

⁶⁶L/3388, 18S/48, 53, Annex II.

treatment” rule to also cover “the laws, regulations and requirements referred to in paragraph 8(a) of Article 18”.⁶⁷ Also at Havana, the first two paragraphs of the Interpretative Note *Ad* paragraph 1 were transferred to the body of the Charter and became Article 30 on Marketing Organizations.⁶⁸ The third paragraph of that Note was amended at Havana “so as to include purchases as well as sales and to take account also of relevant factors other than supply and demand”.⁶⁹ The Interpretative Note *Ad* paragraph 1(a) was also revised at Havana,⁷⁰ and the interpretative notes to paragraphs 1(b) and 2 were deleted and do not appear in the Havana Charter. These drafting changes were not among those which were incorporated into the General Agreement in 1948.

In the 1954-55 Review Session, proposals were made to incorporate all or part of the other Havana Charter provisions on State trading into the General Agreement. The Working Party on “Other Barriers to Trade” considered a proposal “designed to apply to protection afforded through state monopolies the same principle with respect to negotiations as those that have been recommended for negotiation of tariffs”, and recommended addition of Article XVII:3 and the interpretative note thereto.⁷¹ The Working Party also recommended the addition of Article XVII:4 and the note thereto, as a result of its consideration of “proposals designed to provide the CONTRACTING PARTIES with information concerning state monopolies conducted by individual contracting parties and for the submission of pertinent information upon request”.⁷² A proposal was made to add a new article to the General Agreement, similar to Article 32 of the Charter, requiring that a contracting party consult with interested contracting parties before liquidation of non-commercial stocks; it was decided instead that the CONTRACTING PARTIES adopt a resolution on this subject.⁷³ The amendments to Article XVII were effected through the Protocol Amending the Preamble and Parts II and III of the General Agreement, and entered into effect on 7 October 1957.

IV. RELEVANT DOCUMENTS

London

Discussion: EPCT/C.II/36, 37;
EPCT/C.II/PV/5, 6, 13
EPCT/C.II/ST/PV/1, 2, 3 & 6
Reports: EPCT/C.II/52, 53

New York

Discussion: EPCT/C.6/23, 34, 105

Geneva

Discussion: EPCT/EC/PV.2/22
EPCT/A/SR.14, 15, 17, 18, 37
EPCT/TAC/SR.11
EPCT/TAC/PV/27, 28
Reports: EPCT/135, 160, 180, 183, 186, 212,
214/Add.1/Rev.1
EPCT/W/313
Other: EPCT/189, 196
EPCT/W/62, 65, 69, 70, 187, 191,
195, 197, 198, 239, 272, 301, 318

Havana

Discussion: E/CONF.2/C.3/SR.28
Reports: E/CONF.2/C.3/43;
E/CONF.2/C.6/45

Review Session

Discussion: SR.9/41, 47
Reports: W.9/122, 177, 218, 231; 236/Add.1,
L/334, 3S/222
Other: L/189, L/272/Add.1, 273
W.9/20/Add.1, 28, 70, 78, 99, 122

⁶⁷Havana Reports, p. 66, para. 73.

⁶⁸*Ibid.*, p. 115, para. 18.

⁶⁹*Ibid.*, p. 114, para. 13.

⁷⁰*Ibid.*, p. 115, paras. 15, 17.

⁷¹L/334, Report of the Working Party adopted on 3 March 1955, 3S/222, 228.

⁷²*Ibid.*

⁷³*Ibid.*, 3S/230 para. 36-40; see “Liquidation of Strategic Stocks”, Resolution of 4 March 1955, 3S/51.

ARTICLE XVIII

GOVERNMENTAL ASSISTANCE TO ECONOMIC DEVELOPMENT

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I. TEXT OF ARTICLE XVIII, RELEVANT INTERPRETATIVE NOTES AND UNDERSTANDING ON THE BALANCE-OF-PAYMENTS PROVISIONS OF GATT 1994

Article XVIII*

Governmental Assistance to Economic Development

1. The contracting parties recognize that the attainment of the objectives of this Agreement will be facilitated by the progressive development of their economies, particularly of those contracting parties the economies of which can only support low standards of living* and are in the early stages of development.*

2. The contracting parties recognize further that it may be necessary for those contracting parties, in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports, and that such measures are justified in so far as they facilitate the attainment of the objectives of this Agreement. They agree, therefore, that those contracting parties should enjoy additional facilities to enable them (a) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry* and (b) to apply quantitative restrictions for balance of payments purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development.

3. The contracting parties recognize finally that, with those additional facilities which are provided for in Sections A and B of this Article, the provisions of this Agreement would normally be sufficient to enable contracting parties to meet the requirements of their economic development. They agree, however, that there may be circumstances where no measure consistent with those provisions is practicable to permit a contracting party in the process of economic development to grant the governmental assistance required to promote the establishment of particular industries* with a view to raising the general standard of living of its people. Special procedures are laid down in Sections C and D of this Article to deal with those cases.

4. (a) Consequently, a contracting party, the economy of which can only support low standards of living* and is in the early stages of development,* shall be free to deviate temporarily from the provisions of the other Articles of this Agreement, as provided in Sections A, B and C of this Article.

(b) A contracting party, the economy of which is in the process of development, but which does not come within the scope of sub-paragraph (a) above, may submit applications to the CONTRACTING PARTIES under Section D of this Article.

5. The contracting parties recognize that the export earnings of contracting parties, the economies of which are of the type described in paragraph 4 (a) and (b) above and which depend on exports of a small number of primary commodities, may be seriously reduced by a decline in the sale of such commodities. Accordingly, when the exports of primary commodities by such a contracting party are seriously affected by measures taken by another contracting party, it may have resort to the consultation provisions of Article XXII of this Agreement.

6. The CONTRACTING PARTIES shall review annually all measures applied pursuant to the provisions of Sections C and D of this Article.

Section A

7. (a) If a contracting party coming within the scope of paragraph 4 (a) of this Article considers it desirable, in order to promote the establishment of a particular industry* with a view to raising the general standard of living of its people, to modify or withdraw a concession included in the appropriate Schedule annexed to this Agreement, it shall notify the CONTRACTING PARTIES to this effect and enter into negotiations with any contracting party with which such concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein. If agreement is reached between

such contracting parties concerned, they shall be free to modify or withdraw concessions under the appropriate Schedules to this Agreement in order to give effect to such agreement, including any compensatory adjustments involved.

(b) If agreement is not reached within sixty days after the notification provided for in sub-paragraph (a) above, the contracting party which proposes to modify or withdraw the concession may refer the matter to the CONTRACTING PARTIES which shall promptly examine it. If they find that the contracting party which proposes to modify or withdraw the concession has made every effort to reach an agreement and that the compensatory adjustment offered by it is adequate, that contracting party shall be free to modify or withdraw the concession if, at the same time, it gives effect to the compensatory adjustment. If the CONTRACTING PARTIES do not find that the compensation offered by a contracting party proposing to modify or withdraw the concession is adequate, but find that it has made every reasonable effort to offer adequate compensation, that contracting party shall be free to proceed with such modification or withdrawal. If such action is taken, any other contracting party referred to in sub-paragraph (a) above shall be free to modify or withdraw substantially equivalent concessions initially negotiated with the contracting party which has taken the action.*

Section B

8. The contracting parties recognize that contracting parties coming within the scope of paragraph 4 (a) of this Article tend, when they are in rapid process of development, to experience balance of payments difficulties arising mainly from efforts to expand their internal markets as well as from the instability in their terms of trade.

9. In order to safeguard its external financial position and to ensure a level of reserves adequate for the implementation of its programme of economic development, a contracting party coming within the scope of paragraph 4 (a) of this Article may, subject to the provisions of paragraphs 10 to 12, control the general level of its imports by restricting the quantity or value of merchandise permitted to be imported; *Provided* that the import restrictions instituted, maintained or intensified shall not exceed those necessary:

(a) to forestall the threat of, or to stop, a serious decline in its monetary reserves, or

(b) in the case of a contracting party with inadequate monetary reserves, to achieve a reasonable rate of increase in its reserves.

Due regard shall be paid in either case to any special factors which may be affecting the reserves of the contracting party or its need for reserves, including, where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.

10. In applying these restrictions, the contracting party may determine their incidence on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential in the light of its policy of economic development; *Provided* that the restrictions are so applied as to avoid unnecessary damage to the commercial or economic interests of any other contracting party and not to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and *Provided* further that the restrictions are not so applied as to prevent the importation of commercial samples or to prevent compliance with patent, trade mark, copyright or similar procedures.

11. In carrying out its domestic policies, the contracting party concerned shall pay due regard to the need for restoring equilibrium in its balance of payments on a sound and lasting basis and to the desirability of assuring an economic employment of productive resources. It shall progressively relax any restrictions applied under this Section as conditions improve, maintaining them only to the extent necessary under the terms of paragraph 9 of this Article and shall eliminate them when conditions no longer justify such maintenance; *Provided* that no contracting party shall be required to withdraw or modify restrictions on the ground that a change in its development policy would render unnecessary the restrictions which it is applying under this Section.*

12. (a) Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Section, shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance of payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties.

(b) On a date to be determined by them* the CONTRACTING PARTIES shall review all restrictions still applied under this Section on that date. Beginning two years after that date, contracting parties applying restrictions under this Section shall enter into consultations of the type provided for in sub-paragraph (a) above with the CONTRACTING PARTIES at intervals of approximately, but not less than, two years according to a programme to be drawn up each year by the CONTRACTING PARTIES; *Provided* that no consultation under this sub-paragraph shall take place within two years after the conclusion of a consultation of a general nature under any other provision of this paragraph.

(c) (i) If, in the course of consultations with a contracting party under sub-paragraph (a) or (b) of this paragraph, the CONTRACTING PARTIES find that the restrictions are not consistent with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV), they shall indicate the nature of the inconsistency and may advise that the restrictions be suitably modified.

(ii) If, however, as a result of the consultations, the CONTRACTING PARTIES determine that the restrictions are being applied in a manner involving an inconsistency of a serious nature with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV) and that damage to the trade of any contracting party is caused or threatened thereby, they shall so inform the contracting party applying the restrictions and shall make appropriate recommendations for securing conformity with such provisions within a specified period. If such contracting party does not comply with these recommendations within the specified period, the CONTRACTING PARTIES may release any contracting party the trade of which is adversely affected by the restrictions from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(d) The CONTRACTING PARTIES shall invite any contracting party which is applying restrictions under this Section to enter into consultations with them at the request of any contracting party which can establish a *prima facie* case that the restrictions are inconsistent with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV) and that its trade is adversely affected thereby. However, no such invitation shall be issued unless the CONTRACTING PARTIES have ascertained that direct discussions between the contracting parties concerned have not been successful. If, as a result of the consultations with the CONTRACTING PARTIES no agreement is reached and they determine that the restrictions are being applied inconsistently with such provisions, and that damage to the trade of the contracting party initiating the procedure is caused or threatened thereby, they shall recommend the withdrawal or modification of the restrictions. If the restrictions are not withdrawn or modified within such time as the CONTRACTING PARTIES may prescribe, they may release the contracting party initiating the procedure from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(e) If a contracting party against which action has been taken in accordance with the last sentence of sub-paragraph (c) (ii) or (d) of this paragraph, finds that the release of obligations authorized by the CONTRACTING PARTIES adversely affects the operation of its programme and policy of economic development, it shall be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect on the sixtieth day following the day on which the notice is received by him.

(f) In proceeding under this paragraph, the CONTRACTING PARTIES shall have due regard to the factors referred to in paragraph 2 of this Article. Determinations under this paragraph shall be rendered expeditiously and, if possible, within sixty days of the initiation of the consultations.

Section C

13. If a contracting party coming within the scope of paragraph 4 (a) of this Article finds that governmental assistance is required to promote the establishment of a particular industry* with a view to raising the general standard of living of its people, but that no measure consistent with the other provisions of this Agreement is practicable to achieve that objective, it may have recourse to the provisions and procedures set out in this Section.*

14. The contracting party concerned shall notify the CONTRACTING PARTIES of the special difficulties which it meets in the achievement of the objective outlined in paragraph 13 of this Article and shall indicate the specific measure affecting imports which it proposes to introduce in order to remedy these difficulties. It shall not introduce that measure before the expiration of the time-limit laid down in paragraph 15 or 17, as the case may be, or if the measure affects imports of a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, unless it has secured the concurrence of the CONTRACTING PARTIES in accordance with provisions of paragraph 18; *Provided* that, if the industry receiving assistance has already started production, the contracting party may, after informing the CONTRACTING PARTIES, take such measures as may be necessary to prevent, during that period, imports of the product or products concerned from increasing substantially above a normal level.*

15. If, within thirty days of the notification of the measure, the CONTRACTING PARTIES do not request the contracting party concerned to consult with them,* that contracting party shall be free to deviate from the relevant provisions of the other Articles of this Agreement to the extent necessary to apply the proposed measure.

16. If it is requested by the CONTRACTING PARTIES to do so,* the contracting party concerned shall consult with them as to the purpose of the proposed measure, as to alternative measures which may be available under this Agreement, and as to the possible effect of the measure proposed on the commercial and economic interests of other contracting parties. If, as a result of such consultation, the CONTRACTING PARTIES agree that there is no measure consistent with the other provisions of this Agreement which is practicable in order to achieve the objective outlined in paragraph 13 of this Article, and concur* in the proposed measure, the contracting party concerned shall be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to apply that measure.

17. If, within ninety days after the date of the notification of the proposed measure under paragraph 14 of this Article, the CONTRACTING PARTIES have not concurred in such measure, the contracting party concerned may introduce the measure proposed after informing the CONTRACTING PARTIES.

18. If the proposed measure affects a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, the contracting party concerned shall enter into consultations with any other contracting party with which the concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein. The CONTRACTING PARTIES shall concur* in the measure if they agree that there is no measure consistent with the other provisions of this Agreement which is practicable in order to achieve the objective set forth in paragraph 13 of this Article, and if they are satisfied:

- (a) that agreement has been reached with such other contracting parties as a result of the consultations referred to above, or
- (b) if no such agreement has been reached within sixty days after the notification provided for in paragraph 14 has been received by the CONTRACTING PARTIES, that the contracting party having recourse to this Section has made all reasonable efforts to reach an agreement and that the interests of other contracting parties are adequately safeguarded.*

The contracting party having recourse to this Section shall thereupon be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to permit it to apply the measure.

19. If a proposed measure of the type described in paragraph 13 of this Article concerns an industry the establishment of which has in the initial period been facilitated by incidental protection afforded by restrictions imposed by the contracting party concerned for balance of payments purposes under the relevant provisions of this Agreement, that contracting party may resort to the provisions and procedures of this Section; *Provided* that it shall not apply the proposed measure without the concurrence* of the CONTRACTING PARTIES.*

20. Nothing in the preceding paragraphs of this Section shall authorize any deviation from the provisions of Articles I, II and XIII of this Agreement. The provisos to paragraph 10 of this Article shall also be applicable to any restriction under this Section.

21. At any time while a measure is being applied under paragraph 17 of this Article any contracting party substantially affected by it may suspend the application to the trade of the contracting party having recourse to this Section of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove;* *Provided* that sixty days' notice of such suspension is given to the CONTRACTING PARTIES not later than six months after the measure has been introduced or changed substantially to the detriment of the contracting party affected. Any such contracting party shall afford adequate opportunity for consultation in accordance with the provisions of Article XXII of this Agreement.

Section D

22. A contracting party coming within the scope of sub-paragraph 4 (b) of this Article desiring, in the interest of the development of its economy, to introduce a measure of the type described in paragraph 13 of this Article in respect of the establishment of a particular industry* may apply to the CONTRACTING PARTIES for approval of such measure. The CONTRACTING PARTIES shall promptly consult with such contracting party and shall, in making their decision, be guided by the considerations set out in paragraph 16. If the CONTRACTING PARTIES concur* in the proposed measure the contracting party concerned shall be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to permit it to apply the measure. If the proposed measure affects a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, the provisions of paragraph 18 shall apply.*

23. Any measure applied under this Section shall comply with the provisions of paragraph 20 of this Article.

Interpretative Notes from Annex I

Ad Article XVIII

The CONTRACTING PARTIES and the contracting parties concerned shall preserve the utmost secrecy in respect of matters arising under this Article.

Paragraphs 1 and 4

1. When they consider whether the economy of a contracting party "can only support low standards of living", the CONTRACTING PARTIES shall take into consideration the normal position of that economy and shall not base their determination on exceptional circumstances such as those which may result from the temporary existence of exceptionally favourable conditions for the staple export product or products of such contracting party.

2. The phrase "in the early stages of development" is not meant to apply only to contracting parties which have just started their economic development, but also to contracting parties the economies of which are undergoing a process of industrialization to correct an excessive dependence on primary production.

Paragraphs 2, 3, 7, 13 and 22

The reference to the establishment of particular industries shall apply not only to the establishment of a new industry, but also to the establishment of a new branch of production in an existing industry and to the substantial transformation of an existing industry, and to the substantial expansion of an existing industry supplying a relatively small proportion of the domestic demand. It shall also cover the reconstruction of an industry destroyed or substantially damaged as a result of hostilities or natural disasters.

Paragraph 7 (b)

A modification or withdrawal, pursuant to paragraph 7 (b), by a contracting party, other than the applicant contracting party, referred to in paragraph 7 (a), shall be made within six months of the day on which the action is taken by the applicant contracting party, and shall become effective on the thirtieth day following the day on which such modification or withdrawal has been notified to the CONTRACTING PARTIES.

Paragraph 11

The second sentence in paragraph 11 shall not be interpreted to mean that a contracting party is required to relax or remove restrictions if such relaxation or removal would thereupon produce conditions justifying the intensification or institution, respectively, of restrictions under paragraph 9 of Article XVIII.

Paragraph 12 (b)

The date referred to in paragraph 12 (b) shall be the date determined by the CONTRACTING PARTIES in accordance with the provisions of paragraph 4 (b) of Article XII of this Agreement.

Paragraphs 13 and 14

It is recognized that, before deciding on the introduction of a measure and notifying the CONTRACTING PARTIES in accordance with paragraph 14, a contracting party may need a reasonable period of time to assess the competitive position of the industry concerned.

Paragraphs 15 and 16

It is understood that the CONTRACTING PARTIES shall invite a contracting party proposing to apply a measure under Section C to consult with them pursuant to paragraph 16 if they are requested to do so by a contracting party the trade of which would be appreciably affected by the measure in question.

Paragraphs 16, 18, 19 and 22

1. It is understood that the CONTRACTING PARTIES may concur in a proposed measure subject to specific conditions or limitations. If the measure as applied does not conform to the terms of the concurrence it will to that extent be deemed a measure in which the CONTRACTING PARTIES have not concurred. In cases in which the CONTRACTING PARTIES have concurred in a measure for a specified period, the contracting party concerned, if it finds that the maintenance of the measure for a further period of time is required to achieve the objective for which the measure was originally taken, may apply to the CONTRACTING PARTIES for an extension of that period in accordance with the provisions and procedures of Section C or D, as the case may be.

2. It is expected that the CONTRACTING PARTIES will, as a rule, refrain from concurring in a measure which is likely to cause serious prejudice to exports of a commodity on which the economy of a contracting party is largely dependent.

Paragraph 18 and 22

The phrase "that the interests of other contracting parties are adequately safeguarded" is meant to provide latitude sufficient to permit consideration in each case of the most appropriate method of safeguarding those interests. The appropriate method may, for instance, take the form of an additional concession to be applied by the contracting party having recourse to Section C or D during such time as the deviation from the other Articles of the Agreement would remain in force or of the temporary suspension by any other contracting party referred to in paragraph 18 of a concession substantially equivalent to the impairment due to the introduction of the measure in question. Such contracting party would have the right to safeguard its interests through such a temporary suspension of a concession; *Provided* that this right will not be exercised when, in the case of a measure imposed by a contracting party coming within the scope of paragraph 4 (a), the CONTRACTING PARTIES have determined that the extent of the compensatory concession proposed was adequate.

Paragraph 19

The provisions of paragraph 19 are intended to cover the cases where an industry has been in existence beyond the "reasonable period of time" referred to in the note to paragraphs 13 and 14, and should not be so construed as to deprive a contracting party coming within the scope of paragraph 4 (a) of Article XVIII, of its right to resort to the other provisions of Section C, including paragraph 17, with regard to a newly established industry even though it has benefited from incidental protection afforded by balance of payments import restrictions.

Paragraph 21

Any measure taken pursuant to the provisions of paragraph 21 shall be withdrawn forthwith if the action taken in accordance with paragraph 17 is withdrawn or if the CONTRACTING PARTIES concur in the measure proposed after the expiration of the ninety-day time limit specified in paragraph 17.

Ad Articles XI, XII, XIII, XIV and XVIII

Throughout Articles XI, XII, XIII, XIV and XVIII, the terms "import restrictions" or "export restrictions" include restrictions made effective through state-trading operations.

UNDERSTANDING ON THE BALANCE-OF-PAYMENTS PROVISIONS
OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members,

Recognizing the provisions of Articles XII and XVIII:B of GATT 1994 and of the Declaration on Trade Measures Taken for Balance-of-Payments Purposes adopted on 28 November 1979 (BISD 26S/205-209, referred to in this Understanding as the "1979 Declaration") and in order to clarify such provisions¹;

Hereby agree as follows:

Application of Measures

1. Members confirm their commitment to announce publicly, as soon as possible, time-schedules for the removal of restrictive import measures taken for balance-of-payments purposes. It is understood that such time-schedules may be modified as appropriate to take into account changes in the balance-of-payments situation. Whenever a time-schedule is not publicly announced by a Member, that Member shall provide justification as to the reasons therefor.
2. Members confirm their commitment to give preference to those measures which have the least disruptive effect on trade. Such measures (referred to in this Understanding as "price-based measures") shall be understood to include import surcharges, import deposit requirements or other equivalent trade measures with an impact on the price of imported goods. It is understood that, notwithstanding the provisions of Article II, price-based measures taken for balance-of-payments purposes may be applied by a Member in excess of the duties inscribed in the Schedule of that Member. Furthermore, that Member shall indicate the amount by which the price-based measure exceeds the bound duty clearly and separately under the notification procedures of this Understanding.
3. Members shall seek to avoid the imposition of new quantitative restrictions for balance-of-payments purposes unless, because of a critical balance-of-payments situation, price-based measures cannot arrest a sharp deterioration in the external payments position. In those cases in which a Member applies quantitative restrictions, it shall provide justification as to the reasons why price-based measures are not an adequate instrument to deal with the balance-of-payments situation. A Member maintaining quantitative restrictions shall indicate in successive consultations the progress made in significantly reducing the incidence and restrictive effect of such measures. It is understood that not more than one type of restrictive import measure taken for balance-of-payments purposes may be applied on the same product.
4. Members confirm that restrictive import measures taken for balance-of-payments purposes may only be applied to control the general level of imports and may not exceed what is necessary to address the balance-of-payments situation. In order to minimize any incidental protective effects, a Member shall administer restrictions in a transparent manner. The authorities of the importing Member shall provide adequate justification as to the criteria used to determine which products are subject to restriction. As provided in paragraph 3 of Article XII and paragraph 10 of Article XVIII, Members may, in the case of certain essential products, exclude or limit the application of surcharges applied across the board or other measures applied for balance-of-payments purposes. The term 'essential products' shall be understood to mean products which meet basic consumption needs or which contribute to the Member's effort to improve its balance-of-payments situation, such as capital goods or inputs needed for production. In the administration of quantitative restrictions, a Member shall use discretionary licensing only when unavoidable and shall phase it out progressively. Appropriate justification shall be provided as to the criteria used to determine allowable import quantities or values.

Procedures for Balance-of-Payments Consultations

5. The Committee on Balance-of-Payments Restrictions (referred to in this Understanding as the "Committee") shall carry out consultations in order to review all restrictive import measures taken for balance-of-payments purposes. The membership of the Committee is open to all Members indicating their wish to serve on it. The Committee shall follow the procedures for consultations on balance-of-payments restrictions approved on 28 April 1970 (BISD 18S/48-53, referred to in this Understanding as "full consultation procedures"), subject to the provisions set out below.
6. A Member applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures shall enter into consultations with the Committee within four months of the adoption of such measures. The Member adopting such measures may request that a consultation be held under paragraph 4(a) of Article XII or paragraph 12(a) of Article XVIII as appropriate. If no such request has been made, the Chairman of the Committee shall invite the Member to hold such a consultation. Factors that may be examined in the consultation would include, *inter alia*, the introduction of new types of restrictive measures for balance-of-payments purposes, or an increase in the level or product coverage of restrictions.
7. All restrictions applied for balance-of-payments purposes shall be subject to periodic review in the Committee under paragraph 4(b) of Article XII or under paragraph 12(b) of Article XVIII, subject to the possibility of altering the periodicity of consultations in agreement with the consulting Member or pursuant to any specific review procedure that may be recommended by the General Council.
8. Consultations may be held under the simplified procedures approved on 19 December 1972 (BISD 20S/47-49, referred to in this Understanding as "simplified consultation procedures") in the case of least-developed country Members or in the case of developing country

¹Nothing in this Understanding is intended to modify the rights and obligations of Members under Articles XII or XVIII:B of GATT 1994. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of restrictive import measures taken for balance-of-payments purposes.

Members which are pursuing liberalization efforts in conformity with the schedule presented to the Committee in previous consultations. Simplified consultation procedures may also be used when the Trade Policy Review of a developing country Member is scheduled for the same calendar year as the date fixed for the consultations. In such cases the decision as to whether full consultation procedures should be used will be made on the basis of the factors enumerated in paragraph 8 of the 1979 Declaration. Except in the case of least-developed country Members, no more than two successive consultations may be held under simplified consultation procedures.

Notification and Documentation

9. A Member shall notify to the General Council the introduction of or any changes in the application of restrictive import measures taken for balance-of-payments purposes, as well as any modifications in time-schedules for the removal of such measures as announced under paragraph 1. Significant changes shall be notified to the General Council prior to or not later than 30 days after their announcement. On a yearly basis, each Member shall make available to the Secretariat a consolidated notification, including all changes in laws, regulations, policy statements or public notices, for examination by Members. Notifications shall include full information, as far as possible, at the tariff-line level, on the type of measures applied, the criteria used for their administration, product coverage and trade flows affected.

10. At the request of any Member, notifications may be reviewed by the Committee. Such reviews would be limited to the clarification of specific issues raised by a notification or examination of whether a consultation under paragraph 4(a) of Article XII or paragraph 12(a) of Article XVIII is required. Members which have reasons to believe that a restrictive import measure applied by another Member was taken for balance-of-payments purposes may bring the matter to the attention of the Committee. The Chairman of the Committee shall request information on the measure and make it available to all Members. Without prejudice to the right of any member of the Committee to seek appropriate clarifications in the course of consultations, questions may be submitted in advance for consideration by the consulting Member.

11. The consulting Member shall prepare a Basic Document for the consultations which, in addition to any other information considered to be relevant, should include: (a) an overview of the balance-of-payments situation and prospects, including a consideration of the internal and external factors having a bearing on the balance-of-payments situation and the domestic policy measures taken in order to restore equilibrium on a sound and lasting basis; (b) a full description of the restrictions applied for balance-of-payments purposes, their legal basis and steps taken to reduce incidental protective effects; (c) measures taken since the last consultation to liberalize import restrictions, in the light of the conclusions of the Committee; (d) a plan for the elimination and progressive relaxation of remaining restrictions. References may be made, when relevant, to the information provided in other notifications or reports made to the WTO. Under simplified consultation procedures, the consulting Member shall submit a written statement containing essential information on the elements covered by the Basic Document.

12. The Secretariat shall, with a view to facilitating the consultations in the Committee, prepare a factual background paper dealing with the different aspects of the plan for consultations. In the case of developing country Members, the Secretariat document shall include relevant background and analytical material on the incidence of the external trading environment on the balance-of-payments situation and prospects of the consulting Member. The technical assistance services of the Secretariat shall, at the request of a developing country Member, assist in preparing the documentation for the consultations.

Conclusions of Balance-of-Payments Consultations

13. The Committee shall report on its consultations to the General Council. When full consultation procedures have been used, the report should indicate the Committee's conclusions on the different elements of the plan for consultations, as well as the facts and reasons on which they are based. The Committee shall endeavour to include in its conclusions proposals for recommendations aimed at promoting the implementation of Articles XII and XVIII:B, the 1979 Declaration and this Understanding. In those cases in which a time-schedule has been presented for the removal of restrictive measures taken for balance-of-payments purposes, the General Council may recommend that, in adhering to such a time-schedule, a Member shall be deemed to be in compliance with its GATT 1994 obligations. Whenever the General Council has made specific recommendations, the rights and obligations of Members shall be assessed in the light of such recommendations. In the absence of specific proposals for recommendations by the General Council, the Committee's conclusions should record the different views expressed in the Committee. When simplified consultation procedures have been used, the report shall include a summary of the main elements discussed in the Committee and a decision on whether full consultation procedures are required.

II. INTERPRETATION AND APPLICATION OF ARTICLE XVIII

A. SCOPE AND APPLICATION OF ARTICLE XVIII

1. General issues

The present text of Articles XII and XVIII was agreed in the 1954-55 Review Session, and entered into effect on 7 October 1957. The principal source concerning the drafting of Articles XII and XVIII:B, C and D is the Report of the Review Working Party on "Quantitative Restrictions".² Section XVIII:A was redrafted in the Review Working Party on Schedules and Customs Administration, together with Article XXVIII; the Report of that Working Party³ is the principal source concerning its drafting.

Articles XII and XVIII:B have been amplified by detailed consultation procedures introduced in 1970, by "simplified" consultation procedures for developing countries introduced in 1972 and by provisions on the application of the Articles and consultation procedures laid down in the 1979 Declaration on Trade Measures Taken for Balance-of-Payments Purposes, which extend the GATT examination of the balance-of-payments provisions from quantitative restrictions alone to all trade measures taken for balance-of-payments purposes.

The Report of the Review Working Party on "Quantitative Restrictions" notes concerning the general orientation of Article XVIII as redrafted in 1955:

"...The general concept of the new Article is that economic development is consistent with the objectives of the General Agreement and that the raising of the general standard of living of the underdeveloped countries which should be the result of economic development will facilitate the attainment of the objectives of the Agreement. In that sense, the new text represents a new and more positive approach to the problem of economic development and to the ways and means of reconciling the requirements of economic development with the obligations undertaken under the General Agreement regarding the conduct of commercial policy.

"The recognition of this general concept led the Working Party to the conclusion that a suitable solution could be found in an application to the special circumstances of economic development of the principle underlying Article XIX, i.e. that when a country is faced by a conflict between a vital domestic interest and the interests of its exporters as secured by the provisions of the General Agreement, it should, in the last resort, be possible for the government of that country, without infringing its obligations under the General Agreement, to take such action as it considers to be necessary, on the condition that any other contracting party affected by such action would also be free to take such measures as may be necessary to restore the balance of benefits. It is clear that such a condition has an important restraining influence since, before taking action, the government concerned would have to weigh carefully the advantages and disadvantages of unilateral action. Moreover, the new Article contains a number of safeguards to ensure that the exercise of the right to deviate from an obligation under the Agreement would be strictly limited to cases where no other alternative measure consistent with the Agreement would be available, that the new provisions would be reserved exclusively to those under-developed countries which really need such facilities, and that the measures permitted under the Article should be directly related to the requirements of economic development and therefore would contribute in a positive manner to the growth of the country's economy as a whole. Finally, in the various sections of the Article, resort to unilateral action is only permitted after various requirements regarding consultation with the CONTRACTING PARTIES and, in certain cases, negotiation with individual governments have been complied with. Those safeguards are such that it may be reasonably expected that the number of cases in which action under Article XVIII would be taken without the concurrence of the CONTRACTING PARTIES or without agreement with the contracting parties affected would be reduced to a minimum".⁴

²L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170.

³L/329, adopted on 26 February 1955, 3S/205, 215.

⁴L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 179-180, paras. 35-36.

2. Preamble: paragraphs 1-6

The Report of the Review Working Party on “Quantitative Restrictions” notes that

“The *Preamble* contains the recognition of the general principles governing the Article and attempts to define the special problems which economic development may raise for countries having a low standard of living. It also sets out the criteria by which the contracting parties would be considered to be entitled to the facilities of this Article.”⁵

(1) “the objectives of this Agreement”

During the Review Session, when the present text of Article XVIII was drafted, it was also agreed to incorporate the amended text of the Preamble to the General Agreement into the General Agreement as a new Article I entitled “Objectives”. However, this change did not enter into effect because the Protocol Amending Part I and Articles XXIX and XXX did not achieve the necessary unanimous approval and was abandoned. See also references to “objectives” in the Preamble, Articles XXXVI:1 and XXXVII:2(b)(iii), and the Note *Ad* Article XXXVI:1.

(2) “the utmost secrecy”

The Note *Ad* Article XVIII, which incorporates the former text of Article XVIII:2 before the Review Session, provides that “The CONTRACTING PARTIES and the contracting parties concerned shall preserve the utmost secrecy in respect of matters arising under this Article”. See the discussion on secrecy in balance-of-payments consultations in the chapter on Article XII.

(3) “low standards of living”; “early stages of development”

The Report of the Review Working Party on “Quantitative Restrictions” notes that

“...resort to Article XVIII would not be open to all contracting parties, but, apart from Section D, only to countries which are in the early stages of their development and whose economy can only support low standards of living. This limitation appears to be justified by the fact that it would be more difficult for countries having limited resources at their disposal and depending on primary production to rely exclusively on measures consistent with the General Agreement in order to solve the transitional problems which may arise from the implementation of programmes of economic development ...”.⁶

See the Interpretative Notes to paragraphs 1 and 4. See also the 1949 “Questionnaire relating to statements in support of measures for which a release is sought under Article XVIII”.⁷

In the 1957 Panel Report on “Applications by Ceylon,” the “Panel on Article XVIII Applications” considered the eligibility of the applicant under paragraph 4(a) to resort to Section C of Article XVIII. See paragraph 4 of this report for the various criteria used by the panel (per capita gross national product; share of manufacturing, mining and construction in the gross national product).⁸ The 1958 Report on “Consultations and Review Regarding Balance-of-Payments Restrictions” notes “the recommendation of the Chairman of the CONTRACTING PARTIES that it be placed on record that twelve of the contracting parties applying balance-of-payments import restrictions at present fulfil the requirements of Article XVIII:4 and that their restrictions be considered as being applied under Article XVIII:B rather than Article XII”.⁹

⁵*Ibid.*, 3S/182, para. 41.

⁶*Ibid.*, 3S/180-181, para. 37.

⁷Adopted on 10 August 1949, II/63-65.

⁸L/751, adopted on 28 November 1957, 6S/112, 113, para. 4.

⁹L/931, adopted on 22 November 1958, 7S/90, 92, para. 8. The twelve contracting parties referred to were: Brazil, Chile, Ghana, Greece, India, Indonesia, Malaysia, Myanmar, Pakistan, Sri Lanka, Turkey and Uruguay.

In a few instances consultations have been conducted concerning balance-of-payments measures without reference to either Article XII or Article XVIII.¹⁰ In another instance a contracting party has consulted concerning the same measures under Article XVIII:B and subsequently under Article XII.¹¹

(4) “particular industry”

See the Interpretative Note.

(5) “with a view to raising the general standard of living” (paragraphs 3, 7 and 13)

The Report of the Review Working Party on “Quantitative Restrictions” notes that this phrase “has been used instead of the words ‘in order to raise the general standard of living’ which was contained in earlier drafts. The Working Party felt that this more flexible form of words would cover cases where the direct contribution which the establishment of a new industry was expected to make to the general standard of living of the country was not appreciable”.¹²

The Decision on “Safeguard Action for Development Purposes” of 28 November 1979 provides as follows:

“1. The CONTRACTING PARTIES recognize that the implementation by less-developed contracting parties of programmes and policies of economic development aimed at raising the standard of living of the people may involve in addition to the establishment of particular industries¹³ the development of new or the modification or extension of existing production structures with a view to achieving fuller and more efficient use of resources in accordance with the priorities of their economic development. Accordingly, they agree that a less-developed contracting party may, to achieve these objectives, modify or withdraw concessions included in the appropriate schedules annexed to the General Agreement as provided for in Section A of Article XVIII or, where no measure consistent with the other provisions of the General Agreement is practicable to achieve these objectives, have recourse to Section C of Article XVIII, with the additional flexibility provided for below. In taking such action the less-developed contracting party concerned shall give due regard to the objectives of the General Agreement and to the need to avoid unnecessary damage to the trade of other contracting parties.

“2. The CONTRACTING PARTIES recognize further that there may be unusual circumstances where delay in the application of measures which a less-developed contracting party wishes to introduce under Section A or Section C of Article XVIII may give rise to difficulties in the application of its programmes and policies of economic development for the aforesaid purposes. They agree, therefore, that in such circumstances, the less-developed contracting party concerned may deviate from the provisions of Section A and paragraphs 14, 15, 17 and 18 of Section C to the extent necessary for introducing the measures contemplated on a provisional basis immediately after notification.

“3. It is understood that all other requirements of the preambular part of Article XVIII and of Sections A and C of that Article, as well as the Notes and Supplementary Provisions set out in Annex I under these Sections will continue to apply to the measures to which this Decision relates.

“4. The CONTRACTING PARTIES shall review this Decision in the light of experience with its operation, with a view to determining whether it should be extended, modified or discontinued”.¹⁴

¹⁰Israel (BOP/R/90, BOP/R/101, BOP/R/113, BOP/R/129, BOP/R/142, BOP/R/155, BOP/R/170, BOP/R/187, BOP/R/195, BOP/R/210); Portugal (BOP/R/62, BOP/R/93, BOP/R/106, BOP/R/111, BOP/R/118, BOP/R/125, BOP/R/134, BOP/R/145, BOP/R/152); South Africa (BOP/R/92, BOP/R/211).

¹¹Greece (Consultations under Article XVIII:B in BOP/R/89, BOP/R/100, BOP/R/114, BOP/R/123; Article XVIII:B disinvoked, 1984; consultation under Article XII, BOP/R/160; Article XII disinvoked 1987).

¹²L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 182-183, para. 42.

¹³Footnote 1 to the Decision provides: “As referred to in paragraphs 2, 3, 7, 13 and 22 of Article XVIII and in the Note to these paragraphs”.

¹⁴L/4897, Decision of 28 November 1979, 26S/209.

(6) Paragraph 4(b)

The Report of the Review Working Party on “Quantitative Restrictions” notes that “The clause in sub-paragraph 4(b) reading ‘whose economy is in the process of development’ should not be construed as a legal limitation on the eligibility of countries to submit applications under Section D, but as a general indication of the type of economy whose need that Section is intended to meet”.¹⁵

On 19 May 1965, Australia accepted the Protocol Introducing Part IV with a Declaration stating, *inter alia*, that Australia was “one of the contracting parties referred to in Article XVIII:4(b) of the General Agreement, the economy of which is in the course of industrial development and which is seeking to avoid an excessive dependence on a limited range of primary products for its export earnings but which is not a less-developed country”.¹⁶

(7) Paragraph 5: consultations when measures of a contracting party cause a decline in export earnings of developing countries dependent on exports of a small number of primary commodities

During the 1954-55 Review Session, Pakistan proposed that when any developing country was affected by a decline in imports by a particular country of primary commodities exported by it, or by measures likely to lead to such a decline, the developing country be able to ask for consultations; the proposal stated that “where a grave threat has arisen or is likely to arise to the economy of an under-developed country consequent upon measures taken by the government or quasi-government organizations of another contracting party the former may be able, at the discretion of the CONTRACTING PARTIES, to invoke the procedure of multilateral consultations”.¹⁷ A sub-group of Review Working Party IV which studied the Pakistan proposal proposed the present text of Articles XVIII:5 and XXII:2.¹⁸ The Report of Review Working Party I on “Quantitative Restrictions” notes that the insertion of paragraph 5 had been recommended “to refer specifically to the consultation procedure under Article XXII in cases of sudden falls in the sale of primary commodities”.¹⁹

The Resolution on “Particular Difficulties Connected with Trade in Primary Commodities” adopted in the Eleventh Session in 1956 provided, *inter alia*, that the CONTRACTING PARTIES “Resolve ...that it would be appropriate for them to enter into consultations on problems arising out of the trade in primary commodities pursuant to the provisions of paragraph 2 of Article XXII and of paragraph 5 of Article XVIII ...”.²⁰ The Report of the Working Party that drafted the Resolution, on “Particular Difficulties Connected with Trade in Primary Commodities”, also noted the ruling made at the Tenth Session that the CONTRACTING PARTIES have the competence to deal, at the request of one or more contracting parties, with difficulties arising in connexion with international trade in primary commodities.²¹ The Report provides that

“...In addition to this broad competence which would make it possible for any contracting party to submit to the CONTRACTING PARTIES any particular difficulties which it was experiencing in connexion with trade in primary commodities, and which difficulties were in its view such as to impede the attainment of the objectives of the General Agreement, there are specific provisions in the General Agreement which afford an opportunity for contracting parties to secure consideration of special problems arising in this field...difficulties of this kind would be appropriate matters to bring forward under Article XXII, which, when the revised text comes into effect, will provide not only for bilateral consultations, but also for consultations with the CONTRACTING PARTIES as a whole. Finally, the revised text of paragraph 5 of Article XVIII makes particular reference to problems arising out of exports of primary commodities and for consultations regarding these problems in accordance with the provisions of Article XXII”.²²

¹⁵L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 186, para. 54.

¹⁶Status of Legal Instruments, p. 2-14.2. See also statements of Australia, New Zealand and South Africa, 2SS/SR.4 and 5. W.9/134; see also L/291.

W.9/180, “Report by Sub-Group C on the Pakistan Proposal Relating to the Off-take of Primary Commodities”; see also Spec/92/55 and the Report of the Working Party on “Organizational and Functional Questions”, L/327, adopted on 28 February, 5 and 7 March 1955, 3S/231, 244, para. 42.

¹⁹L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 182, para. 41.

²⁰Resolution of 17 November 1956, 5S/26, 27, para. 3.

²¹See ruling at SR.10/19, p. 218.

²²L/592/Rev.1, adopted on 17 November 1956, 5S/87, 88, para. 1.

The Report of the Working Party in the Fourteenth Session on “Impact of Commodity Problems on International Trade” further noted: “...The General Agreement offers facilities for bilateral and multilateral consultations of which governments may avail themselves when difficulties arise in international commodity trade. ...Contracting parties, whether importing or exporting countries, can avail themselves of the provisions of Article XXII of the General Agreement and initiate consultations under that Article when difficulties arise in connexion with their commodity trade”.²³

In 1981 Peru requested consultations with the United States under the Resolution of 4 March 1955 on the liquidation of strategic stocks and the provisions of Article XVIII:5 and Article XXII:1 of the General Agreement because of prejudice caused to the economy of Peru by the liquidation of United States strategic stocks of silver.²⁴

See also Articles XXXVI:4 and XXXVII:2, and the material in this Index on Articles XXII:2 and XXV:1.

(8) *Annual reviews of measures applied under Article XVIII:C and D*

The Report of the Review Working Party on “Quantitative Restrictions” notes:

“Paragraph 6 of the preamble provides for an annual review of the deviations from the provisions of the Agreement. This review is intended to provide an opportunity for discussing the effects of the measures applied under Sections C and D, the progress made by the industries in question and the general operation of these Sections. It is agreed that the CONTRACTING PARTIES shall not withdraw their concurrence or modify the terms of a concurrence during the period of validity for which it has been given, or request the withdrawal or modification of a measure applied in full accordance with the terms of that concurrence”.²⁵

All measures applied pursuant to the provisions of Section C were reviewed annually.²⁶ The seventh and most recent review, conducted at the Twenty-fourth Session in November 1967, noted that Ceylon was no longer applying measures under Section C.²⁷ No contracting party has had recourse to Section D.

3. Article XVIII:A

The Report of the Review Working Party on “Schedules and Customs Administration” notes as follows concerning the drafting of Article XVIII:A at the Review Session:

“...Section A ...permits a contracting party, which comes within the definition in paragraph 4(a) ...to enter into negotiations for the modification of a concession, in order to promote the establishment of an industry, with the country with which it was initially negotiated and with other substantially interested countries. If agreement is not reached within sixty days the matter may be referred to the CONTRACTING PARTIES. If the CONTRACTING PARTIES find that the contracting party which initiated the negotiation has made every effort to reach an agreement and has offered an adequate compensatory adjustment they can allow the contracting party to modify or withdraw the concession.

“The Working Party recommends an addition to Section A to provide that the CONTRACTING PARTIES may allow the applicant contracting party to modify or withdraw concessions in cases where it is unable, for good reasons, to provide adequate compensation; the provision corresponds to that of Article XXVIII:4(d) including the right of other contracting parties to modify or withdraw substantially equivalent concessions initially negotiated with that contracting party”.²⁸

²³L/1103, adopted on 20 November 1959, 8S/76, 84, para. 35.

²⁴L/5264.

²⁵L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 182, para. 41.

²⁶Reports of these annual reviews appear at 7S/71, 8S/97, 9S/101, 10S/106, 11S/158, 13S/65, 14S/127, and 15S/65.

²⁷15S/65.

²⁸L/329, adopted on 26 February 1955, 3S/205, 215, paras. 22-23. See also documents from the Review Session on the drafting of Article XVIII:A: reports in W.9/17, W.9/43, Sec/54/140, W.9/206, W.9/212+Corr.1; proposals in W.9/37, W.9/39, W.9/40, W.9/49.

As of March 1994, Section A of Article XVIII had been invoked nine times: by Benelux on behalf of Suriname (1958), Greece (1956, 1965), Indonesia (1983), Korea (1958), and Sri Lanka (twice in 1955 and once each in 1956 and 1957).

See also: the provisions of the Decision of 28 November 1979 on "Safeguard Action for Development Purposes" above at page 498; the Interpretative Notes to Section A; and the material under Article XXVIII:4.

(1) "to modify or withdraw a concession"

The Decisions of 19 November 1968 and 26 March 1980 on "Procedures for Modification and Rectification of Schedules of Tariff Concessions" include in their scope modifications resulting from action under Article XVIII.²⁹ The Guidelines adopted on 10 November 1980 on "Procedures for Negotiations under Article XXVIII" provide in paragraph 10 that "These procedures are in relevant parts also valid for renegotiations under Article XVIII, paragraph 7 ...".³⁰

(2) "such concession was initially negotiated"

See Article XXVIII; see also the discussion of "floating initial negotiating rights" under Article XXVIII.

4. Article XVIII:B: Import measures for balance-of-payments reasons

(1) Paragraphs 8 and 9

The Report of the Review Working Party on "Quantitative Restrictions" notes that

"...Although all countries in balance-of-payments difficulties inevitably have a large number of problems in common and, therefore, the procedures relating to balance-of-payments restrictions are not fundamentally different, nevertheless the countries coming under Section B of Article XVIII face special additional problems which the provisions have been adjusted to meet. The Working Party has recognized that for such countries balance-of-payments difficulties will tend to be generated by development itself. In addition, paragraph 9, although modelled on paragraphs 1 and 2 of Article XII, recognizes that the reserve problem for these countries is one of the adequacy of the reserves in relation to their programme of economic development, that for this reason the word 'imminent' which occurs in paragraph 2(a) is inappropriate in this context, and that in order to safeguard their external position these countries may need over a period of time to control the general level of their imports in order to prevent that level from rising beyond the means available to pay for imports as the progress of development programmes creates new demands".³¹

(a) Disinvocations of Article XVIII:B since 1979

Contracting parties having disinvoked Article XVIII:B since 1979 are indicated in Table B following the chapter on Article XII. See also the Secretariat Note of 24 June 1988 on "Consultations Held in the Committee on Balance-of-Payments Restrictions under Articles XII and XVIII:B since 1975".³²

²⁹L/3131, 16S/16; L/4962, 27S/25, para. 1.

³⁰C/113 and Corr.1, 27S/26, 28, para. 10.

³¹L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 183, para. 44.

³²MTN.GNG/NG7/W/46, para. 31.

(2) Paragraphs 10 and 11: application of balance-of-payments measures

The Report of the Review Working Party on “Quantitative Restrictions” notes that

“Paragraphs 10 and 11 reproduce in substance the provisions of sub-paragraph 2(b) and of paragraph 3 of Article XII. These paragraphs have however been re-arranged and the thought contained in the first sentence of sub-paragraph 3(d) of Article XII has been omitted as it was already expressed in the first two paragraphs of Section B ...”.³³

See also the material in this volume on paragraphs 2(b) and 3 of Article XII.

The 1979 “Declaration on Trade Measures Taken for Balance-of-Payments Purposes” provides that:

“The CONTRACTING PARTIES,

“*Having regard* to the provisions of Articles XII and XVIII:B of the General Agreement; ...

“*Reaffirming* that restrictive import measures taken for balance-of-payments purposes should not be taken for the purpose of protecting a particular industry or sector;

“*Convinced* that the contracting parties should endeavour to avoid that restrictive import measures taken for balance-of-payments purposes stimulate new investments that would not be economically viable in the absence of the measures;

“*Recognizing* that the less-developed contracting parties must take into account their individual development, financial and trade situation when implementing restrictive import measures taken for balance-of-payments purposes; ...

“*Agree* as follows:

“...The application of restrictive import measures taken for balance-of-payments purposes shall be subject to the following conditions in addition to those provided for in Articles XII, XIII, XV and XVIII without prejudice to other provisions of the General Agreement:

“(a) In applying restrictive import measures contracting parties shall abide by the disciplines provided for in the GATT and give preference to the measure which has the least disruptive effect on trade³⁴;

“(b) The simultaneous application of more than one type of trade measure for this purpose should be avoided;

“(c) Whenever practicable, contracting parties shall publicly announce a time schedule for the removal of the measures.

“The provisions of this paragraph are not intended to modify the substantive provisions of the General Agreement”.³⁵

In the three parallel Panel Reports in 1989 on “Republic of Korea - Restrictions on Imports of Beef” in response to complaints by Australia,³⁶ the United States,³⁷ and New Zealand,³⁸ the Panel, having decided that the consistency of restrictive measures with Article XVIII:B could be examined under Article XXIII, examined

³³*Ibid.*, 3S/183, para. 45.

³⁴Footnote 1 to the Decision provides: “It is understood that the less-developed contracting parties must take into account their individual development, financial and trade situation when selecting the particular measure to be applied”.

³⁵L/4904, adopted on 28 November 1979, 26S/205, preamble and para. 1.

³⁶L/6504, adopted on 7 November 1989, 36S/202.

³⁷L/6503, adopted on 7 November 1989, 36S/268.

³⁸L/6505, adopted on 7 November 1989, 36S/234.

Korea's Article XVIII:B justification for its import restrictions on beef, which it was contended were not justified because it was alleged that Korea no longer had balance-of-payments problems.

"...The Panel noted that Korea had maintained import restrictions on beef on balance-of-payments grounds since 1967. The Panel noted the condition in paragraph 9 of Article XVIII that 'import restrictions instituted, maintained or intensified shall not exceed those necessary: (a) to forestall the threat of, or to stop, a serious decline in its monetary reserves, or (b) in the case of a contracting party with inadequate monetary reserves, to achieve a reasonable rate of increase in its reserves'. The Panel noted further that paragraph 11 required the progressive relaxation of such restrictions 'as conditions improve' and their elimination 'when conditions no longer justify such maintenance.'

"Article XV:2 of the General Agreement provided that '[i]n all cases in which the CONTRACTING PARTIES are called upon to consider or deal with problems concerning monetary reserves, balances of payments or foreign exchange arrangements, they shall consult fully with the International Monetary Fund.' The latest full consultation concerning Korea's balance-of-payments situation in the Balance-of-Payments Committee had taken place in November 1987, the report of which had been adopted by the CONTRACTING PARTIES in February 1988. The next full consultation was scheduled for June 1989. The Panel considered that it should take into account the conclusions reached by the Balance-of-Payments Committee in 1987.

"At the full consultation in the Balance-of-Payments Committee with Korea in November 1987, '[t]he prevailing view expressed in the Committee was that the current situation and outlook for the balance of payments was such that import restrictions could no longer be justified under Article XVIII:B'.³⁹ Moreover, the full Balance-of-Payments Committee had 'stressed the need to establish a clear timetable for the early, progressive removal of Korea's restrictive trade measures maintained for balance-of-payments purposes' and had expressed the expectation that 'Korea would be able in the meantime to establish a timetable for the phasing-out of balance-of-payments restrictions, and that Korea would consider alternative GATT justification for any remaining measures, thus obviating the need for such consultations'.⁴⁰

"The Panel noted that all available information, including figures published by the Korean authorities and advice provided to it in February 1989 by the International Monetary Fund, had shown that the reserve holdings of Korea had increased in 1988, that Korea's balance-of-payments situation had continued to improve at a good pace since the November 1987 consultations, and that the current economic indicators of Korea were very favourable. According to information provided to the Panel by the International Monetary Fund, the Korean gross official reserves had increased by 9 billion dollars to 12 billion dollars (equivalent to three months of imports) by end 1988. The Panel concluded that in the light of the continued improvement of the Korean balance-of-payments situation, and having regard to the provisions of Article XVIII:11, there was a need for the prompt establishment of a timetable for the phasing-out of Korea's balance-of-payments restrictions on beef, as called for by the CONTRACTING PARTIES in adopting the 1987 Balance-of-Payments Committee report."⁴¹

The Panels each suggested that the CONTRACTING PARTIES recommend that:

"(a) Korea eliminate or otherwise bring into conformity with the provisions of the General Agreement the import measures on beef introduced in 1984/85 and amended in 1988; and,

"(b) Korea hold consultations with [Australia, New Zealand and the United States] and other interested contracting parties to work out a timetable for the removal of import restrictions on beef justified since 1967 by Korea for balance-of-payments reasons and report on the result of such consultations within a period of three months following the adoption of the Panel report by the Council".⁴²

³⁹Footnote 1 to this paragraph refers to BOP/R/171, paragraph 22.

⁴⁰Footnote 2 to this paragraph refers to BOP/R/171, paragraph 23, and notes that the full text of the Balance-of-Payments Committee's conclusions is contained in Annex I to each of these Panel Reports.

⁴¹*Ibid.*, paras. 98-101, 120-123, and 114-117 respectively.

⁴²*Ibid.*, paras. 109, 131 and 125 respectively.

See also paragraphs 2, 3 and 4 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994.

(3) Paragraph 12: consultations and review of balance-of-payments measures

(a) General

The Report of the Review Working Party on “Quantitative Restrictions” notes that “it was also agreed to insert an additional provision in [sub-paragraph (f)] to the effect that when they are called upon to take any action under paragraph 12 the CONTRACTING PARTIES would take fully into account the special factors existing in the case of under-developed countries which have been described in the Preamble of the Article”.⁴³

b) Notification of balance-of-payments measures

The “Procedures for dealing with new import restrictions applied for balance-of-payments reasons” adopted in 1960 provide that “any contracting party modifying its import restrictions is required to furnish detailed information promptly to the Executive Secretary, for circulation to the contracting parties”. A footnote to this paragraph notes: “Under established procedures, contracting parties should furnish such information not only when they wish to initiate a consultation pursuant to Articles XII:4(a) or XVIII:12(a) but whenever any significant changes are made in their restrictive systems”.⁴⁴

The 1972 Decision on simplified procedures for balance-of-payments consultations under Article XVIII:12(b) (cited below *in extenso*) noted that “There are a number of developing contracting parties, mostly the newly independent countries, which maintain import restrictions. ...the adoption of the ‘streamlined’ procedures set forth in paragraph 3 above should contribute substantially to easing the way for all developing countries to define their position regarding their restrictions in relation to the GATT provisions. It is therefore proposed that, upon approval of the new procedures, the secretariat be instructed to enquire and discuss with each of these developing countries with a view to establishing a complete list of the contracting parties invoking Section B of Article XVIII of the Agreement”.⁴⁵

Paragraph 3 of the 1979 Declaration provides: “Contracting parties shall promptly notify to the GATT the introduction or intensification of all restrictive import measures taken for balance-of-payments purposes. Contracting parties which have reason to believe that a restrictive import measure applied by another contracting party was taken for balance-of-payments purposes may notify the measure to the GATT or may request the GATT secretariat to seek information on the measure and make it available to all contracting parties if appropriate”.⁴⁶

Paragraph 8 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provides as follows:

“A Member applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures shall enter into consultations with the Committee within four months of the adoption of such measures. The Member adopting such measures may request that a consultation be held under paragraph 4(a) of Article XII or paragraph 12(a) of Article XVIII as appropriate. If no such request has been made, the Chairman of the Committee shall invite the Member to hold such a consultation. Factors that may be examined in the consultation would include, *inter alia*, the introduction of new types of restrictive measures for balance-of-payments purposes, or an increase in the level or product coverage of restrictions.

⁴³L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 184, para. 48.

⁴⁴Procedures approved on 16 November 1960, 9S/18, para. 2.

⁴⁵L/3772/Rev.1, approved by the Council on 19 December 1972, 20S/47, 49, para. 4.

⁴⁶L/4904, adopted on 28 November 1979, 26S/205, 207, para. 3. See also discussion on this issue in CG.18/W/9/Rev. 1, 22 October 1976. Nigeria began consulting in the Committee on Balance-of-Payments Restrictions in 1984 following a “reverse notification” by another contracting party.

For instances of “reverse notification” of restrictions or requests to the Secretariat to seek information on restrictions maintained by another contracting party, see the 1987 Note by the Secretariat on “Articles XII, XIV, XV and XVIII”⁴⁷.

In 1965, procedures were adopted relating to import restrictions maintained by newly-independent countries; it was suggested to such countries that “even if they were not yet in a position to determine whether they wished to invoke the provisions of Article XVIII as justification for some or all restrictions in force, they might submit descriptive material relative to their entire import control system, without prejudice to the consistency of the measures maintained with their obligations under GATT”.⁴⁸

See also the material on notification under Article XII.

(c) *“shall ...consult with the CONTRACTING PARTIES”: procedures and timing for consultations under paragraph 12*

The Report of the Review Working Party on “Quantitative Restrictions” notes that the main difference between the provisions of Article XVIII:12 and the corresponding provisions of Article XII:4 “relates to the periodicity of the consultations under sub-paragraph (b)” and further notes that “The remarks and agreed statements referring to consultations under Article XII and which are reproduced in paragraphs 6 to 11 of this report apply also to consultations under paragraph 12 of Article XVIII”.⁴⁹

The 1979 Declaration on “Trade Measures Taken for Balance-of-Payments Purposes”⁵⁰ states, with regard to examination of balance-of-payments measures in the Committee on Balance-of-Payments Restrictions, that “The Committee shall follow the procedures for consultations on balance-of-payments restrictions approved by the Council on 28 April 1970 (18S/48-53, hereinafter referred to as ‘full consultations procedures’) or the procedures for regular consultations on balance-of-payments restrictions with developing countries approved by the Council on 19 December 1972 (20S/47-49, hereinafter referred to as ‘simplified consultation procedures’) subject to the provisions set out below.”⁵¹

The 1970 “full consultations procedures” referred to in the Declaration describe the arrangements and procedures originally agreed in 1958 for consultations under Article XII:4(b) and Articles XVIII:12(b) as revised in the Review Session, as they had evolved to 1970. The 1970 procedures deal with the contents of the consultations, the documentation for the consultations, the time schedule for the consultations, arrangements for consultation with the International Monetary Fund, the composition of the Committee on Balance-of-Payments Restrictions, and the reports to be prepared on the consultations. Attached to the 1970 procedures are a plan of discussion for balance-of-payments consultations, and a list of points to be covered in the basic document for the consultations.⁵²

The “simplified consultation procedures” referred to in the Declaration provide:

- “(a) each year, the secretariat establishes a schedule showing the contracting parties acting under Article XVIII:B which are required to consult under paragraph 12(b) that year;
- “(b) each of these contracting parties should submit to the CONTRACTING PARTIES a concise written statement on the nature of the balance-of-payments difficulties, the system and methods of restriction (with particular reference to any discriminatory features and changes in past two years), the effects of the restrictions and prospects of liberalization;

⁴⁷MTN.GNG/NG7/W/14, dated 11 August 1987, para. 36.

⁴⁸14S/161.

⁴⁹L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 183-84, para. 46.

⁵⁰L/4904, adopted on 28 November 1979, 26S/205.

⁵¹26S/207, para. 6.

⁵²L/3388, presented to the Council on 28 April 1970, 18S/48.

- “(c) the statements received will be circulated to all contracting parties and presented to the Committee on Balance-of-Payments Restrictions for prior consideration, so that the Committee may determine whether a full consultation is desirable. If it decides that such a consultation is not desirable, the Committee will recommend to the Council that the contracting party be deemed to have consulted with the CONTRACTING PARTIES and to have fulfilled its obligations under Article XVIII:12(b) for that year. Otherwise, the CONTRACTING PARTIES will consult the International Monetary Fund, and the Committee will follow the procedures applicable hitherto for a full consultation; and
- “(d) arrangements will be made with the International Monetary Fund for the supply of balance-of-payments statistics for each country submitting a statement in accordance with paragraph (b) above”.⁵³

“It should be noted that this proposal relates only to the periodic consultations provided for in Article XVIII:12(b). Consultations under Article XVIII:12(a) will continue to follow the existing rules. Consultations with developed countries acting under Article XII will be held annually in the usual manner”.⁵⁴

Thus, the “full consultations procedures” agreed in 1970 apply to all consultations under Article XVIII:12(a); in certain cases the “simplified consultation procedures” agreed in 1972 apply to periodic consultations under Article XVIII:12(b).

The 1979 “Declaration on Trade Measures taken for Balance-of-Payments Purposes” provides that

“1. The procedures for examination stipulated in Articles XII and XVIII shall apply to all restrictive import measures taken for balance-of-payments purposes.

...

“8. In the case of consultations under Article XVIII:12(b) the Committee shall base its decision on the type of procedure on such factors as the following:

- “(a) the time elapsed since the last full consultations;
- “(b) the steps the consulting contracting party has taken in the light of conclusions reached on the occasion of previous consultations;
- “(c) the changes in the overall level or nature of the trade measures taken for balance-of-payments purposes;
- “(d) the changes in the balance-of-payments situation or prospects;
- “(e) whether the balance-of-payments problems are structural or temporary in nature.

“9. A less-developed contracting party may at any time request full consultations”.⁵⁵

Paragraphs 7 and 8 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provide as follows:

“All restrictions applied for balance-of-payments purposes shall be subject to periodic review in the Committee under paragraph 4(b) of Article XII or under paragraph 12(b) of Article XVIII, subject to the possibility of altering the periodicity of consultations in agreement with the consulting Member or pursuant to any specific review procedure that may be recommended by the General Council.

⁵³L/3772/Rev.1, approved by the Council on 19 December 1972, 20S/47, 48-49, para. 3.

⁵⁴*Ibid.*, para. 4.

⁵⁵L/4904, adopted on 28 November 1979, 26S/205, 206-208.

“Consultations may be held under the simplified procedures approved on 19 December 1972 (BISD 20S/47-49, referred to in this Understanding as ‘simplified consultation procedures’) in the case of least-developed country Members or in the case of developing country Members which are pursuing liberalization efforts in conformity with the schedule presented to the Committee in previous consultations. Simplified consultation procedures may also be used when the Trade Policy Review of a developing country Member is scheduled for the same calendar year as the date fixed for the consultations. In such cases the decision as to whether full consultation procedures should be used will be made on the basis of the factors enumerated in paragraph 8 of the 1979 Declaration. Except in the case of least-developed country Members, no more than two successive consultations may be held under simplified consultation procedures.”

Further concerning balance-of-payments consultations, see Section II.C under Article XII.

(d) *“as to the nature of its balance of payments difficulties”: scope of consultations under paragraph 12*

General scope: The 1979 “Declaration on Trade Measures taken for Balance-of-Payments Purposes” provides that “All restrictive import measures taken for balance-of-payments purposes shall be subject to consultation in the GATT Committee on Balance-of-Payments Restrictions ...”⁵⁶

External factors adversely affecting the export trade of the contracting party applying restrictions: See the material in this Index under Article XII:4(e) and Section II.C under Article XII. The Report of the Review Working Party on “Quantitative Restrictions” notes that the Working Party agreed

“that ...the scope of consultations under paragraph 12 of Article XVIII was the same as that of consultations under Article XII and that the clarification contained in paragraph 4(e) of Article XII and in the related interpretative note would apply equally to consultations undertaken under Section B of Article XVIII”.⁵⁷

Prior consultations on balance-of-payments matters: In November 1984, proposals were made in the GATT Council by Chile regarding the use of prior consultations under Article XVIII:12 and XII:4 as a preventive mechanism aimed at avoiding import restrictions by countries suffering balance-of-payments difficulties, and focusing on obstacles to expansion of trade.⁵⁸ Following consultations on this question in the Balance-of-Payments Committee, a Report was made to the Council by the Chairman of the Committee in March 1985 in which it was recognized that, in view of the text and drafting history of Article XII:4(a) and XVIII:12(a) there was nothing to prevent a contracting party in balance of payments difficulties from holding prior consultations with the Committee under the normal procedures of these Articles.⁵⁹ Such consultations, which would be full consultations, would, *inter alia*, take due account of all factors, including external factors, affecting the consulting country’s balance of payments.⁶⁰

(e) *“the CONTRACTING PARTIES shall review all restrictions applied under this Section”*

The Interpretative Note to this provision indicates that the review of restrictions under Article XVIII:12(b) and the review to be conducted under Article XII:4(b) of restrictions under Article XII were intended to be initiated on the same date.⁶¹ This review was carried out by the CONTRACTING PARTIES in 1958-59. Part I of the resulting document discusses the financial background of the restrictions and discriminations, recent changes in the use of restrictions and the then-current level of restrictions and discrimination in the use of restrictions. Part II contains separate notes describing the restrictions in force as at the end of 1958 or early in 1959, in the twenty-five contracting parties resorting to Article XII or Article XVIII:B at that time.⁶² See also the material on Article XII:4(b) in this Index.

⁵⁶*Ibid.*, 26S/207, para. 4.

⁵⁷L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 184, para. 49.

⁵⁸C/M/183.

⁵⁹C/M/186.

⁶⁰C/132; 32S/46.

⁶¹L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 184, para. 46.

⁶²MGT(59)76, dated 30 July 1959; see also material on the background of this review at 6S/39-40, paras. 13-16.

(f) *Sub-paragraphs c(ii), (d) and (e)*

The Report of the Review Working Party on “Quantitative Restrictions” notes concerning paragraph (e) that it was added “in order to allow a contracting party to withdraw from the General Agreement at shorter notice than is provided in Article XXXI” in the circumstances specified.⁶³

In the three parallel Panel Reports on “Republic of Korea - Restrictions on Imports of Beef” in response to complaints by Australia,⁶⁴ the United States,⁶⁵ and New Zealand⁶⁶, the Panel examined whether the consistency of restrictive measures with Article XVIII:B could be examined within the framework of Article XXIII. “It was the view of the Panel that excluding the possibility of bringing a complaint under Article XXIII against measures for which there was claimed balance-of-payments cover would unnecessarily restrict the application of the General Agreement. This did not preclude, however, resort to special review procedures under Article XVIII:B. Indeed, either procedure, that of Article XVIII:12(d) or Article XXIII, could have been pursued by the parties in this case. But as far as the Panel was concerned, the parties had chosen to proceed under Article XXIII”.⁶⁷ See further under Article XXIII.

(4) *Balance-of-payments measures other than quantitative restrictions*

See the discussion of surcharges for balance-of-payments purposes under Article XII:1. Concerning waivers granted in connection with the imposition of surcharges, see under Article II and Article XXV.

The Committee on Legal and Institutional Framework, which prepared the text of Part IV, recommended an amendment to Section B of Article XVIII to permit a less-developed contracting party to use temporary import surcharges, in place of quantitative restrictions, to safeguard its balance of payments.⁶⁸ This Recommendation was referred to the Committee on Trade and Development which considered the question in an Ad Hoc Group on Legal Amendments during 1965/1966.⁶⁹

The Report of the Balance-of-Payments Committee on its work during the years 1970-1974 discusses the treatment of balance-of-payments surcharges during that period.⁷⁰

The 1979 “Declaration on Trade Measures taken for Balance-of-Payments Purposes” provides, *inter alia*: “The procedures for examination stipulated in Articles XII and XVIII shall apply to all restrictive import measures taken for balance-of-payments purposes. ...The provisions of this paragraph are not intended to modify the substantive provisions of the General Agreement”.⁷¹ However, paragraph 2 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provides, *inter alia*: “It is understood that, notwithstanding the provisions of Article II, price-based measures taken for balance-of-payments purposes may be applied by a Member in excess of the duties inscribed in the Schedule of that Member.”

5. Article XVIII:C

(1) *Invocation of Article XVIII:C*

Releases have been granted under Section C of Article XVIII to Cuba, Haiti, India and Sri Lanka.⁷² Some other contracting parties, including Greece⁷³, Indonesia⁷⁴ and Malaysia⁷⁵ have notified certain import regulations

⁶³L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 184, para. 47.

⁶⁴L/6504, adopted on 7 November 1989, 36S/202.

⁶⁵L/6503, adopted on 7 November 1989, 36S/268.

⁶⁶L/6505, adopted on 7 November 1989, 36S/234.

⁶⁷*Ibid.*, 36S/227, para. 97; 36S/303, para. 119; and 36S/265, para. 113 respectively.

⁶⁸L/2281, para.7 and Annex II; L/2297, para. 6.

⁶⁹13S/76; 14S/141.

⁷⁰L/4200.

⁷¹L/4904, adopted on 28 November 1979, 26S/205, 206, para. 1.

⁷²See the list of such releases in the Index of the BISD, e.g. at 38S/141.

⁷³L/3460.

⁷⁴L/5452, L/5597.

⁷⁵C/W/448, p. 38.

taken for development purposes under Section C of Article XVIII. The measures applied pursuant to the provisions of Section C were reviewed annually. The last review was conducted at the Twenty-fourth Session in November 1967.⁷⁶

The 1979 Decision on "Safeguard Action for Development Purposes" provides that "...there may be unusual circumstances where delay in the application of measures which a less-developed contracting party wishes to introduce under Section A or Section C of Article XVIII may give rise to difficulties in the application of its programmes and policies of economic development for the aforesaid purposes. ...in such circumstances, the less-developed contracting party concerned may deviate from the provisions of Section A and paragraphs 14, 15, 17 and 18 of Section C to the extent necessary for introducing the measures contemplated on a provisional basis immediately after notification".⁷⁷ See further at page 498 above.

The 1986 Report of the Group on "Quantitative Restrictions and other Non-Tariff Measures" provides that "The Group noted that some progress had been made in bringing existing quantitative restrictions into conformity with the General Agreement. ...However, it also noted that ...countries invoking ...Article XVIII:C had not followed the prescribed procedures".⁷⁸

(2) Paragraph 14: "The contracting party concerned shall notify"

Before Article XVIII was re-drafted at the Review Session of 1954-55, Article XVIII permitted the institution or maintenance of certain measures but only on the condition that a contracting party "shall notify" the existing or proposed measures in question. The 1949 Report of the Working Party on "Notifications of Existing Measures and Procedural Questions" studied the question of notification under Article XVIII. The question was raised whether "existing legislation" covered by the derogation to Part II of the General Agreement in the Protocol of Provisional Application or accession protocols (see the chapter in this Index on provisional application) had to be notified or whether it could be retained even if not notified. In response, the Working Party concluded "that there is no obligation on the part of a contracting party to notify a measure permitted by sub-paragraph 1(b) of the Protocol of Provisional Application or sub-paragraph 1(a)(ii) of the Annex Protocol".⁷⁹

In the Interpretative Note to paragraphs 13 and 14 it is recognized "that, before deciding on the introduction of a measure and notifying the CONTRACTING PARTIES in accordance with paragraph 14, a contracting party may need a reasonable period of time to assess the competitive position of the industry concerned". With respect to this Interpretative Note and its reference to "a reasonable period of time", the Report of the Review Working Party on "Quantitative Restrictions" noted: "it is recognized that this period should normally not exceed two years".⁸⁰ See also the Note *Ad* paragraph 19 of Article XVIII.

A Questionnaire on "Information to accompany notifications under Section C, and applications under Section D, of Article XVIII" was approved on 15 October 1958 for the guidance of contracting parties.⁸¹

In 1958, a Panel on Article XVIII considered certain notifications by Ceylon of measures under Article XVIII:C. The Panel noted that the Ceylon Government had imposed temporary import controls on certain products in anticipation of the concurrence of the CONTRACTING PARTIES. "...The Panel recognized that these measures, which had not been notified to the CONTRACTING PARTIES before they were put into force, were of the type contemplated in the proviso to paragraph 14 of Article XVIII: it [expressed] the hope that if the need for similar temporary measures should arise in the future, the Ceylon Government would inform the CONTRACTING PARTIES before putting such measures into force."⁸²

⁷⁶For reports on annual reviews, see: 7S/71, 8S/97, 9S/101, 10S/106, 11S/158, 13S/65, 14S/127, 15S/65.

⁷⁷L/4897, Decision of 28 November 1979, 26S/209.

⁷⁸L/6073, adopted on 26 November 1986, 33S/160, 169, para. 35.

⁷⁹GATT/CP.3/60/Rev.1, approved on 10 August 1949, II/49, 62, para. 100.

⁸⁰L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 189, para. 65.

⁸¹L/888, 7S/85-88. It was understood that this questionnaire would replace the questionnaire approved in 1949 (II/63-65) for governments notifying measures under Article XVIII as it stood prior to the Review Session.

⁸²L/932, "Notifications by Ceylon", adopted on 22 November 1958, L/932, 56S/75, 78, para. 8.

(3) Paragraph 16: “the contracting party concerned shall consult”

The Report of the Panel on Article XVIII Applications in 1957 concerning “Applications by Ceylon” notes, concerning the consultation provided for in Article XVIII:16:

“First, the Panel endeavoured, in the light of the provisions of paragraphs 1, 2 and 13 of Article XVIII, to see whether the objectives of each measure proposed was to assist the establishment of a particular industry as defined in the relevant Note to Annex [I], if such industry was established with a view to raising the general standard of living of the Ceylonese people and if the measure proposed was required to promote the establishment of that industry.

“As regards the first criterion, the Panel examined, in the light of the data submitted by the Ceylon delegation, whether there was already a domestic production of the articles covered by each Ceylonese application, or, if such a production existed, whether the programme involved a substantial transformation of an existing industry, or a substantial increase in production for an industry which satisfied at present only a small fraction of the domestic demand. As regards the second criterion, the Panel had at its disposal estimates prepared by the secretariat with respect to the added national income which the new production was likely to bring about. ...

“The Panel then considered with the Ceylon delegation the alternative measures which might be available under the Agreement, such as tariffs (or tariff quotas) and subsidies, and took into account the practical difficulties which reliance on these measures might create for the achievement of the objectives proposed by the Ceylon Government.

“Finally, as regards the possible effect of the measures on the commercial or economic interests of other contracting parties, the Panel had at its disposal estimates prepared by the secretariat concerning the probable effects of the measures not only on the imports of the products covered by the applications but also on imports of other products, such as raw materials, capital equipment and spare parts which would be required from the establishment or expansion of domestic production and consumer goods for which an increased demand should normally result from increased wages, salaries and profits”.⁸³

The 1959 Panel Report on “Notifications by Ceylon” recorded the following statements in its report:

“The Panel has been guided by its understanding that the provisions of Section C of Article XVIII are intended to be used only in special circumstances where no measure consistent with the other provisions of the General Agreement is practicable to permit a contracting party coming within the scope of Article XVIII:4(a) to achieve the purpose of promoting the establishment of a particular industry with a view to raising the general standard of living of its people. While the procedures of Section C of Article XVIII are explicitly intended to facilitate the general economic development of less-developed countries, their use must be limited to cases where the criteria set forth in that Article are fulfilled”.⁸⁴

“The Panel has noted that for a number of these notifications by Ceylon the exporting countries to be affected were often countries with a lower standard of living. It suggests that in granting future releases under Article XVIII the CONTRACTING PARTIES may wish to take account of the effects of the proposed measures not only on the economic development of the applicant country, but also on the economy of countries which may likewise be in the early stages of economic development and whose viability and solvency depended predominantly on exports”.⁸⁵

(4) Paragraph 18: consultations concerning products subject to concessions

The Report of the Panel on Article XVIII Applications in 1957 concerning “Applications by Ceylon” notes that “Whenever an application involved items the duties on which were bound under the GATT, the Panel

⁸³L/751, adopted on 28 November 1957, 6S/112, 114-115, paras. 6-9.

⁸⁴Part I of L/1113, adopted on 20 November 1959, 8S/90, 91, para. 5.

⁸⁵*Ibid.*, 8S/92, para. 7.

considered whether the conditions laid down in paragraphs 13 to 16 were fulfilled, then invited the Ceylon delegation to enter into consultations with the parties concerned in accordance with paragraph 18 of Article XVIII ...”.⁸⁶

(5) Paragraph 21: “it may suspend the application of such substantially equivalent concession or other obligation”

See the Interpretative Note.

(6) Relationship between Article XVIII:B and C

In the Report of the Working Party on the “Accession of Tunisia” the representative of Tunisia pointed out that “as a provisional member, Tunisia had observed the provisions of Article XVIII:B of the General Agreement together with the appropriate procedures governing its application and would continue to do so in the future. He recalled, nevertheless, that Article XVIII:C of the General Agreement and the 1979 CONTRACTING PARTIES’ Decision on Safeguard Action for Development Purposes recognized to developing countries the right to protect infant domestic industries ...A member recommended that Tunisia not invoke Article XVIII:B to justify protective measures taken for development purposes to establish or protect infant industries. Rather, Tunisia should adhere to the provisions of Article XVIII:C or XVIII:D, or other GATT provisions as appropriate, to justify protection for these reasons ...”.⁸⁷

6. Article XVIII:D

Section D of Article XVIII applies to those contracting parties within the scope of sub-paragraph 4(b). The Report of the Review Working Party on “Quantitative Restrictions” notes with regard to Section D of Article XVIII that “the scope of the Section and the procedural provisions of that Section are the same as for Section C, but all the measures without exception have to be concurred in by the CONTRACTING PARTIES before they can be introduced”.⁸⁸ A Questionnaire on “Information to accompany notifications under Section C, and applications under Section D, of Article XVIII” was approved on 15 October 1958 for the guidance of contracting parties.⁸⁹

Section D has not been invoked.

B. RELATIONSHIP BETWEEN ARTICLE XVIII AND OTHER GATT PROVISIONS

1. Article III

The Report of the Working Party on the “Accession of Costa Rica” includes a discussion of Costa Rica’s selective consumption levy. Some members of the Working Party pointed out that “neither Part IV nor Article XVIII of the General Agreement authorized the discriminatory application of levies contrary to Article III”.⁹⁰

2. Article XII

See under Article XII and at page 497.

⁸⁶L/751, adopted on 28 November 1957, 6S/112, 115, para. 10.

⁸⁷L/6277, adopted on 12 December 1990, 37S/30, 36, para. 25.

⁸⁸L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 189, para. 64.

⁸⁹L/888, 7S/85-88. It was understood that this questionnaire would replace the questionnaire approved in 1949 (II/63-65) for governments notifying measures under Article XVIII as it stood prior to the Review Session.

⁹⁰L/6589, adopted on 7 November 1989, 36S/26, 33, para. 32.

3. Article XIV

The Report of the Review Working Party on “Quantitative Restrictions” noted that “Appropriate references to Section B of Article XVIII have been introduced in the text of Article XIV; through these insertions, the application of balance-of-payments restrictions by under-developed countries are governed by the provisions of Article XIV as regards deviations from the rule of non-discrimination”.⁹¹

4. Article XXIII

See under Article XXIII for material on the relationship of that Article with Article XVIII:B and with Article XVIII:C and D.

5. Article XXIV

See references under Article XXIV to relationship with Article XVIII.

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

Corresponding provisions in the Havana Charter are contained in Articles 13 and 14; in the London and New York Drafts, in Article 13; and in the Geneva Draft, in Articles 13 and 14.

The text of Article XVIII has been replaced twice. Firstly, at the Second Session in September 1948 it was decided to replace the original text of Article XVIII with provisions reflecting Articles 13 and 14 of the Havana Charter.⁹² These amendments were effected by the Protocol Modifying Part II and Article XXVI of the GATT, which entered into effect on 14 December 1948. Secondly, as noted at page 496 above, the present text of Article XVIII was agreed at the Review Session in 1954-55, where the balance-of-payments articles of the General Agreement were extensively debated in the Review Working Party on Quantitative Restrictions. Concerning the Review, see the documents listed below and the Report of the Working Party, which contains a “description of the purpose and intent of the various amendments proposed, as well as agreed statements the purpose of which is to clarify the meaning of certain provisions, with a view to facilitating the interpretation of those provisions in the future”.⁹³ At the same time, Article XVIII:A was redrafted in the Review Working Party on Schedules and Customs Administration.⁹⁴ The new text of Article XVIII, contained in the 1955 Protocol Amending the Preamble and Parts II and III of the GATT, entered into force on 7 October 1957.

⁹¹L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 177, para. 27.

⁹²See Report of the Working Party on “Modifications to the General Agreement”, adopted on 1 and 2 September 1948, GATT/CP.2/22/Rev.1, II/39, 41, para. 14.

⁹³L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170 (passage cited is in paragraph 2, 3S/170).

⁹⁴L/329, adopted on 26 February 1955, 3S/205, 215.

IV. RELEVANT DOCUMENTS*London*

Discussion: EPCT/C.I and II/PV/4

Geneva

Discussion: EPCT/A/PV/22, 23, 26, 39;
EPCT/TAC/PV/11, 19, 22, 27
Reports: EPCT/135, 162, 165, 167, 197
Other: EPCT/W.313

Havana

Discussion: E/CONF.2/C.2/SR.13, 14, 15, 23,
26
Report: E/CONF.2/C.2/41 and Add.1
E/CONF.2/45/Rev.1, 51

CONTRACTING PARTIES

Discussion: GATT/CP.3/SR.39, 40, 43, 44
GATT/TN.2/SR.3, 4, 7, 8
Reports: GATT/CP.3/60/Rev.1, G/39

Review Session

Discussion: SR.9/14, 15, 16, 25, 26, 36, 37, 38,
40, 42, 45, 47
Reports: L/332/Rev.1+Adds., L/327, L/329
3S/179-189, 215, 244
W.9/101+Add.1, 126, 154, 180,
184/Rev.1, 189, 198, 206, 208, 212,
225, 233, 236/Add.2
Other: L/189+Add.1, 272, 277, 282
W.9/17, 18+Add.1, 22, 23, 31, 32,
35, 37, 39+Add.1, 40, 43, 49, 51,
52, 106, 115, 154, 175, 189/Add.1,
196, 210, 221, 226
Sec/50/54, 134/54, 145/54, 158/54
Spec/3/55, 8/55, 10/55, 14/55,
15/55, 17/55, 26/55, 34/55, 35/55,
133/55, 138/55, 139/55, 143/55,
154-156/55, 176/55

ARTICLE XIX

EMERGENCY ACTION ON IMPORTS OF PARTICULAR PRODUCTS

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I. TEXT OF ARTICLE XIX

Article XIX

Emergency Action on Imports of Particular Products

1. (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to

prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

(b) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in sub-paragraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.

2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.

3. (a) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (b) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

(b) Notwithstanding the provisions of sub-paragraph (a) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.

II. INTERPRETATION AND APPLICATION OF ARTICLE XIX

A. SCOPE AND APPLICATION OF ARTICLE XIX

1. Paragraphs 1 and 2

A Working Party in 1950-51 on "Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement" examined the complaint of Czechoslovakia that the United States, in withdrawing a concession on women's fur felt hats and hat bodies, had failed to fulfil the requirements of Article XIX. The Report of the Working Party notes that

"In attempting to appraise whether the requirements of Article XIX had been fulfilled, the Working Party examined separately each of the conditions which qualify the exercise of the right to suspend an obligation or to withdraw or modify a concession under that Article.

“Three sets of conditions have to be fulfilled:

“(a) There should be an abnormal development in the imports of the product in question in the sense that:

“(i) the product in question must be imported in increased quantities;

“(ii) the increased imports must be the result of unforeseen developments and of the effect of the tariff concession; and

“(iii) the imports must enter in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products.

“(b) The suspension of an obligation or the withdrawal or modification of a concession must be limited to the extent and the time necessary to prevent or remedy the injury caused or threatened.

“(c) The contracting party taking action under Article XIX must give notice in writing to the CONTRACTING PARTIES before taking action. It must also give an opportunity to contracting parties substantially interested and to the CONTRACTING PARTIES to consult with it. As a rule consultation should take place before the action is taken, but in critical circumstances consultation may take place immediately after the measure is taken provisionally”.¹

Legislation of acceding governments implementing Article XIX (“safeguards legislation”) has been a subject of examination in certain recent accession negotiations. In the reports of the accession working parties concerned, members of the accession working party generally have not deemed the absence of a serious injury requirement in such legislation, or the complete absence of such legislation, to be as such inconsistent with the General Agreement. The acceding governments have generally confirmed their intention to abide by the provisions of Article XIX in any instance of application of measures under Article XIX.²

(1) “as a result of unforeseen developments”

The members of the Working Party cited above on “Withdrawal by the United States of a Tariff Concession under Article XIX”, except for the United States, agreed

“that the term ‘unforeseen development’ should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated”.³

The same Working Party also agreed “that the fact that hat styles had changed did not constitute an ‘unforeseen development’ within the meaning of Article XIX”⁴, but that the effects of the special circumstances of this case, “and particularly the degree to which the change in fashion affected the competitive situation, could not reasonably be expected to have been foreseen by the United States authorities in 1947, and that the condition of Article XIX that the increase in imports must be due to unforeseen developments and to the effect of the tariff concessions can therefore be considered to have been fulfilled”.⁵

¹GATT/CP/106, report adopted on 22 October 1951, GATT/CP.6/SR.19, Sales No. GATT/1951-3.

²See Working Party Reports on accessions of Bolivia, L/6542, adopted on 19 July 1989, 36S/9, 19-20, para. 29; Costa Rica, L/6589, adopted on 7 November 1989, 36S/26, 38-39, paras. 47, 49; El Salvador, L/6771, adopted on 12 December 1990, 37S/9, 22-23, paras. 40-41; Guatemala, L/6770, adopted on 6 February 1991, 38S/3, 12, paras. 33-34; Tunisia, L/6277, adopted on 12 December 1990, 37S/30, 38, para. 31.

³GATT/CP/106, report adopted on 22 October 1951, GATT/CP.6/SR.19, Sales No. GATT/1951-3, p. 10, para. 9.

⁴*Ibid.*, p. 12, para. 11.

⁵*Ibid.*, p. 13, para. 12.

(2) *“being imported ... in such increased quantities”*

In discussions concerning Article 40 of the Charter (the Article corresponding to Article XIX) during the Havana Conference, it was agreed to insert the word “relatively” between “such” and “increased”, “so as to make it clear that Article 40 could apply in cases where imports had increased relatively to domestic production, even though there might not have been an absolute increase in imports as compared with a previous base period”.⁶ The Working Party on “Modifications to the General Agreement”, which met directly after the Havana Conference, considered amendment of Article XIX to conform to this wording but decided not to do so, on the basis that “It was also the understanding of the Working Party that the phrase ‘being imported ... in such increased quantities’ in paragraph 1(a) of Article XIX was intended to cover cases where imports may have increased relatively, as made clear in Article 40, paragraph 1(a), of the Havana Charter”.⁷

(3) *“cause or threaten serious injury to domestic producers ... of like or directly competitive products”*

The Working Party Report on “Report on the Withdrawal by the United States of a Tariff Concession under Article XIX” notes that “the statistics bearing on the relation between imports and domestic production up to mid-1950 show a large and rapidly increasing volume of imports, while at the same time domestic production decreased or remained stationary. On the whole, therefore, they constitute evidence of some weight in favour of the view that there was a threat of serious injury to the United States industry”.⁸ However, the Working Party also pointed out that

“To sum up, the available data support the view that increased imports had caused or threatened some adverse effect to United States producers. Whether such a degree of adverse effect should be considered to amount to ‘serious injury’ is another question, on which the data cannot be said to point convincingly in either direction, and any view on which is essentially a matter of economic and social judgment involving a considerable subjective element. In this connection it may be observed that the Working Party naturally could not have the facilities available to the United States authorities for examining interested parties and independent witnesses from the United States hat-making areas, and for forming judgments on the basis of such examination. Further, it is perhaps inevitable that governments should on occasion lend greater weight to the difficulties or fears of their domestic producers than would any international body, and that they may feel it necessary on social grounds, e.g. because of lack of alternative employment in the localities concerned, to afford a high degree of protection to individual industries which in terms of cost of production are not economic. Moreover, the United States is not called upon to prove conclusively that the degree of injury caused or threatened in this case must be regarded as serious; since the question under consideration is whether or not they are in breach of Article XIX, they are entitled to the benefit of any reasonable doubt. No facts have been advanced which provide any convincing evidence that it would be unreasonable to regard the adverse effects on the domestic industry concerned as a result of increased imports as amounting to serious injury or a threat thereof; and the facts as a whole certainly tend to show that some degree of adverse effect has been caused or threatened. It must be concluded, therefore, that the Czechoslovak Delegation has failed to establish that no serious injury has been sustained or threatened”.⁹

(4) *“in respect of such product”*

A Secretariat Note of 1978 on “Modalities of Application of Article XIX” notes that Article 29 of the US Draft Charter, on “Emergency Action on Imports of Particular Products” made no reference to the question whether it was intended to be applied on a most-favoured-nation basis or not. However, this Note indicates that an United States internal memorandum gave the following information regarding the historical background for the United States draft:

“These relevant provisions (of Article XIX) follow closely in substance those in the first detailed escape clause, contained in Article XI of the 1942 trade agreement with Mexico ... At the time the United States was putting escape clauses comparable to Article XIX into bilateral trade agreements and was proposing

⁶Havana Reports, p. 83, para. 11.

⁷II/39, 43-44, para. 30.

⁸GATT/CP/106, report adopted on 22 October 1951, GATT/CP.6/SR.19, Sales No. GATT/1951-3, p. 21, para. 26.

⁹*Ibid.*, p. 22-23, para. 30.

the multilateral negotiation of comparable language it had no authority to take action under such a clause in other than a non-discriminatory manner and therefore must have contemplated its non-discriminatory use".¹⁰

The Report of the Havana Conference Sub-Committee D on Articles 40, 41 and 43 of the Charter makes the following comment concerning discussions at Havana:

"The Sub-Committee was unanimous in its understanding of this Article that action taken by Members under paragraphs 1(a), 1(b) and 3(b) - as distinct from paragraph 3(a) - should not involve any discrimination against the trade of any Member. As the Geneva text might leave room for doubts on this point, it was felt that this intention, as interpreted by the Sub-Committee, should be expressly stated in the Charter. The Sub-Committee decided therefore to recommend that this interpretation be embodied in a footnote attached to the Article and forming part of the Charter".¹¹

Accordingly the Sub-Committee proposed the following Interpretative Note to Article 40, the Article corresponding to Article XIX of the General Agreement:

"It is understood that any suspension, withdrawal or modification under paragraphs 1(a), 1(b) and 3(b) must not discriminate against imports from any Member country".

In the discussion of the Report of Sub-Committee D in Committee III of the Havana Conference, the deletion of this footnote was requested on the basis that "the application of Article 40 would in many cases be discriminatory and the footnote might create a chain of withdrawals of concessions". In reply it was stated that "the intention of the Article was set forth in the footnote. Paragraph 3(a) offered counteraction against emergency actions; the phrase 'to the trade of the Member' showed a discriminatory characteristic not evident in the other paragraphs ... the general intent of Article 40 was to provide time to rectify possible miscalculations of a concession. Since concessions were negotiated on a non-discriminatory and most-favoured-nation basis, their withdrawal should also be on that basis ... The intent of the footnote was that any action, except that taken under paragraph 3(a), should be in conformity with the most-favoured-nation concept".¹² The footnote was further examined by a working party which added the phrase, "and that such action should avoid, to the fullest extent possible, injury to other supplying Member countries"¹³; this Note was included in the Charter. However, it was not among those Charter changes which were brought into the General Agreement in 1948.

(a) Non-discriminatory invocation of Article XIX

The "Report on the Accession of Japan" of the Ad-Hoc Committee on Agenda and Intersessional Business in 1953 mentioned the views of contracting parties that "emergency action under Article XIX would have to be non-discriminatory and would thus have to be applied to the trade of all contracting parties, including those which were in no way responsible for the circumstances requiring redress".¹⁴ A suggestion to add an additional clause to Article XIX permitting a discriminatory application of safeguard measures in case of "serious disruption of trade conditions" was rejected.¹⁵

During the Review Session of 1954-55, Denmark, Norway and Sweden proposed to add a new paragraph at the end of Article XIX on the lines of the Charter Interpretative Note, concerning non-discriminatory invocation of Article XIX. The records indicate that as this proposal did not meet with the general approval of Sub-Group B of Working Party II, it was withdrawn. The Sub-Group considered both this and another Scandinavian proposal to be unnecessary.¹⁶

¹⁰L/4679, p. 1, para. 4.

¹¹Havana Reports p. 82, para. 9.

¹²E.CONF.2/C.3/SR.32, p. 2-3.

¹³E/CONF.2/C.3/49; approval by Committee III without comment at E/CONF.2/C.3/SR.34, p. 7.

¹⁴L/76, adopted on 13 February 1953, p. 2, para. 6.

¹⁵*Ibid.*, para. 7.

¹⁶W.9/193, p. 13.

In an informal note of 26 May 1964 on the “Rationale for Dealing with Market Disruption through the Application of Article XIX”, the Executive Secretary stated, *inter alia*:

“There can be no serious question that the intention of the drafters of Article XIX was that action ... should be of a non-discriminatory character. This indeed is a logical counterpart of the provisions of Article I and Article XIII. This is also borne out by the legislative history and both practice and theory since the drafting of the Article. ... The fact, however, that it was necessary to record this understanding in the legislative proceedings also suggests, however, that the language itself is not conclusive”.¹⁷

In the same Note, the Executive Secretary suggested:

“as worthy of examination ... to place upon the existing provisions of Article XIX an interpretation which I think they can bear ... and which would in carefully defined circumstances entitle an importing country to protective measures which would be restricted in application to imports from a supplying country which were in fact creating the disruptive situation. It could be argued that the situation results from a combination of the increase of the particular exports in question from the particular source, and the obligation to refrain from discriminatory measures to remedy the situation. If so it would reasonably follow that the obligation regarding non-discrimination could be suspended within the existing language of Article XIX ...”.¹⁸

This interpretation was, however, contested and did not meet with approval.¹⁹

A Secretariat Note of 1978 on “Modalities of Application of Article XIX” states: “In view of the fact that emergency actions under Article XIX are to be taken in respect of ‘such product’ and not in respect of individual contracting parties, the indication is that Article I applies.”²⁰

During the discussion in the Council in March 1978 concerning the EEC’s invocation of Article XIX with respect to measures on imports into the United Kingdom of television sets from Korea, “a large number of representatives ... spoke on the matter and expressed the opinion that Article XIX did not provide for the discriminatory application of measures to limit potentially disruptive imports. They considered the measures in question to be clearly inconsistent with GATT provisions. Some delegations expressed serious concern about the use of Article XIX on a selective basis, in particular when this was done in a manner discriminating against a developing country”.²¹

The 1980 Panel on “Norway - Restrictions on Imports of Certain Textile Products” examined an Article XIX action by Norway, which consisted of introduction of global quotas on nine textile items. Imports from the EEC and EFTA countries were not subject to these quotas, nor were imports from six developing textile exporting countries with which Norway had concluded bilateral arrangements. The size of the global quotas was calculated on the basis of average imports in 1974-76 from the countries included in the quotas; the quotas were allocated to importers but not allocated by supplier country. The Panel Report provides: “The Panel was of the view that the type of action chosen by Norway, i.e. the quantitative restrictions limiting the importation of the nine textile categories in question, as the form of emergency action under Article XIX was subject to the provisions of Article XIII which provides for non-discriminatory administration of quantitative restrictions. ... The Panel was of the view that to the extent that Norway had acted with effect to allocate import quotas for these products to six countries but had failed to allocate a share to Hong Kong, its Article XIX action was not consistent with Article XIII”.²²

¹⁷L/4679, Annex 2, p. 47-48.

¹⁸*Ibid.*

¹⁹L/4679, p. 7.

²⁰L/4679, p. 11, para. 35.

²¹C/M/124 p. 19. The 1978 Secretariat Note on “Modalities of Application of Article XIX” states that “This case is the only one in the history of the GATT in which Article XIX action has unilaterally been taken on a discriminatory basis with regard to a single source of supply in a transparent manner.” (L/4679 p. 14). The EEC action was revoked after conclusion of a voluntary export restraint arrangement as from 22 June 1979; C/M/134, L/4613/Add.1.

²²L/4959, adopted on 18 June 1980, 27S/119, 125-126, paras. 14, 16. See further under Article XIII.

(b) *Price discrimination*

The 1978 Note by the GATT Secretariat on “Modalities of Application of Article XIX” notes that

“A number of actions of a quantitative and tariff-type nature have been linked to the price of the products concerned. In practice, such measures, although applied on a global basis, may have been selective in their application to one or a limited number of countries. In the current ten-year period, ten such instances have been notified, compared to eight during the preceding twenty years. Some of these measures took the form of special customs valuation methods levied for imports at lower prices during a short agricultural or horticultural season. In addition to these measures, there were a few cases in the earlier years where specific duties or surtaxes were replaced by ad valorem rates”.²³

In Council discussion of a 1977 Article XIX action by Finland imposing a surcharge on imports of tights below a basic price, the representative of Singapore noted that Article XIX referred to “any product” and stated that this action was aimed at low-cost suppliers in developing countries. The representative of Finland stated that the measure was fully in accordance with Article XIX.²⁴

During discussion in the Committee on Trade and Development in March 1983 of a Canadian Article XIX action on leather footwear, which exempted footwear above a certain value, it was stated that “This price discrimination was not only contrary to the letter and spirit of Article XIX, but also established a dangerous precedent, and had an adverse effect on the export interests of developing countries. ... The representative of Canada stated that in the view of his authorities, the Article XIX action referred to ... was consistent with the relevant provisions of the General Agreement, and the price discrimination element in the action did not constitute a new precedent under the GATT”. Several other contracting parties expressed concern at the price-discriminatory use of Article XIX and stated that they regarded a discrimination between suppliers, either geographically or on the basis of prices, as an infringement of GATT rules.²⁵ Canada’s Article XIX action on imports of footwear was discussed again in the GATT Council meeting in March 1985. Concern was expressed at “Canada’s application of price breaks in the context of this Article XIX action. Such devices could produce such a narrow and selective definition of source that the action could no longer be said to be truly non-discriminatory. This would appear to conflict with the fundamental principles of the General Agreement”.²⁶

(5) “to the extent and for such time as may be necessary”

(a) *Extent of action under Article XIX*

The 1951 Report of the Working Party on the “Withdrawal by the United States of a Tariff Concession under Article XIX” noted that

“the Czechoslovak representative questioned whether the substantial increase in rates of duty involved in the withdrawal were necessary to prevent or remedy the alleged injury and whether the re-establishment of prohibitive duties to enable an uneconomic industry to prolong its existence was consistent with the purposes of the General Agreement. The other members of the Working Party considered that it is impossible to determine in advance with any degree of precision the level of import duty necessary to enable the United States industry to compete with overseas suppliers in the current competitive conditions of the United States market, and that it would be desirable that the position be reviewed by the United States from time to time in the light of experience of the actual effect of the higher import duties now in force on the economic position of the United States industry”.²⁷

²³L/4679, para. 45.

²⁴C/M/119 p. 21-22.

²⁵COM.TD/114, p. 10, paras. 41-43.

²⁶C/M/186, p.5.

²⁷GATT/CP/106, report adopted on 22 October 1951, GATT/CP.6/SR.19, Sales No. GATT/1951-3, p. 24-25, para. 34-35.

(b) *Duration of action under Article XIX*

At the 1946 London Preparatory Conference it was stated during the course of the discussion of Article 29, the draft Article corresponding to Article XIX, that “the Article provided only for a temporary relaxation of commitments, not for a permanent revision”.²⁸ It was also stated that “the general purpose of Article 29 is to deal with an emergency situation. In general you would expect that it would be short-term, but it does not necessarily have to be under the terms of the Article”.²⁹

The 1951 Report of the Working Party on the “Withdrawal by the United States of a Tariff Concession under Article XIX” concluded that

“action under Article XIX is essentially of an emergency character and should be of limited duration. A government taking action under that Article should keep the position under review and be prepared to reconsider the matter as soon as this action is no longer necessary to prevent or remedy a serious injury. In the case under review events which have occurred after it was decided to raise the duties would indicate that it would be desirable for the United States Government to follow the trends of consumption, production and imports in the following months with a view to restoring the concession on hat bodies in whole or in part if and as soon as it becomes clear that its continued complete withdrawal cannot reasonably be maintained to be permissible under Article XIX”.³⁰

It was also stated that Article XIX required that the original tariff concessions should be wholly or partially restored “if and as soon as the United States industry is in a position to compete with imported supplies without the support of the higher rates of import duty”.³¹

The 1984 Report on “Safeguards” by the Chairman of the Council states, *inter alia*:

“There is a convergence of views that safeguard actions are not intended to protect domestic producers for an unlimited period of time. Safeguard actions are emergency measures which should therefore be temporary by definition and progressively liberalized during the period of their application, unless they are maintained for such a short time as to make this impractical”.³²

(c) ***“to suspend the obligation in whole or in part or to withdraw or modify the concession”: Nature of action under Article XIX***

The Report of the Havana Conference Sub-Committee on Articles 40, 41 and 43 notes: “The question was raised whether, in taking action under paragraph 1 of Article 40 [which corresponded to GATT Article XIX], Members would be limited to the reimposition of measures which had been in effect prior to the entry into force of the Charter. It was agreed that the text as drafted does not limit the measures which Members might take”.³³

A 1987 Secretariat Note on “Drafting History of Article XIX and its Place in GATT” notes that tariff measures notified under Article XIX have included increases in specific duties, increases in ad valorem duties, surcharges, surtaxes, imposition of a minimum value for duty, increases in compound duties, compensatory taxes, tariff quotas, and imposition of surtaxes and charges on products imported below a minimum price. Non-tariff measures that have been notified include outright embargoes and bans on import licences, global quotas, discretionary licensing, import deposit schemes, import authorization and other import restrictions. A few actions have involved both tariff and non-tariff measures. During the period 1950-59, actions taken were predominantly tariff measures (80 per cent). The next ten-year period saw a rise in the use of non-tariff measures (45 per cent) and in the period 1970-79 non-tariff measures constituted the

²⁸EPCT/C.II/38, p.5.

²⁹EPCT/C.II/QR/PV/5, p.77.

³⁰GATT/CP/106, report adopted on 22 October 1951, GATT/CP.6/SR.19, Sales No. GATT/1951-3, p. 29-30, para. 50.

³¹*Ibid.*, p. 26 para. 38.

³²MDF/4, 31S/136, 137, para. 7.

³³Havana Reports, p. 83, para. 10.

majority (70 per cent) of all actions invoked. For the 1980-87 period the share of tariff and non-tariff measures was about equal.³⁴

At the 1946 London Preparatory Conference, it was stated that “Language has been inserted in paragraph (1) ... which makes it clear that members invoking the Article may withdraw or modify concessions in respect of preferences as well as concessions in respect of tariffs and obligations regarding quantitative restrictions, etc.”.³⁵ Individual schemes of preferences for developing countries have provided for certain safeguard mechanisms under which the preference-giving countries have reserved the right to withdraw preferences if they deem it necessary.³⁶

(7) Paragraph 1(b)

The purpose of this paragraph was explained at the London Preparatory Conference as follows: “... this right of withdrawal or modification will extend to cases where a country’s trade is injured by reason of the loss in whole or in part of a preference which it previously enjoyed in another market”.³⁷

(8) “shall give notice in writing to the CONTRACTING PARTIES”

The 1951 Report of the Working Party on the “Withdrawal by the United States of a Tariff Concession under Article XIX” examined also the conformity of the United States actions with the notice and consultation requirements of Article XIX, and noted, “In this connection the Working Party wishes to draw the attention of the CONTRACTING PARTIES to the desirability of delaying, as far as practicable, the release of any public announcement on any proposed action under Article XIX, as a premature disclosure to the public would make it difficult for the government proposing to take action to take fully into consideration the representations made by other contracting parties in the course of consultations”.³⁸

After a discussion on notification of Article XIX actions, including whether such actions could be notified by countries other than those taking them, at its April 1981 meeting the Committee on Safeguards agreed, *inter alia*, on the following conclusion:

“3. All actions taken under Article XIX, and to the extent possible, other actions which serve the same purpose will be notified to the CONTRACTING PARTIES. In addition, it will be open to contracting parties to bring up any matter in accordance with the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance”.³⁹

Lists of Article XIX actions notified to the Secretariat appear in the following notes:

- Factual Note on Safeguards prepared by the Secretariat in 1973.⁴⁰
- Study on “Emergency type actions in the widest sense” prepared by the Secretariat in 1975.⁴¹
- Secretariat Note of 5 July 1978 on “Modalities of Application of Article XIX”, including a table of Article XIX actions.⁴²
- Secretariat Note of 26 March 1982, including a revised and updated list of measures taken since 1978 and notified under Article XIX, as well as of “grey-area” measures.⁴³

³⁴MTN.GNG/NG9/W/7, dated 16 September 1987, p. 4.

³⁵London Report, p. 10, para. 3(b)(i).

³⁶COM.IND/W/88/Rev.1, Annex C.

³⁷EPCT/C.II/PV/12, p. 12.

³⁸GATT/CP/106, report adopted on 22 October 1951, GATT/CP.6/SR.19, Sales No. GATT/1951-3, para. 46.

³⁹L/5151, paras. 20-28.

⁴⁰COM.IND/W/88/Rev.1, dated 18 January 1973.

⁴¹MTN/SG/W/1.

⁴²L/4679.

⁴³Spec(82)18 and Rev.1-Rev.3 (through 22 May 1984).

- Background Note by the Secretariat prepared in 1987 including an “Inventory of Article XIX Actions and other Measures which Appear to Serve the Same Purpose”.⁴⁴

A table of Article XIX actions notified to the Secretariat up to October 1993 appears at the end of this chapter.

(9) “in critical circumstances”

At the Havana Conference, it was decided to substitute the words “in circumstances of special urgency” for “in critical circumstances” as a clarifying change.⁴⁵ However, this was not among those Charter changes which were brought into the General Agreement in 1948.

In practice, the provision that in critical circumstances action may be taken provisionally without prior consultation has been applied in a large number of cases.⁴⁶

2. Paragraph 3

(1) “If agreement among the interested contracting parties with respect to the action is not reached”

With reference to import restrictions under Article XIX applied by Australia on motor vehicles and on footwear which had been in effect since 1974/75 (with some interruption in the application of the restrictions on motor vehicles), the European Communities, in 1982, notified the intention to suspend tariff concessions granted by the Community on selected imports from Australia “in accordance with the procedures of paragraph 3(a) of Article XIX”.⁴⁷ Australia then requested that a meeting of the Council be convened within thirty days of the Communities’ notification “in order to discharge the responsibility of the CONTRACTING PARTIES under paragraph 3(a) of Article XIX of the General Agreement”.

In February 1982, Australia requested the Council to disapprove the proposed action (see at page 526 below). During the discussion on this matter the representative of the EEC stated that “The Community recognized Australia’s right to invoke the provisions of Article XIX. At the same time, it considered that the entire procedure provided for under Article XIX should be followed, which included the offer of compensation. ... He pointed out that there was no requirement that there be a prior agreement between the parties in order for the affected party to take action under Article XIX. He said that the element of agreement concerned the compensation, and that if there were no agreement on this issue, the affected party was free to take retaliatory action as provided for in Article XIX, unless the CONTRACTING PARTIES disapproved”.⁴⁸ The Australian representative agreed that “there was no need for a prior agreement for the type of action contemplated by the Community”.⁴⁹

The Report in 1984 by the Chairman of the Council to the Fortieth Session on “Safeguards” noted that:

“There is a convergence of views that contracting parties should retain the right given to them in the General Agreement to re-establish the balance of rights and obligations under the Agreement if this is significantly modified. At the same time, it is recognized that the right to retaliate can, in practice, be used more effectively by some contracting parties than others. There is furthermore a convergence of views that the threat of retaliation could have a deterrent effect against the application of safeguard actions; the possibility of retaliation could also promote agreement on compensation. There is, at the same time, a recognition that retaliatory action has trade disruptive effects. The conclusion that many participants draw is that, wherever possible, constructive settlements should be reached involving compensation rather than the retaliatory withdrawal of benefits ...”.⁵⁰

⁴⁴MTN.GNG/NG9/W/2/Rev.1 and Corr.1.

⁴⁵Havana Reports, p. 83, para. 13.

⁴⁶C/III, p. 8.

⁴⁷L/4526/Add.23, L/4099/Add.25; see also documents on Australian action on motor vehicles, L/4526, and on footwear, L/4099.

⁴⁸C/M/155, p. 4, p. 5.

⁴⁹C/M/155, p. 6.

⁵⁰MDF/4, 31S/136, 137 para. 8.

A Secretariat Note on “Drafting History of Article XIX and its Place in GATT” states that, as of 1987, there had been 20 instances of agreement or offers of compensation, usually when the Article XIX action took the form of a tariff increase. There were 10 such cases during 1950-59, eight cases in 1960-69, one case in 1970-79 and one case in 1980-87. With the declining incidence of compensation, there had been an increasing incidence of invocation of Article XIX:3.⁵¹

Decisions by the CONTRACTING PARTIES extending time limits under Article XIX:3

Australia

Motor mowers	Decision of 19 September 1960	L/1217/Add.1, 9S/267
Woollen piece goods	Decision of 31 August 1961	L/1546, 10S/270
	Decision of 16 November 1961	L/1638, 10S/270
Heat-resisting glassware	Decision of 6 July 1964	C/M/21

Germany

Hard coal products	Decision of 17 November 1958	L/920, 7S/128
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United States

Bicycles	Decision of 17 October 1955	L/433, 4S/31
Clinical thermometers	Decision of 8 September 1958	L/803/Add.2
Cotton typewriter ribbon cloth	Decision of 18 November 1960	L/1397, 9S/267
Dried figs	Decision of 29 October 1952	G/39, 1S/107
	Decision of 8 November 1952	G/39, 1S/28
	Decision of 23 October 1953	2S/26
Lead and zinc	Decision of 22 November 1958	L/940
	Decision of 27 May 1959	L/1012, 8S/179
	Decision of 20 November 1959	L/1078, 8S/179
	Decision of 4 June 1960	L/1246, 9S/267
Linen towelling	Decision of 14 September 1956	5S/32
Safety pins	Decision of 4 April 1958	L/624/Add.2
Spring clothes pins	Decision of 24 April 1958	L/757/Add.1
Stainless steel table flatware	Decision of 18 February 1960	L/1076/Add.1, 9S/267

(2) “not later than ninety days after such action is taken”

The period provided in Article XIX:3 for notification of any proposed suspension of obligations or concessions was extended on several occasions by decisions of the CONTRACTING PARTIES, including certain cases from 1952 through 1964 which are listed in the accompanying table.⁵²

More recently, the practice has evolved of extending the ninety-day period referred to in paragraph 3(a) of Article XIX through bilateral agreement between the contracting parties concerned with subsequent submission of a joint communication to the other contracting parties to the effect that they, for example, “have agreed that their reciprocal rights and obligations under the General Agreement will be maintained and for this purpose have agreed that the ninety-day period set forth in Article XIX:3(a) shall be considered to expire on”... [date fixed].⁵³ The texts of such communications are published in addenda to the basic documents on the respective safeguard measures referred to in the table at the end of this chapter.

In the February 1975 Council meeting,

⁵¹MTN.GNG/NG9/W/7, dated 16 September 1987, p. 5.

⁵²See, e.g., decision of 29 October 1952 “to extend by ninety days the period provided under Article XIX:3 for the Turkish Government to notify the CONTRACTING PARTIES of any suspension of equivalent obligations or concessions which it might propose”, SR.7/11, p. 1, L/44/Add.1.

⁵³See also L/7219/Add.3-5 (reference to “the time period set forth in Article XIX:3(a) within which [contracting party] must notify any intention to suspend substantially equivalent concessions”).

“the representative of the European Communities stated that, in connection with the recent Article XIX action on imports of certain footwear taken by Australia, the European Communities had asked for a prolongation by mutual agreement of the period of ninety days, referred to in paragraph 3(a) of Article XIX. There were several precedents for such a prolongation by mutual agreements between the parties. The Australian delegation, however, believed that a decision of this nature would have to be taken by the CONTRACTING PARTIES. He therefore asked whether any other contracting party was of the opinion that such a decision would come under the jurisdiction of the CONTRACTING PARTIES and whether such contracting party would have objections to such a decision. A number of representatives stated that they had never encountered any difficulty in reaching agreement with the other party for an extension of the period referred to in Article XIX:3(a) in order to continue consultations rather than having recourse to retaliation. ... The representative of the European Communities stated that ... it appeared to him that no objection had been voiced in the Council to the extension of the time limit for a reasonable period of time”.⁵⁴

In 1981, Australia raised again, but did not pursue, the procedural question of whether or not contracting parties to the GATT may agree bilaterally to extend the ninety-day period referred to in Article XIX or whether, since the General Agreement makes no provision for bilaterally agreed extensions of the ninety-day period, such an extension should be approved by the CONTRACTING PARTIES.⁵⁵

By a communication dated 14 January 1984, the EC notified a proposed compensatory adjustment, to take effect on 1 March 1984, in response to a US Article XIX action on certain specialty steels. At the GATT Council meeting in February 1984 the United States representative requested the Council to extend the time limit under Article XIX:3(a) for an additional thirty days, stating that “more time should be allowed for the two parties to reconcile the major discrepancies and problems in the Community’s calculations before the Community retaliated”. The EC representative stated that the EC could not agree to the US request for a further extension. In response to a question regarding whether the Council would be competent to take the decision requested of it, the Director-General said that “if the Community agreed to the US request for an extension of the date of entry into force of the retaliatory measures, this could be done. If the Community did not agree, its retaliatory measures could be put into place on 1 March unless the Council were to disapprove of them; but, in the absence of disapproval, the Council could not postpone the entry into force of the measures, because this was the Community’s sovereign right”.⁵⁶

(3) “to suspend ... the application ... of such substantially equivalent concessions”

In the February 1982 Council discussion of proposed EEC measures under Article XIX:3 with respect to Australia,⁵⁷ the Australian representative stated that

“Australia did not dispute the right of a contracting party to take action, but it disputed the nature and the extent of this action and whether or not there existed a substantial equivalence”.⁵⁸

“... although a contracting party was entitled to re-establish the balance of concessions, it was not entitled to calculate retrospectively and to take retaliatory action on alleged trade losses over a subsequent period of years beyond the original ninety-day consultative period. ... In the case of motor vehicles, one single atypical year (1974) had been chosen as the base representative period, whereas the normal GATT practice was to use the three-year average, as the EEC had done in the case of footwear. Nonetheless, even when applying the EEC’s method and statistical base, but using normal three-year base periods, imports of motor vehicles from the EEC in each year between 1975 and 1980 significantly exceeded the average levels achieved in the base periods. Also, the EEC’s actual share of the Australian market in each of these years was higher than in either of the base periods. Thus, on the basis of either market shares or actual trade levels, the EEC had no basis on which to take retaliatory action.

⁵⁴C/M/103.

⁵⁵L/5026/Add.10, L/4099/Add.20; no subsequent Council discussion of this case.

⁵⁶C/M/174, p. 11; notification under Article XIX:3, L/5524/Add.15.

⁵⁷L/4099/Add.25, L/4526/Add.23; discussion at C/M/155 p. 1-11.

⁵⁸C/M/155, p. 6.

“Turning to footwear, he said that Australia had similar conceptual and practical problems. In addition, although Australia’s Article XIX action on footwear had ceased on 31 December 1981, the EEC sought to take retaliatory action which was totally open-ended. His delegation rejected the notion that the EEC could, at any time in the future, impose a discriminatory tariff on one or all of the items listed in [the EEC’s notifications of proposed action], at any level of duty, despite the fact that its rights under Article XIX had expired, and when the Article XIX action taken by Australia itself had expired”.⁵⁹

The EEC representative responded that “in the case of motor vehicles, Australia had set up a quota restriction as well as a customs surcharge ... in order to ensure that 80 per cent of the Australian market would be reserved for local production. This had resulted in considerable injury for European producers during the previous seven years ... Australia now had the intention of continuing this action on motor vehicles for another three years”. He stated that Australia’s offer of compensation had not been acceptable to the EEC because it “did not compensate for the seven years of injury experienced by it”.⁶⁰

Other contracting parties also expressed concern at the open-ended nature of the proposed EEC suspension of bindings. It was stated that, “since the damage calculated by the Community referred to a time period, countermeasures might also be expected to be limited in duration ... on the only previous occasion when the CONTRACTING PARTIES had decided not to disapprove a countermeasure - the 1952 case of Turkish countermeasures to US Article XIX action on dried figs - the Turkish action was to be effective only for the period in which the US continued to impose the increased duty on dried figs”. The representative of the European Communities stated that “the suspension of concessions was temporary, since any EEC action would remain in force only for the time strictly necessary to compensate the damage”.⁶¹

In March 1985, in response to a notification by the EC of proposed compensatory measures in response to a Canadian Article XIX action on imports of footwear⁶², at the Council meeting the representative of Canada stated that “Canada did not question the right of a contracting party to suspend concessions pursuant to Article XIX:3(a) if a mutually satisfactory settlement could not be found. However, the contracting party was required to limit such suspensions to substantially equivalent concessions or other obligations. Canada considered that the Community’s proposals did not meet that requirement, and it did not accept the basis for the level of the proposed suspensions, i.e. the Community’s calculation of trade impairment in the area of Can.\$58 million. Nor did Canada accept that a total embargo on the import of any product (as the Community proposed with respect to Canadian footwear products) could be justified as a suspension of substantially equivalent concessions or other obligations”.⁶³

The table of Article XIX actions following this chapter notes all known instances to date of action under Article XIX:3.

(4) “to the trade of the contracting party taking such action”

In the discussion of the report of Sub-Committee D in Committee III at the Havana Conference, it was stated with regard to paragraph 3(a) of Article 40, which corresponds to Article XIX:3(a) of the General Agreement:

“Paragraph 3(a) offered counteraction against emergency actions; the phrase ‘to the trade of the Member’ showed a discriminatory characteristic not evident in the other paragraphs”.⁶⁴

⁵⁹C/M/155, p. 2-3.

⁶⁰C/M/155, p. 4.

⁶¹C/M/155, p. 6, 7.

⁶²L/5351/Add.22, proposing a one-year total import ban on Canadian footwear and one-year increases in duties applicable to imports of certain products from Canada.

⁶³C/M/186, p. 4.

⁶⁴E/CONF.2/C.3/SR.32, p. 3.

(5) “upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES”

In past instances, these words have been understood to mean that the thirty days started counting on the date of receipt of the written notice in the GATT Secretariat. See, e.g., the notice of a 1952 action under Article XIX:3(a) by Belgium against the United States:

“As written notice of this suspension was received on the 22 April, the suspension became effective on 22 May 1952”.⁶⁵

In the February 1982 Council discussion noted above on the EC’s Article XIX:3 action against Australia, the Chairman ruled that “Article XIX:3 indicated that a contracting party could not take retaliatory action before the expiry of thirty days or if it were disapproved by the Council. This did not mean that a contracting party was compelled to take such action at the end of the thirty-day period”.⁶⁶

(6) “the suspension of which the CONTRACTING PARTIES do not disapprove”

The CONTRACTING PARTIES have never “disapproved” of a countermeasure to a withdrawal pursuant to Article XIX:3(a). There is only one instance of the CONTRACTING PARTIES in session taking a formal decision *not* to disapprove proposed compensatory action, in the case of Turkish action under Article XIX:3(a) against the US in 1952.⁶⁷

The notice of a 1952 action under Article XIX:3(a) by Belgium against the United States, referred to above, is phrased as follows:

“It was reported in GATT/AIR/14 of 23 April 1952 that the Government of Belgium had engaged in consultations with the Government of the United States, concerning the action of the latter in modifying the concession on hatters’ fur in Part I of Schedule XX, and had announced its intention to suspend, under the provisions of Article XIX:3(a), the application of the following concession in the Schedule of Benelux to the trade of the United States: ... Since no request had been received from any contracting party to secure consideration of the proposed action, the proposed suspension of the concession on Item 312 in Schedule II, to the trade of the United States, is deemed to be a substantially equivalent concession, under the Agreement, the suspension of which the Contracting Parties do not disapprove, within the terms of paragraph 3(a) of Article XIX ...”.⁶⁸

The Report of the Review Session Working Party on “Quantitative Restrictions” noted, with respect to the phrase “the suspension of which the CONTRACTING PARTIES do not disapprove” that “it is clear, both from the text itself and from the practice followed so far by the CONTRACTING PARTIES, that the contracting party affected is not obliged to obtain prior approval from the CONTRACTING PARTIES and that the object of the phrase quoted is merely to indicate that the CONTRACTING PARTIES have a right to require adjustments in the action taken if they consider that the action goes beyond what is necessary to restore the balance of benefits”.⁶⁹

At the 7 February 1984 Council meeting in discussion of proposed EEC compensatory measures under Article XIX:3(a) with respect to a United States Article XIX action on certain specialty steels, the United States argued that the proposed EEC action was “excessive by the standards of Article XIX:3(a)”. The EEC representative stated that if, after the date of implementation of the EEC’s measures, “the United States considered that the Community’s measures were excessive, then the CONTRACTING PARTIES would have the right, as stressed by a working party in 1955, ‘to require adjustments in the action taken if they consider that the action goes beyond what is necessary to restore the balance of benefits’”.⁷⁰ The US then submitted a request for

⁶⁵L/9.

⁶⁶C/M/155, p. 10.

⁶⁷Decision of 8 November 1952, L/57, 1S/28-30, SR.7/15.

⁶⁸L/9.

⁶⁹L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 182, para. 39.

⁷⁰C/M/174, p. 11-12.

a decision disapproving the measures notified by the EEC.⁷¹ At the 22 February 1984 Council meeting, the US representative stated that the EEC measures “would exceed the level which could be considered ‘substantially equivalent’ to the US action, and that therefore, the CONTRACTING PARTIES should disapprove of the Community’s proposal unless it was modified to conform with the criteria of Article XIX. The United States had tried to ensure ... that its safeguard action was proportionate to the injury that the US industry had suffered. It was equally important for the integrity of the safeguard process that any retaliatory action did not exceed the effect of the measures; and the question of the quality of responsive measures to safeguard actions should be a matter of concern for the Council”. The two parties agreed to continue consultations to find a satisfactory solution.⁷²

B. RELATIONSHIP BETWEEN ARTICLE XIX AND OTHER GATT PROVISIONS

1. Articles I and XIII

See the discussion above beginning on page 519 concerning “Non-discriminatory invocation of Article XIX”.

2. Article XVIII:A

The 1951 Working Party “Report on the Withdrawal of a Tariff Concession by the United States” noted, in relation to Article XVIII as it existed prior to its amendment in 1955:

“... it must be commented that any proposal to withdraw a tariff concession in order to promote the establishment or development of domestic production of a new or novel type of product in which overseas suppliers have opened up a new market is not permissible under Article XIX but should be dealt with under other provisions of the Agreement, such as Article XVIII. On the other hand, it may be permissible to have recourse to Article XIX if a new or novel type of imported product is replacing the customary domestic product to a degree which causes or threatens serious injury to domestic producers”.⁷³

3. Article XXIII

See under Article XXIII.

4. Article XXIV

See under Article XXIV.

5. Part IV

See under Part IV.

6. Article XIX actions and rectification and modification of schedules

The Report of the Working Party on “Preparation of the Second Protocol of Rectifications and Modifications and Legal Status of the Consolidated Schedules” noted:

“The question was raised in the Working Party of giving effect to withdrawals of concessions under Article XIX ... by means of including such withdrawals in protocols of rectifications and modifications. The Working Party considered that this would be an undesirable procedure since all withdrawals would thus be given an irrevocable character and eventual reinstatement of such concessions would be difficult”.⁷⁴

⁷¹L/5524/Add.21-22, L/5524/Add.22/Corr.1.

⁷²C/M/175, p. 2-3; no further Council discussion.

⁷³GATT/CP/106, report adopted on 22 October 1951, GATT/CP.6/SR.19, Sales No. GATT/1951-3, p. 21, para. 28.

⁷⁴G/34, adopted on 8 November 1952, 1S/64, 65, para. 5.

The current Procedures for Modification and Rectification of Schedules of Tariff Concessions⁷⁵ do not provide for certification of changes in schedules resulting from Article XIX action.

C. EXCEPTIONS AND DEROGATIONS

1. Special safeguards provisions in certain protocols of accession

Certain protocols of accession contain special safeguards provisions for consultations and possible remedial action if any product is being imported “in such increased quantities or under such conditions as to cause or threaten serious injury ...”. Paragraph 4 of the Protocol for the Accession of Poland provides as follows:

“(a) If any product is being imported into the territory of a contracting party from the territory of Poland in such increased quantities or under such conditions as to cause or threaten serious injury to domestic producers in the former territory of like or directly competitive products, the provisions of (b) to (e) of this paragraph shall apply.

“(b) The contracting party concerned may request Poland to enter into consultation with it. Any such request shall be notified to the CONTRACTING PARTIES. If, as a result of this consultation, Poland agrees that the situation referred to in (a) above exists, it shall limit exports or take such other action, which may include action with respect to the price at which the exports are sold, as will prevent or remedy the injury.

“(c) Should it not be possible to reach agreement between Poland and the contracting party concerned as a result of consultation under (b), the matter may be referred to the CONTRACTING PARTIES who shall promptly investigate the matter and who may make recommendations to Poland or to the contracting party which initially raised the matter.

“(d) If following action under (b) and (c) above, agreement is still not reached between Poland and the contracting party concerned, the contracting party shall be free to restrict imports from the territory of Poland of the product concerned to the extent and for such time as is necessary to prevent or remedy the injury. Poland shall then be free to deviate from its obligations to the contracting party in respect of substantially equivalent trade.

“(e) In critical circumstances, where delay would cause damage difficult to repair the contracting party affected may take action provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action”.⁷⁶

Paragraph 5 of the Protocol for the Accession of Hungary and paragraph 4 of the Accession of Romania contain identical provisions as follows:

“(a) If any product is being imported, in the trade between [Hungary] and contracting parties, in such increased quantities or under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products, the provisions of (b) to (e) of this paragraph shall apply.

“(b) [Hungary] or the contracting party concerned may request consultations. Any such request shall be notified to the CONTRACTING PARTIES. If, as a result of such consultations, it is agreed that the situation referred to in (a) above exists, exports shall be limited or such other action taken, which may include action, if possible, with respect to the price at which the exports are sold, as will prevent or remedy the injury.

“(c) Should it not be possible to reach agreement between the parties concerned as a result of consultation under (b), the matter may be referred to the CONTRACTING PARTIES who shall promptly investigate the matter and who make appropriate recommendations to [Hungary] or to the contracting party concerned.

⁷⁵Adopted on 26 March 1980, 27S/25.

⁷⁶15S/46, 48-49, para. 4.

“(d) If, following action under (b) and (c) above, agreement is still not reached between the parties concerned, the contracting party concerned shall be free to restrict the imports of the products concerned to the extent and for such time as is necessary to prevent or remedy the injury. The other party shall then be free to deviate from its obligations to the contracting party concerned in respect of substantially equivalent trade.

“(e) In critical circumstances, where delay would cause damage difficult to repair, such preventive or remedial action may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action”.⁷⁷

The Report of the Working Party on “Accession of Hungary” notes in this respect:

“Members of the Working Party considered it important to have in a protocol of accession a specific safeguard clause. Representatives of countries maintaining quantitative restrictions against Hungary’s exports indicated in this connexion that the inclusion of such a safeguard clause would facilitate the removal of the restrictions [maintained inconsistently with Article XIII]. The representative of Hungary could agree to the inclusion of a safeguard clause, provided it operated on a reciprocal basis. He also stated that his acceptance of such a safeguard clause was in anticipation of the early elimination of quantitative restrictions maintained against imports from Hungary, inconsistently with Article XIII. Paragraph 5 of the draft Protocol has been prepared taking into account these views”.⁷⁸

2. Arrangement Regarding International Trade in Textiles (MFA)

The Arrangement Regarding International Trade in Textiles (MFA) of 20 December 1973⁷⁹ included special safeguard provisions but provided, in paragraph 6 of its Article 1, that “the provisions of this Arrangement shall not affect the rights and obligations of the participating countries under the GATT”. The period of validity of the MFA was extended several times, most recently by the Protocol Maintaining in Force the Arrangement Regarding International Trade in Textiles of 9 December 1993, which provided that the Arrangement was to be maintained in force until 31 December 1994, at which time the MFA expired.⁸⁰ Trade in textiles and clothing is now governed by the Agreement on Textiles and Clothing in Annex 1A of the WTO Agreement. Article 1:6 of this Agreement provides: “Unless otherwise provided in this Agreement, its provisions shall not affect the rights and obligations of Members under the provisions of the WTO Agreement and the Multilateral Trade Agreements”.

The question whether, in the light of Article 1:6, a party to the MFA could invoke GATT provisions for restrictive actions relating to textile products, was discussed in the Textiles Surveillance Body on several occasions.⁸¹ Paragraphs 9, 23 and 26 respectively of the Conclusions of the Textiles Committee adopted on 14 December 1977, 22 December 1981 and 31 July 1986 which are confirmed in and attached to the 1977, 1981 and 1986 Protocols Extending the Arrangement Regarding International Trade in Textiles, provided, *inter alia*, “that in order to ensure the proper functioning of the MFA, all participants would refrain from taking measures on textiles covered by the MFA outside the provisions therein before exhausting all the relief measures provided in the MFA”.⁸² With regard to paragraph 23 of the Conclusions, the view was expressed “that, pursuant to Article 1:6 of the MFA, resort to any of the provisions of the GATT was fully consistent with the objectives of this paragraph”.⁸³ The representative of Colombia, speaking on behalf of developing exporting countries, said “that the MFA, as extended by the new Protocol adopted by the Textiles Committee, constituted the

⁷⁷20S/3, 4-5 (Hungary); 18S/5, 7, para. 4 (Romania). Concerning the use of these safeguard clauses by contracting parties see the Working Party Report on “Trade with Hungary - Seventh Review under the Protocol of Accession”, L/6535, adopted on 19 July 1989, 36S/416, 422 para. 38; also, the Working Party Report on “Trade with Romania - Sixth Review under the Protocol of Accession”, L/6282, adopted on 2 February 1988, 35S/337, 344-345 paras. 25-26, 30-31, and L/6155; see also Working Party Report on “Accession of Greece to the European Communities”, L/5453, adopted on 9 March 1983, 30S/168, 178-179 paras. 30 and 32.

⁷⁸L/3889, adopted on 30 July 1973, 20S/34, 35 para. 9.

⁷⁹TEX.NG/1, 21S/3; L/5276, 28S/3.

⁸⁰L/7363 (text of Protocol); COM.TEX/76, Annex II (Decision by the Textiles Committee).

⁸¹24S/28, 44-48, paras. 60-70; COM.TEX/SB/210, 225, 255.

⁸²L/4616, 24S/5, 7, para. 9; L/5276, 28S/3, 8, para. 23; L/6030, 33S/7, 14, para. 26.

⁸³COM.TEX/W/127, para. 14.

multilaterally agreed special framework governing international trade in textiles. It would therefore be the only legal basis for future bilateral agreements between exporting and importing participants".⁸⁴

D. "VOLUNTARY EXPORT RESTRAINTS" AND GREY-AREA MEASURES

During the discussion in the Council in March 1978 concerning the EEC's invocation of Article XIX with respect to the imposition of import restrictions on monochrome television sets imported into the United Kingdom from Korea, the Korean representative stated that these restrictions were imposed in violation of the relevant provisions of the GATT, and "expressed concern that acquiescence on the part of the CONTRACTING PARTIES in this case might be utilized as a precedent for legitimizing selective import restrictions in the conduct of international trade". The Hong Kong delegation "emphasized that Article XIX was not susceptible of being invoked on a discriminatory basis. He referred to [discussions during the Havana Conference and in 1953, noted above at page 519 and following] ... The only derogation from this principle of non-discrimination was in the Textiles Arrangements, which would not have been necessary if Article XIX had been capable of being used in a selective manner. ... A large number of representatives also spoke on the matter and expressed the opinion that Article XIX did not provide for the discriminatory application of measures to limit potentially disruptive imports". It was also stated that "voluntary restraint agreements were often forced upon the weaker members of the GATT ... there was no provision in the General Agreement that provided a legal basis for discriminatory restraints, even when they were supported by an agreement of a voluntary nature".⁸⁵

A Note by the Director-General on "Safeguards", which is annexed to the 1984 Report on "Safeguards" by the Chairman of the Council to the Fortieth Session of the CONTRACTING PARTIES, notes as follows:

"Export restrictions are generally prohibited under Article XI unless covered by an exception. Measures limiting exports to certain contracting parties only are, in any case, contrary to the provisions of Article XIII (except in the exceptional situations laid down in Article XIV) which provides for the non-discriminatory application of such restrictions. It may be argued that this is a very legalistic way of looking at the matter and that 'voluntary export restraints' are not, in fact, export restrictions but import restrictions which are administered by the exporting country. They would, once again, only be in conformity with the General Agreement if they were justified under a particular exception to Article XI and administered in accordance with the provisions relating to the non-discriminatory administration of quantitative restrictions contained in Article XIII. In fact 'voluntary' export restraints are clearly contrary to the present rules of the General Agreement and are only 'outside the General Agreement' in the sense that governments have not brought them formally to the GATT for examination".⁸⁶

Grey-area measures have been examined by panels under Article XXIII on a number of occasions. In 1980, the Panel on "EEC - Restrictions on Imports of Apples from Chile" examined a suspension by the EEC of imports of apples from Chile, after arrangements were reached with four other Southern Hemisphere suppliers for the restraint of their exports of apples to the EEC. In its findings,

"The Panel examined the EEC measure in relation to Article XIII:1. The Panel found that the EEC suspension applied to imports from Chile was not a restriction similar to the voluntary restraint agreements negotiated with the other Southern Hemisphere suppliers on the basis primarily that:

- "(a) there was a difference in transparency between the two types of action;
- "(b) there was a difference in the administration of the restrictions, the one being an import restriction, the other an export restraint; and
- "(c) the import suspension was unilateral and mandatory while the other was voluntary and negotiated.

⁸⁴*Ibid.*, para. 17.

⁸⁵C/M/124, p. 18-20.

⁸⁶MDF/4, p. 6, para. 11; MDF/4 appears at 31S/136 but the Annex is not reproduced.

“... Notwithstanding the Panel’s conclusions regarding the lack of similarity of the restrictions with regard to Article XIII:1, and in light of XIII:5, the Panel proceeded to consider the EEC import suspension against Chile and the voluntary restraint agreements with other Southern Hemisphere exporters as ‘quotas’ for purposes of the Panel’s examination of the EEC measure under XIII:2”.⁸⁷

In 1989, the Panel on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile” examined a later suspension by the EEC of imports of apples from Chile. With regard to Article XIII:2 and :4, “...the Panel did not find any basis in the General Agreement for the EC taking into account as ‘special factors’ the restraint alleged to have been exercised in previous years by other suppliers”.⁸⁸

See also the 1988 Report of the Panel on “Japan - Trade in Semi-conductors”, which examined, *inter alia*, a third-country market monitoring scheme established by Japan after the 1985 Arrangement with the United States concerning Trade in Semiconductors. In its findings,

“The Panel examined the parties’ contentions in the light of Article XI:1. ... The Panel noted that this wording [of Article XI:1] was comprehensive: it applied to all measures instituted or maintained by a contracting party prohibiting or restricting the importation, exportation or sale for export of products other than measures that take the form of duties, taxes or other charges.

“The Panel noted that the CONTRACTING PARTIES had decided in a previous case that the import regulation allowing the import of a product in principle, but not below a minimum price level, constituted a restriction on importation within the meaning of Article XI:1 (BISD 25S/99). The Panel considered that the principle applied in that case to restrictions on imports of goods below certain prices was equally applicable to restrictions on exports below certain prices.

“The Panel then examined the contention of the Japanese Government that the measures complained of were not restrictions within the meaning of Article XI:1 because they were not legally binding or mandatory. In this respect the Panel noted that Article XI:1, unlike other provisions of the General Agreement, did not refer to laws or regulations but more broadly to measures. This wording indicated clearly that any measure instituted or maintained by a contracting party which restricted the exportation or sale for export of products was covered by this provision, irrespective of the legal status of the measure”.⁸⁹

“... The Panel concluded that the complex of measures constituted a coherent system restricting the sale for export of monitored semi-conductors at prices below company-specific costs to markets other than the United States, inconsistent with Article XI.1”.⁹⁰

With regard to the possibility of using dispute settlement proceedings under the General Agreement to enforce agreements between contracting parties providing for “voluntary export restraints”, it may be noted that a Decision of the CONTRACTING PARTIES provides that “The determination of rights and obligations between governments arising under a bilateral agreement is not a matter within the competence of the CONTRACTING PARTIES”. A footnote to this decision provides that “This Decision by its terms clearly refers only to the determination of the rights and obligations as between the parties to the bilateral agreement and arising from it. It is, however, within the competence of the CONTRACTING PARTIES to determine whether action under such a bilateral agreement would or would not conflict with the provisions of the General Agreement”.⁹¹

⁸⁷L/5047, adopted on 10 November 1980, 27S/98, 114, paras. 4.11-4.12. The Panel found the EEC measure to be inconsistent with paragraphs 1, 2(a), 2(d) and 3(b) first sentence of Article XIII; *ibid.*, para. 4.25.

⁸⁸L/6491, adopted on 22 June 1989, 36S/93, 131 para. 12.24.

⁸⁹L/6309, adopted on 4 May 1988, 35S/116, 153-154, paras. 104-106.

⁹⁰*Ibid.*, 35S/158, para. 117.

⁹¹Decision of 9 August 1949, II/11 (relating to a matter raised by Cuba with reference to a Cuba-US agreement providing for trade preferences). See also L/1636 (Note of 1961 by the Executive Secretary stating that CONTRACTING PARTIES have jurisdiction to examine consistency of bilateral agreements with rights of third GATT contracting parties).

A series of lists of “grey-area measures” have been compiled by the Secretariat, most recently in 1987.⁹²

E. WORK UNDERTAKEN IN THE GATT ON SAFEGUARDS

A Secretariat Note of 1987 on “Work Already Undertaken in the GATT on Safeguards” describes the history of discussions on safeguards as follows:

At the time that Japan’s accession to the GATT was under discussion in February 1953, some contracting parties wished to retain the right to apply discriminatory quantitative restrictions on imports from Japan.⁹³ They suggested that an additional safeguard clause should be introduced into the General Agreement, arguing that a large number of Article XIX actions, which would have to be applied on a most-favoured-nation basis, might lead to a general raising of barriers to world trade. Other contracting parties felt that no additional safeguard clause was required. A suggestion was made that in order to avoid a higher general level of barriers to world trade, contracting parties might bring cases to the GATT under Article XXIII, paragraph 2, under which the CONTRACTING PARTIES could authorize the application of safeguard actions on a discriminatory basis. However, some delegations pointed out that there might be circumstances in which the procedures of Article XXIII would be too slow in operation to provide adequate safeguards, and they suggested that if the CONTRACTING PARTIES failed to reach a decision within thirty days, provisional safeguard measures might be taken pending a decision of the CONTRACTING PARTIES. In the end there was no agreement on the application of Article XXIII along these lines.

Japan became a contracting party in September 1955 without any new general safeguard clause being added to the General Agreement. Some contracting parties invoked Article XXXV on Japan’s accession. In a number of cases, Japan negotiated bilateral trade agreements containing special safeguard clauses and then the countries concerned disinvoked Article XXXV. Some countries did not invoke Article XXXV but nevertheless continued to discriminate against Japan.⁹⁴

At the November 1959 Session of the CONTRACTING PARTIES, some delegations stated that sharp increases in imports, over a brief period of time and in a narrow range of commodities, could have serious economic, political and social repercussions in the importing countries. The CONTRACTING PARTIES accordingly decided that the secretariat should prepare a factual study on the question of “market disruption”.⁹⁵ The outcome of the study showed that a wide variety of products, chiefly textiles and clothing products, were subject to import restrictions applied by a number of countries to deal with market disruption.⁹⁶ In June 1960 a Working Party on “Avoidance of Market Disruption” was established. In November 1960, a Decision was adopted recognizing that

“(a) In a number of countries situations occur or threaten to occur which have been described as ‘market disruption’.

“(b) These situations generally contain the following elements in combination:

⁹²Spec(82)18 dated 26 March 1982; Spec(82)18/Rev.3 dated 22 May 1984; L/6087, dated 28 November 1986; Secretariat Note on “Inventory of Article XIX Actions and Other Measures which Appear to Serve the Same Purpose”, MTN.GNG/NG9/W/2/Rev.1, dated 17 August 1987, and Corr.1 dated 31 August 1987; Background Note by the Secretariat on “‘Grey-Area’ Measures” dated 16 September 1987, MTN.GNG/NG9/W/6. See also various reports under the Trade Policy Review Mechanism since 1989.

⁹³L/76.

⁹⁴See, e.g., L/1164, page 33.

⁹⁵8S/22.

⁹⁶L/1164.

“(i) a sharp and substantial increase or potential increase of imports of particular products from particular sources;

“(ii) these products are offered at prices which are substantially below those prevailing for similar goods of comparable quality in the market of the importing country;

“(iii) there is serious damage to domestic producers or threat thereof;

“(iv) the price differentials referred to in paragraph (ii) above do not arise from governmental intervention in the fixing or formation of prices or from dumping practices. ...

“(c) These situations have often led governments to take a variety of exceptional measures. In some cases importing countries have taken or maintained discriminatory measures either outside the framework of the General Agreement, or contrary to the provisions of the General Agreement. In some other cases exporting countries have tried to correct the situation by taking measures to limit or control the export of the products giving rise to the situation.

“(d) Such measures, taken unilaterally or through bilateral arrangement, may in some cases tend to cause difficulties in other markets and create problems for other contracting parties”.⁹⁷

The same Decision provided for a programme of work. This work did not lead to the elaboration of any generally applicable solutions, however,⁹⁸ but indirectly to the negotiation of a special safeguard clause relating to a single industrial sector – cotton textiles.

The Short-Term Arrangement Regarding International Trade in Cotton Textiles (STA)⁹⁹ came into force on 1 October 1961 for a twelve-month period pending a long-term solution. A year later, the STA was superseded by the Long-Term Arrangement Regarding International Trade in Cotton Textiles (LTA)¹⁰⁰ which came into force on 1 October 1962 for a five-year period and continued into force until 31 December 1973. The stated objectives of the LTA, as of the STA, were two-fold: to promote the economic progress of developing countries by providing larger opportunities for exchange earnings, while ensuring that cotton textiles trade developed in such a way as to avoid disruptive effects in individual markets. Later, the Arrangement Regarding International Trade in Textiles, commonly known as the Multifibre Arrangement or the MFA,¹⁰¹ covering textile products of man-made fibre and wool as well as cotton, entered into force on 1 January 1974 for a period of four years. As noted above on page 531, the MFA was extended a number of times and finally expired at the end of 1994.

The Tokyo Declaration adopted in September 1973, which launched the Tokyo Round of multilateral trade negotiations, stated that these negotiations should aim, *inter alia*, to “include an examination of the adequacy of the multilateral safeguard system, considering particularly the modalities of application of Article XIX, with a view to furthering trade liberalization and preserving its results”.¹⁰² The Trade Negotiations Committee established a negotiating group on safeguards in February 1975 to carry out the task set out in the Ministerial mandate. However, in spite of intensive efforts made in the final stage of the Tokyo Round, and a narrowing of differences, it did not prove possible to reach agreement within the framework of the Round.¹⁰³

In the “GATT Work Programme” agreed on 29 November 1979 to follow up on the Tokyo Round results, it was agreed that “Continued negotiations on safeguards constitute an essential element in the GATT

⁹⁷9S/26, 26-27, Decision of 19 November 1960 on “Avoidance of Market Disruption - Establishment of Committee”; see also L/1374, Report of the Working Party on “Avoidance of Market Disruption - Establishment of Committee”, adopted on 19 November 1960, 9S/108.

⁹⁸In May 1964, after two years of experience with the LTA and at the time when the Kennedy Round was under preparation, the Executive Secretary of GATT made some unofficial “preliminary suggestions” (see above, page 520) which were rejected and not pursued.

⁹⁹10S/18.

¹⁰⁰11S/25.

¹⁰¹21S/3.

¹⁰²MIN(73)1, Declaration of Ministers approved at Tokyo on 14 September 1973, 20S/19, 21, para. 3(d).

¹⁰³Concerning negotiations on safeguards in the Tokyo Round, see further *The Tokyo Round of Multilateral Trade Negotiations: Report by the Director-General of GATT*, April 1979, p. 90-95, and the *Supplementary Report* of January 1980, p. 14-17.

Work Programme and should be carried out as a matter of urgency in accordance with the agreement reached in the Council on this matter".¹⁰⁴ The separate Decision on "Safeguards" of the same date provided that "The CONTRACTING PARTIES stress the need for an agreement on an improved multilateral safeguard system. The CONTRACTING PARTIES reaffirm their intention to continue to abide by the disciplines and obligations of Article XIX of the General Agreement. A Committee is established to continue discussions and negotiations ... with the aim of elaborating supplementary rules and procedures regarding the application of Article XIX of the General Agreement, in order to provide greater uniformity and certainty in the implementation of its provisions".¹⁰⁵ At the same time it was decided to establish the Sub-Committee on Protective Measures of the Committee on Trade and Development.¹⁰⁶

At its meeting in April 1981, the Committee on Safeguards adopted the following conclusions:

- "(i) the provisions of Article XIX of the General Agreement continue to apply fully and at the present time the rules and procedures for their application remain unchanged;
- "(ii) the CONTRACTING PARTIES will continue to keep the matter under examination and discussion and to this end the Committee on Safeguards will expedite its work;
- "(iii) All actions taken under Article XIX, and to the extent possible, other actions which serve the same purpose will be notified to the CONTRACTING PARTIES. In addition, it will be open to contracting parties to bring up any matter in accordance with the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance.¹⁰⁷

In November 1982, the CONTRACTING PARTIES meeting at Ministerial level adopted a Ministerial Declaration, paragraph 7(vi) of which provided that "the contracting parties undertake, individually and jointly ... to bring into effect expeditiously a comprehensive understanding on safeguards to be based on the principles of the General Agreement".¹⁰⁸ The Decision adopted on the same date on "Safeguards" provides:

"The CONTRACTING PARTIES decide:

"1. That, having regard to the objectives and disciplines of the General Agreement, there is need for an improved and more efficient safeguard system which provides for greater predictability and clarity and also greater security and equity for both importing and exporting countries, so as to preserve the results of trade liberalization and avoid the proliferation of restrictive measures; and

"2. That to this end, effect should be given to a comprehensive understanding to be based on the principles of the General Agreement which would contain, *inter alia*, the following elements:

- "(i) Transparency;
- "(ii) Coverage;
- "(iii) Objective criteria for action including the concept of serious injury or threat thereof;
- "(iv) Temporary nature, degressivity and structural adjustment;
- "(v) Compensation and retaliation; and
- "(vi) Notification, consultation, multilateral surveillance and dispute settlement with particular reference to the role and functions of the Safeguards Committee".

¹⁰⁴L/4884/Add.1/Annex VI, adopted on 28 November 1979, 26S/219, 220, para. 2.

¹⁰⁵L/4898, adopted on 29 November 1979, 26S/202.

¹⁰⁶L/4899, Decision of 28 November 1979 on "Examination of Protective Measures Affecting Imports from Developing Countries"; concerning this Sub-Committee see the chapter on Part IV.

¹⁰⁷L/5151.

¹⁰⁸L/5424, Ministerial Declaration adopted on 29 November 1982, 29S/9, 12, para. 7(vi).

The Ministerial Declaration of 20 September 1986 launching the Uruguay Round provided that

“A comprehensive agreement on safeguards is of particular importance to the strengthening of the GATT system and to progress in the Multilateral Trade Negotiations.

“The agreement on safeguards:

- “– shall be based on the basic principles of the General Agreement;
- “– shall contain, *inter alia*, the following elements: transparency, coverage, objective criteria for action including the concept of serious injury or threat thereof, temporary nature, degressivity and structural adjustment, compensation and retaliation, notification, consultation, multilateral surveillance and dispute settlement; and
- “– shall clarify and reinforce the disciplines of the General Agreement and should apply to all contracting parties”.¹⁰⁹

The WTO Agreement includes an Agreement on Safeguards, which includes provisions on conditions for application of safeguards measures (“those measures provided for in Article XIX of GATT 1994”), determination of serious injury or threat thereof, application of safeguard measures, provisional safeguard measures, duration and review of safeguard measures, level of concessions and other obligations, developing country WTO members, termination of pre-existing Article XIX measures, and prohibition and elimination of grey-area measures. The Agreement also provides for notification, consultation, dispute settlement and surveillance of measures in this area.

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

The Havana Charter provision corresponding to Article XIX is Article 40; in the US Draft, Article 29; in the London and New York Drafts, Article 34; and in the Geneva Draft, Article 40. Concerning the antecedents of the “escape clause” in the US Draft Charter, see page 518 above.

Article XIX has been amended only once. In the Review Session of 1954-55, it was agreed to change the term “obligations or concessions” (paragraph 3(a) and (b)) to “concessions or other obligations”.¹¹⁰ This change was effected through the 1955 Protocol Amending the Preamble and Parts II and III, and came into force in October 1957. Various other amendments to Article XIX were proposed in the Review Session but rejected.¹¹¹

¹⁰⁹Min.Dec., section I.D, 33S/19, 24-25.

¹¹⁰W.9/236, Legal and Drafting Committee report on drafting changes to various Articles.

¹¹¹See Statement of Recommendations submitted by Sub-Group B to Working Party II, W.9/193, p. 12-13.

IV. RELEVANT DOCUMENTS

London

Discussion: EPCT/C.II/38
EPCT/C.II/QR/PV/5

New York

Discussion: EPCT/C.6/29+Corr.1-2, 34, 40
Reports: EPCT/C.6/28/Rev.1, 97/Rev.1, 105
Other: EPCT/C.6/W/8, 66, 87

Geneva

Discussion: EPCT/A/SR.11, 12, 35
EPCT/TAC/PV/28
Reports: EPCT/135, 189, 196, 212,
214/Rev.1/Add.1
EPCT/W/313
Other: EPCT/W/272, 301

Havana

Discussion: E/CONF.2/C.3/SR.17, 32, 35
E/CONF.2/C.3/D/2, 4, 7-11, 13
Reports: E/CONF.2/C.3/37, 49, 52
E/CONF.2/C.3/D/W/12
Other: E/CONF.2/C.3/D/1-7

CONTRACTING PARTIES

Report: GATT/CP/106 (Published in
November 1951: *Report on the
Withdrawal by the United States of a
Tariff Concession under Article XIX*,
Sales No. GATT/1951-3.)

Review Session

Discussion: SR.9/16, 25
Reports: W.9/124, 193, W.9/236
Other: L/273, 275, 277, 283
W.9/21, 45; Spec/3/55, 4/55, 85/55,
94/55

V. NOTIFICATIONS TO THE SECRETARIAT OF ACTIONS UNDER ARTICLE XIX

(Situation as at 1 January 1995)

General notes:

- (1) The only actions listed are those which have been notified under Article XIX. This table does not include other quantitative restrictions or "emergency actions" notified without reference to Article XIX.
- (2) Product descriptions are abbreviated.
- (3) Column on affected countries is based on claimed interest or on information on principal or substantial suppliers furnished by governments taking actions, and may therefore be incomplete. In some instances, these statistics indicate largest suppliers.
- (4) Shaded table cells indicate that the Article XIX action had not been terminated as of 1 January 1995.

N°	Date introduced	Date terminated	Contracting party	Product	Measure taken	Affected countries, territories or customs unions, compensation, retaliation	References
1.	1.12.50	June 1956 XXVIII:4 reneg.	US	Women's fur felt hats and hat bodies	Value-bracketed ad valorem duties replaced by compound rates for products between certain prices	Austria, Czechoslovakia, France, Italy, UK. Compensation to France, Italy at Torquay. Czechoslovakia brought dispute under Article XXIII:2.	GATT/CP/83, GATT/CP:522, GATT/CP:5/SR:22 & 23; Panel report GATT/CP/106; adopted at GATT/CP:6/SR:19. SECRET/63/Add. 1-2
2.	9.2.52	14.9.58	US	Hatters' fur	Ad valorem duty replaced by compound rates subject to an ad valorem floor and ceiling	Argentina, Belgium, France; Benelux took Article XIX:3 action 22.5.52	SECRET/CP/19 & Add. 1, GATT/CP/140 & Add. 1, L/9, L/851 & Add. 1
3.	30.8.52	1966 XXVIII:4 reneg. (nomenci. rev.)	US	Dried figs	Specific duty increased	Greece, Italy, Turkey. Turkey took Art. XIX:3 action 23.2.53 (see BISD 1S/28). <i>Compensatory reductions</i> made by US to a number of countries in 1966.	AIR/23, L/14, L/40, L/44, L/57, L/72, L/83, L/145, L/147, L/161, L/284, L/2592, G/39, G/70, BISD 1S/28
4.	1.7.54	30.6.59	US	Alsike clover seed	Specific duty increased for imports above a fixed annual quota, which was increased 1 July 1955 and 2 July 1957	Canada, Belgium	AIR/47, L/216, L/662, L/1532 & Add. 1
5.	3.55	Oct. 1955 XXVIII reneg.	Greece	Apples	Specific duty replaced by increased ad valorem duty plus 75% surtax	Canada, which was <i>compensated</i>	L/346 & Corr. 1; unpublished Canadian letters dated 21.5.62, 6.5.63, 7.4.70.
6.	19.8.55	Jan 1961 XXVIII:4 reneg.	US	Bicycles	Duties per unit increased, as well as floors and ceilings with respect to ad valorem equivalents. On 12 December 1960, US Supreme Court invalidated the action on one out of four subitems in question.	Austria, Belgium, Netherlands, Germany, UK (all <i>compensated in 1950</i>); France, Italy.	AIR/77, 79 & 214, L/433, 6PSC, CMI/2, SECRET/136/Add. 1-4
7.	26.7.56	1966 XXVIII:4 reneg. (nomenci. rev.)	US	Towelling of flax, hemp or ramie	Ad valorem duty increased	Belgium, Japan, Netherlands, United Kingdom. Compensation to Benelux, U.K. in June 1957. <i>Compensatory reductions</i> made by US to a number of countries in 1966.	AIR/90 & 92, L/548, L/573 & Add. 1, L/2592

N°	Date introduced	Date terminated	Contracting party	Product	Measure taken	Affected countries, territories or customs unions, compensation, retaliation	References
8.	3.10.56	June 1961 XXVIII:1 reneg.	Greece	Electric refrigerators	Ad valorem duty increased	United States, which was compensated	L/541, L/575, SECRET/131/Add.7; letters (unpubl. 21.5.62 and 7.4.70)
9.	14.6.57	14.12.57	Canada	Strawberries	Minimum values for duty (increased specific duties)	United States	L/642
10.	9.11.57	Feb. 1961 XXVIII:4 reneg.	US	Spring clothespins	Specific duty increased.	Benelux, Denmark, Hong Kong, Sweden. Compensation to Denmark, Sweden, Benelux	L/757 & Add.1, L/758, SR.12/21, AIR/128 & 214, C/M/2, SECRET/136/Add. 5-7
11.	29.11.57	28.1.66	US	Safety-pins	Ad valorem duty increased.	Germany, Japan, United Kingdom. Compensation to Germany, UK in Jan. 1962.	AIR/105, L/624 & Add.1-2, AIR/125, L/1746, L/2565
12.	12.2.58	15.6.59	Canada	Frozen peas	Minimum values for duty (increased specific duties)	United States (only supplier)	AIR/124, L/1017
13.	27.2.58	15.5.58	Australia	Printed cotton textiles	Ban on import licences. Japan had agreed to reduce exports already covered by licences and firm orders. Licences thus redundant could not be used to import from any other source, but might be used on other categories of goods from any country. Action modified 1 April 1958. Licences issued against other quotas but value of licences issued to any individual quota holder not to be in excess of his imports in same licensing period in 1957; also, of total value licensed, not more than 50 per cent to be imported prior to 30 June 1958.	Japan	L/797 & Add.1-2
14.	22.5.58	7.1.66	US	Clinical thermometers	Ad valorem rate increased.	Japan	L/803 & Add.1 & Corr. 1 and Add.2, AIR/138, L/2566
15.	4.9.58		Germany	Hard coal and hard coal products	Repeal of general licence from countries outside the ECSC. Further contracts subjected to individual licensing.	Norway, United Kingdom, United States; compensation was offered	L/855, L/920
16.	1.10.58	22.10.65 (ores + concentrates) 22.11.65 (metals)	US	Lead and zinc	Separate country-allocated quarterly quotas representing 80% of average competitive imports during 1953-1957.	Canada, Mexico, Peru for lead and zinc; Australia, South Africa, Yugoslavia (lead)	L/819, L/859, L/940, L/1078, L/2489, C/SR.41

N°	Date introduced	Date terminated	Contracting party	Product	Measure taken	Affected countries, territories or customs unions, compensation, retaliation	References
17.	1.1.59	1.1.61 (XXV/III:1 renege. with effect from same date)	Austria	Porcelain	Specific duty increased	Czechoslovakia, Germany, which were both compensated prior to action	L/863 & Add.1, SECRET/120 & Add.1-3
18.	1.4.59	20.5.60 (new tariffs introduced)	Australia	Footwear	Import licensing issued to the extent of 100% of imports during financial year 1956-57. All footwear transferred from licensing categ. B (under which quotas were interchangeable among a wide variety of goods) to categ. A (under which quotas were related to particular goods), to reduce substantially only rate of import of casual footwear. Background was marked increase in licences issued for imports from Hong Kong and other sources after Japan agreed Dec. 1958 to export restraints on casual footwear. Action modified 1 August 1959 (for some items 100% of 1957-58 imports, for some items 75%, for another 50%).	Japan, Hong Kong	L/974 & Add.1-2
19.	1.11.59	11.10.67	US	Stainless steel flatware	Various compound duties replaced by increased ad valorem duties or compound duties depending on the article, for imports valued under certain price when imported in excess of a tariff quota. In 3.1958 President had decided that "a full evaluation of Japan's voluntary export limitation system was necessary because of the promise it held of relieving the situation ... In July 1959 after a supplemental investigation another report was submitted. It is on the basis of this entire investigation and history that the action ... is taken" (L/1076). On 7.1.66, quotas increased and over-quota rates reduced retroactive to 1.11.65.	Japan	L/791, L/1076 & Add.1, AIR/177, L/2543, L/2953 See also item 62.
20.	30.5.60	17.7.61 (new tariff introduced)	Australia	Motor mowers and engines	Global non-discriminatory licensing of engines for motor mowers at 25% of requirements; for other engines at 100% of requirements; for motor mowers at 100% of 1959 imports.	United Kingdom, United States	L/1217 & Add.1, AIR/204, L/1527
21.	22.9.60	11.10.67	US	Cotton typewriter ribbon cloth	Duties increased to various higher ad valorem rates.	Germany, Japan, United Kingdom. UK compensated January 1962.	L/1313, W.17/13, L/1746, L/2953

N°	Date introduced	Date terminated	Contracting party	Product	Measure taken	Affected countries, territories or customs unions, compensation, retaliation	References
22.	26.5.61	31.12.64 XXVIII:1 reneq.	Australia	Piece-goods and non- pile fabrics: woollen	Compound duties (piece-goods) and ad valorem duties (fabrics), replaced by higher temporary duties	Italy, United Kingdom, France, Germany, Japan, Benelux. EEC was compensated	L/1497, AIR/243, L/1546, L/1612, L/1638, L/2455, SECRET/156/Add.4
23.	14.12.61		Nigeria	Cement	Import licences prohibited, except for contracts concluded prior to 14.12.61.	Germany, Israel, United Kingdom	L/1781
24.	17.6.62	1.2.74 (concession partly restored 11.1.67, 1.5.72, 1.2.73)	US	Sheet glass (principally window glass)	Increased specific duties varying with type of glass	EEC, UK, Japan (compensated December 1962); Sweden (compensated December 1967); EEC took Article XIX:3 action 4.6.62; partly restored 1.6.67: fully restored 1.1.73	L/1509, & Add.1-3, L/1803, L/1951, L/1959, L/2743, L/2784, L/2953, L/2959, L/3316, L/3317, L/3664, L/4188
25.	17.6.62	1.1.73 (concession partly restored January 1972)	US	Wilton and velvet carpets	Ad valorem duty increased	EEC, Japan, Sweden. Compensation to UK and Japan December 1962. Art. XIX:3 action by EEC; see preceding item.	L/1530 & Add.13, L/1803, L/1951, L/1959, L/2953, L/3378, L/4188
26.	9.7.62	11.1.64 (New tariff introduced)	Australia	Timber	Non-discriminatory global quota licensing on basis of 25% of imports in the 2 year period ending 30.6.62. Firm orders at 8.7.62 licensed with debit where necessary against future quotas for the relevant timbers.	Canada, Brazil, British Borneo, Malaya, United States	L/1812 & Corr.1 & Add.1-2
27.	31.7.62	May 1967 XXVIII renegotiation (Kennedy Round)	Australia	Parts for refrigerating appliances	Additional specific duties for some parts, additional ad valorem duty for others, on top of bound ad valorem rate	United Kingdom, United States	L/1819, L/2791, SECRET/156/Add.7
28.	3.8.62	4.6.63	Australia	Antibiotics	Non-discriminatory quantitative licensing on an administrative basis. Licensing periods of 6 months. For certain antibiotics: 1 imported unit per each 9 locally-produced units purchased after 2.8.62. For others, licences issued at annual rate of 20% of 1961-62 imports.	France, United Kingdom, United States	L/1820 & Add.1
29.	12.10.62	May 1967 XXVIII renegotiation (Kennedy Round)	Australia	Forged steel flanges	Additional ad valorem duty	Germany	L/1863, L/2791, SECRET/156/Add.4

N°	Date introduced	Date terminated	Contracting party	Product	Measure taken	Affected countries, territories or customs unions, compensation, retaliation	References
30.	5.11.62	28.2.64 (new tariff introduced)	Rhodesia: from 1.1.64 Southern Rhodesia only	Cotton & rayon piecegoods	Import restrictions on products of a certain weight and valued under a certain f.o.b. price per sq.yd.		L/1898, L/2213
31.	27.2.63 (1)	22.4.65 XXVIII renegotiation (Kennedy Round)	Australia	Linseed oils	Duty-free entrance and specific duties (depending on tariff item) replaced by increased duties	Argentina, India	L/1981, L/2455
32.	23.2.63 26.2.63	November 1966	Peru	Lead arsenate and valves, respectively	Specific duty introduced on duty-free lead arsenate; increased specific duty on valves	United States	L/1979, L/1896
33.	24.2.64 (2)	9.3.64	Austria	Chicken eggs	Suspension of liberalization		L/2148 + Add.1
34.	15.2.64	31.12.70	France	Foundry pig-iron	Introduction of specific duty, whenever higher than the ad valorem duty. Minimum protection reduced November 1966. Action was recommended by ECSC, but affected only France's and Italy's obligations. Disinvocation was made by EEC.	Benelux, Australia, Canada, Germany, Norway, Spain, Sweden, Finland, United Kingdom	L/2139, L/2183, L/2197, L/2531, L/2532, L/2536, L/2719, L/2731, L/3165, L/3170, L/3505
35.	15.2.64	31.12.70	Italy ⁷	Foundry pig-iron	As above	Germany, Spain	L/2197, L/2536, L/2719, L/3505
36.	14.5.64	March 1968 XXVIII.4 renegotiation	Australia	Heat-resisting glassware of a minimum price	Specific duty introduced for imports valued over certain f.o.b. prices	France, United Kingdom, United States; EEC compensated	L/2220, C/M/21, AIR/529, C/M/33, Spec(67)6, L/2985
37.	10.12.64	1.1.82	Germany	Petroleum and shale oils etc.	Import licences introduced		L/2321 & Corr.1
38.	4.3.65	1.9.65	Australia	Copper, brass sheet and strip	Quantitative restrictions introduced during a period of temporary shortage of Australia-produced unwrought copper		L/2373, L/2474
39.	22.4.65 (3)	31.5.71	Greece	Tyres	Specific duties replaced by higher ad valorem duties. Increase reduced in April 1966	United States, which was compensated in May 1971; Norway	L/2431 & Add.1, letter from Greece 13.1.75
40.	14.1.66	1.1.69	Australia	Polyethylene twine, cordage rope and cable	Quantitative restrictions introduced	Japan	SECRET/162, L/2961 & Add.1; see also item 48.

N°	Date introduced	Date terminated	Contracting party	Product	Measure taken	Affected countries, territories or customs unions, compensation, retaliation	References
41.	29.4.66	24.6.1982	Australia	Alloy steels	Additional specific duty, less 40% off f.o.b. price	Benelux, United States, Japan	SECRET/163, L/5343
42.	30.6.66	May 1980	Spain	Cheese	Individual licensing, and temporary ban on imports, followed 5.6.70 by agreement with EEC liberalizing certain items via regulating duties subject to threshold prices. Certain items required certificate (issued for some items by Spain; for others by exporting country but approved by Spain). For some items Spain opened global quota, distributed quarterly on basis of imports in 1963/64/65, the EEC counting as a whole. Regulating duties increased in March 1972, pending consultations with principal supplying countries concerning new threshold prices	EEC, Norway	L/2670, L/3407 & Add.1; See also item 105
43.	2.2.67	Date of termination unknown	Spain	Synthetic rubber	Tariff heading sub-divided into two: 15% provisional customs duty imposed on synthetic rubber based on polybutadiene.	United States (compensated 21.3.69), Canada (compensated 12.11.70) and EEC (compensated 4.3.70)	L/2820 & Add.1-4, L/3323 & Add.1, L/3375
44.	21.4.67	1.7.89	Australia	Used 4-wheel drive vehicles	Quantitative restrictions imposed	United States	L/2787 & Add.1, NTM Inventory
45.	14.11.67	1.1.68	Austria	Matches	Quantitative restrictions within the limits of a global quota open to all contracting parties		L/2920 & Add.1
46.	17.11.67	31.12.68	Canada	Turkeys	In view of threat of imports from US, special valuation levied for imports at distress prices to protect against being sold at less than cost	United States	L/2924 & Add.1
47.	19.12.67	1.9.72	Australia	Knitted coats and the like	Quantitative restrictions imposed	Japan, EEC	L/2957, L/3834
48.	4.1.68	1.1.69	Australia	Polypropylene twine, cordage and cable	Same as for item 40	Japan, United States	See item 40.
49.	17.3.68	30.12.71	France	Horsemeat	Quantitative restrictions imposed. Global quota initially opened from 1.4.68 to 31.8.68, distribution of which was based on 1967 imports	Argentina, Canada, Poland, Spain	L/3000, L/4182

N°	Date introduced	Date terminated	Contracting party	Product	Measure taken	Affected countries, territories or customs unions, compensation, retaliation	References
50.	15.7.68	1.3.69	Austria	Oilcakes	Specific duty imposed	Argentina; United States (which proposed Article XIX:3 action 12.12.68 (not implemented))	L/3046 & Add.1-4
51.	12.9.68	2.11.68	Canada	Potatoes	"Action" taken under Section 40-A-7(c) of Canadian Customs Act on imports entering Western Canada. (Reference to this Act was made in respect of item 46 when special valuation was introduced.)	United States, compensated through advanced implementation 1.10.68 of Kennedy Round reduction of duty on cranberries	L/3066 & Add.1
52.	30.10.68	31.12.68	Canada	Corn	Idem, for whole of Canada	United States	L/3097 & Add.1
53.	19.5.69	Partial termination Aug. 1969; date of complete termination unknown	Italy	Raw silk	Measure adopted at Community level. Notification stated, <i>inter alia</i> , that EEC Council decided in 1968 to support Italian efforts <i>inter alia</i> by reintroducing, over 1.1.70 to 31.12.76, existing Common External Tariff customs duty on raw silk and establishing EEC duty-free quota for raw silk equal to difference between demand for and production of raw silk within the EEC; and by applying same Common External Tariff duty on permanent basis from 1.1.76, if in 1976 Italian silkworm cocoon production made possible production of at least 1,000 tonsyr of raw silk. Partial removal in August 1969 concerned silk waste.		L/3231 & Add.1
54.	9.6.69	1.9.72	Australia	Knitted shirts	Quantitative restrictions introduced		L/3217, L/3834
55.	21.2.70	20.2.74	US	Pianos	Increased ad valorem duty	Japan, EEC	L/3314, L/3371 & Add.1, L/4005
56.	7.5.70	16.6.73	Canada	Motor gasoline	Resulting from conditions under which increasing quantities of motor gasoline had been entering the Ontario market, discretionary licensing introduced for imports into Canada (east of Province of Manitoba). Not envisaged that overall volume would be significantly affected.	United States	L/3400, L/3877

N°	Date introduced	Date terminated	Contracting party	Product	Measure taken	Affected countries, territories or customs unions, compensation, retaliation	References
57.	2.6.70	29.11.71	Canada	Men's and boys' woven fabric shirts	Surtax applied for imports from all countries except for products in transit on or before 2.6.70 and except for shirts subject to export restraint or equivalent intergovernmental arrangements. To limit restrictive impact and ensure equity, quantitative exemptions established for countries with recent substantial interest "consistent with that set out in Annex B of the [Cotton Textiles Arrangement]". Surtax was the lesser of either twice the amount by which Can\$24 per dozen exceeded the f.o.b. price or Can\$24.		L/3402, L/3613 & Add.1. See also items 60 and 82.
58.	1.1.71	21.3.71	Israel	Radio equipment	Increased ad valorem duty		L/3424 & Add.1
59.	21.5.71	21.7.71 and 18.8.71 (for frozen strawberries)	Canada	Fresh and preserved frozen strawberries	Surtax	United States, Mexico	L/3539 & Add.1-2
60.	30.11.71	31.12.78 (subsumed in action No. 82)	Canada	Men's and boys' shirts, woven or knitted	Global quotas with country reserves for imports under a certain price.	Hong Kong, Japan, Korea, Macao, Malaysia, Poland, Romania, Singapore, Trinidad and Tobago	L/3613 & Add.1, L/4143 & Add.1, L/4453/Add.4. See also items 57 and 82
61.	1.5.72	30.4.76 and 30.4.79	US	Ceramic tableware articles	Various increased compound duties for imports valued under or between certain prices depending on the article. Some high-value goods also included. Action terminated on 30 April 1976 for earthen and china stems and mugs and lowpriced earthen tableware, and on 30 April 1979 for certain high-priced earthen dinnerware or other tableware, and for certain low-priced and medium-priced china tableware.	Japan, EEC	L/3678, L/3700 & Add.1 & 2, L/4326, C/M/78. Replies to GATT/AIR/112
62.	1.4.73	31.12.73	EEC	Tape recorders	Import licences limited to a certain quantity; action taken by EEC but applied to Italy	Japan, Korea	L/3847, L/3892, L/3977, C/M/86, SR.29/1
63.	30.6.73	3.8.73	Canada	Fresh cherries	Surtax introduced	United States which was compensated	L/3887 & Add.1-6

N°	Date introduced	Date terminated	Contracting party	Product	Measure taken	Affected countries, territories or customs unions, compensation, retaliation	References
64.	1.5.74	30.4.78	US	Ball bearings	Increased ad valorem or compound rates, depending on the item, if valued not over certain unit prices	Japan, Canada, EEC	L/3897, L/4016 & Add.1-3, C/M/95. Replies to GATT/AIR/1128
65.	12.8.74	1.1.76	Canada	Cattle, beef, veal	Annual global quotas, based on 5-year average US imports. First quota for 12.8.-30.9.74, thereafter quarterly; administered so as to ensure that relative shares of each of Canada's main suppliers would bear a reasonable relationship to past patterns of trade, market trends and historical performances. Measure taken in context of a temporary beef stabilization programme. After 1.1.76 imports from Rhodesia continued to require an individual import licence.	United States. Holding that the action did not provide access for cattle and meat on an equitable basis and failing to reach agreement, <i>US suspended substantially equivalent concessions</i> 12.8.74-1.1.76 pursuant to Article XIX:3. Also affected: Australia, New Zealand	L/4072 & Add.1-5, L/4118 & Add.1. Replies to GATT/AIR/1128
66.	1.10.74	1.1.82 (Partial removal 22.11.77)	Australia	Certain footwear	Quantitative restrictions, to a level of 20% greater than imports in 1972/73. Quotas allocated to established importers without restriction as to source of supply. High-priced footwear exempted from import licensing on 22.11.77.	EEC, Japan, Korea, Malaysia, Spain, India, Hong Kong, Portugal; <i>retaliation proposed by EEC</i>	L/4099 & Add.1-26, C/M/103, 107, 113, C/M/155 item 1, C/M/156 item 2. See also items 73 and 89.
67.	1.2.75	8.12.76 (partial removal 30.3.75)	Australia	Motor vehicles	Global quotas; removed for light commercial vehicles 30.3.75.	EEC, Japan, United States	L/4149 & Add.1-9, C/M/103, 107, 113. See also item 85.
68.	1.1.75	5.3.76	Australia	Hot-rolled and cold-rolled sheets and plates of iron or steel	Global quotas	Japan, United States	L/4166 & Add.1-7, C/M/105, 107, 114
69.	1.3.75	27.4.88	Australia	Certain apparel	Additional duties in excess of a tariff quota	Canada, EEC, Egypt, Hong Kong, India, Japan, Pakistan, Romania, Sweden, Switzerland, United States	L/4162 & Add.1-3, C/M/103, 105, 114
70.	1.3.75	25.5.76	Australia	Ophthalmic frames, sunglass frames and sunglasses	Quotas allocated to importers without restriction as to source of supply. Each importer granted a licence for a 6-month period equal to no more than half his established quota. (Frames: limitation to 75% of 1973/74 imports; sunglasses to 85% of 1973/74 imports)	EEC, Japan	L/4169 & Add.1-6 & Corr.1, C/M/107, 113

N°	Date introduced	Date terminated	Contracting party	Product	Measure taken	Affected countries, territories or customs unions, compensation, retaliation	References
71.	1.4.75	18.3.76	New Zealand	Woven polyester fabrics (extended coverage May 1975)	Import licences. Allocations for 1975-76 were 60% of 1973-74 import volume. Certain items remain under control after termination of the action. Licence allocation to be 100% of 1976-77 volume levels.	Japan, United States	L/4172 & Add.1-5
72.	1.1.76	31.8.78	Canada	Worsted spun acrylic yarns below a certain price	Global quota for products under a certain export price (determined in accordance with the Anti-Dumping Act). Permits already issued for Jan - June 1976 delivery were honoured and included as part of quota; distribution of import permits was based on historical performance of importer over two years ending 31.3.76. 10% of quota allotted to importers without historical performance in this period. Gradually phased out as from 30 June 1978.	Japan, Korea	L/4344 & Add.1-2
73.	1.5.76	1.1.82 (Partial removal 22.11.77)	Australia	Sand boots and shoes; parts of footwear	Included within scope of restrictions under item 66. Footwear already subject to licensing maintained at 140% of 1972-73 volume. Sand boots/shoes incorporated into non-leather footwear licensing category (quota for which was consequently increased). This additional quota allocated to individual importers after account taken of goods in bond and in transit as at 7.5.76; base period for this allocation widened to include imports 1.7.74-31.12.75, and quotas thus allocated could be used to import sand shoes/boots and other non-leather footwear (quota available for non-leather footwear could also be used for sand shoes/boots). Licensing controls on imports of parts for footwear restricted annual import value to 140% of 1973-74. Allocations to individual importers made on basis of 1973-74 imports after account taken of goods in bond and in transit. High-priced footwear exempted from import licensing on 22.11.77.	Sand boots and shoes: Korea. Parts: Germany, Italy, Portugal	L/4099/Add.3 and 6, Add. 16, Add.23. See also items 66 and 89.

Nº	Date introduced	Date terminated	Contracting party	Product	Measure taken	Affected countries, territories or customs unions, compensation, retaliation	References
74.	25.5.76 (4)	31.12.78	Australia	Files and rasps	Quotas allocated to importers on the basis of import performance in 1974 and 1975 and without restriction as to source of supply	United States	L/4351 & Add.1-3. Letter (unpublished). See also item 92.
75.	14.6.76	13.2.80	United States	Specialty steel	Orderly marketing agreement (signed 11.6) with principal supplier (Japan) covering three years, plus three-year restraints on imports from other foreign suppliers. Quota system replaced by a transitional one, with progressively larger bi-monthly quotas, 12 June 1979	Japan, Argentina, Austria, Sweden, Canada, Finland, France, UK, Germany, Korea, Mexico, Spain, Norway 113, 114.	L/4314, L/4318, L/4368 & Add.1-57, C/M/112, 113, 114.
76.	1.7.76	27.4.88	Australia	Knitted and woven dresses	Additional specific duties for imports in excess of tariff quota, applied to import clearances after 1.7.76		L/4364/Add.1
77.	1.7.76	31.12.78	Canada	Work gloves	Three-year global quota for imports under a certain export price (determined in accordance with Anti-Dumping Act). Sub-quota for 100% cotton gloves (as opposed to leather gloves) based on actual imports during 1975. Quota divided quarterly. Permits distributed according to historical performance of importers 1.7.74-15.6.76. 10% allotted to importers with no or little historical performance	Hong Kong	L/4382 & Add.1
78.	7.7.76	23.12.76	Canada	Textured polyester filament yarn	Surtax for imports exported at less than a specified value, applied on m.f.n. basis among exporting countries. Surtax equal to difference between export price as defined in Anti-Dumping Act and values as specified for four different categories.	United States	L/4374 & Add.1-3
79.	10.8.76	9.8.79	Australia	Electrical chest freezers	Global import licensing, applying to all imports other than those under existing special trading arrangements provided for in New Zealand Australia Free Trade Agreement, which were "administered separately". Licences allocated on basis of importers' performance 1.7.74-30.6.76	EEC	L/4387 & Add.1; Letter, unpublished

N°	Date introduced	Date terminated	Contracting party	Product	Measure taken	Affected countries, territories or customs unions, compensation, retaliation	References
80.	8.10.76	9.10.79	Canada	Double-knit fabrics	Global quota distributed among importers semi-annually based on their individual historical import performance. (Prior to action there were restraint arrangements with a number of countries renewed annually as from 1972.)	Japan, United States, Singapore, Hong Kong, Malaysia	L/4450 & Add.1-5, C/M/123
81.	18.10.76	31.12.76	Canada	Beef and veal	General import permit replaced by individual permit control. Permits issued on basis of global quota allocated among supplying countries in accordance with their market shares in the base period (not specified)	New Zealand	L/4437 & Add.1, C/M/117
82.	29.11.76	31.12.78	Canada	A range of clothing items	Global quotas at 1975 levels, administered (other than for outerwear) on basis of importer's 1975 performance in each product category. Goods in transit on or before 29.11.76 exempted from quota. All existing quota and restraint arrangements were suspended by these measures. Outerwear imports limited to 2.3 million units from all sources	Austria, United States, Hong Kong, Korea	L/4453 & Add.1-4
83.	27.12.76	31.12.79	Finland	Women's panty hose	Surcharge equivalent to difference between a basic price and import price applied non-discriminatory on all imports taking place under that price	Singapore, United Kingdom	L/4461 & Add.1-2, C/M/119
84.	28.6.77	30.6.81	US	Footwear	Agreement with Korea 21.6.77 in which Korea will carry out export restraints for a period up to 1.7.81 and be assisted in this by US import restrictions for certain items.	Korea	L/4477 & Add.1, L/4525 & Add.1, C/M/112, C/M/119 item 16, C/M/124
85.	12.7.77	1.1.85	Australia	Passenger motor vehicles	Global quotas	EEC, Japan; <i>retaliation proposed by EEC</i>	L/4526 & Add.1-25, C/M/123, C/M/155, item 1, C/M/156 item 2; see also item 67
86.	22.7.77	22.6.79	EEC	Portable TV sets from Korea	Annual quotas applying only to imports into United Kingdom. On 22 June 1979 a VER came into effect.	Korea, other suppliers: Japan and Singapore	L/4613 & Add.1, C/M/112, 124 and 134, SR.34/1

N°	Date introduced	Date terminated	Contracting party	Product	Measure taken	Affected countries, territories or customs unions, compensation, retaliation	References
87.	23.9.77	8.11.79 (Partial removal 22.2.79)	Australia	Brandy	Temporary additional specific duties increasing the margin between customs and excise rates existing at the time of binding (1947). Tariff quotas applied at level equivalent to 40% of 1975/76 imports. A further temporary specific duty above the tariff quota. Tariff quotas allocated on basis of imports 1.976-31.8.77. (Identical measures applied to whisky imports.) Same basis used for quotas after 22.2.79. Cognac exempted from measures as from 22.2.79 (L/4569/Add.8).	EEC (France, Germany, Italy), Cyprus, Greece, Spain, Yugoslavia	L/4569 & Add.1-12
88.	10.11.77	9.5.79	Australia	Fixed resistors	Import licences; entitlements determined as one unit (after 10.5.78 two units) of import quota for each unit purchased or irrevocably committed for delivery from Australian production; irrevocable commitments as at 22.9.77 allowed entry on special licences valid for sixty days from 10.11.77. Goods in transit or in bond allowed entry on special licences if entered within 21 days of date of the announcement or arrival. Licences transferable between individual importers under certain circumstances.		L/4603 & Add.1
89.	22.11.77	1.1.82	Australia	Thongs, gumboots and sporting footwear (see items 66 and 73)	Thongs with value for duty below certain prices plus parts thereof; included within scope of existing quantitative restrictions (with value between certain prices quota is 100% of imports; for parts 100% of 1976/77 imports). Import licensing procedures for certain specialist sporting footwear and gumboots (because of administrative difficulties regarding definitions). Exemption of high-priced footwear from import licensing (removed on 1.9.80). "Threshold" price level to be adjusted each 6 months in accordance with movements in footwear component of Australian consumer price index.	EEC	L/4099/Add.4-26; See also items 66 and 73.

N°	Date introduced	Date terminated	Contracting party	Product	Measure taken	Affected countries, territories or customs unions, compensation, retaliation	References
90.	1.12.77	30.11.81 (partial removal July 1980)	Canada	Footwear, other than footwear of rubber or canvas	Global quota at levels corresponding to annual average 1974-76, administered by permits to importers having imported 1.976-31.8.77 at pro rata share calculated on performance during base period. Committee was to distribute small amount reserved to meet unforeseen circumstances. Removal of certain specialized footwear notified in July 1980. Global quota (total amount unchanged) extended up to 30.11.1981. Importers who had imported under the quota system were entitled to pro rata share of total quota based on performance during first two years of quota.	EEC, Brazil, US, Korea, Poland, Romania, Spain, United States; <i>retaliation proposed by EEC</i> (see Add.41)	L/4611 & Add.1-50, SR.34/1
91.	1.3.78	27.4.88	Australia	Wool worsted yarns	Global tariff quotas (additional specific duty). Base period for individual importer's quota entitlements will be the twelve month period ending 30 November 1977. Initial quota allocations for six month period beginning 1 March 1978 valid for twelve months.	EEC	L/4659 & Add.1-5
92.	29.3.78 (5)	31.12.78	Australia	Round blunt chainsaw files	Included in action on files and rasps		L/4351/Add.2 & 3; unpublished letter; See item 74.
93.	11.4.78	10.4.81	US	CB radio receivers	Increased ad valorem duty to be phased down in three decrements and phased out 10 April 1981. The items were also removed from GSP.	Japan, Korea	L/4634 & Add.1-2
94.	21.4.78	18.2.82	Australia	Double-edged safety razor blades	Quantitative restrictions for two years. In first year imports restricted to sixteen million, individual importer's quota allocations based on twelve-month period ended 31.12.77. Allocations for second year to be announced later.		L/4666 & Corr.1 & Add.1
95.	26.5.78	15.5.80	EEC	Preserved cultivated mushrooms (CCCN 20.02A)	Suspension of import licences. Not applied to third countries which could assure that their exports did not exceed a reasonable quantity. Measure amended several times 1978-79 and suspended after principal suppliers had given necessary assurances. From 16.5.80 surveillance introduced.		L/4678, L/4994, L/5105. See items 104 and 106.

N°	Date introduced	Date terminated	Contracting party	Product	Measure taken	Affected countries, territories or customs unions, compensation, retaliation	References
96.	1.7.78	30.4.80	Australia	Hot and cold rolled and galvanized sheets and plates of iron and steel	Global quota, allocated on basis of clearances during 1977		L/4696 & Add.1
97.	17.11.78	Nov. 1982	US	High-carbon ferrochromium	Additional specific duty for products with customs value below a certain price	South Africa, Rhodesia, Japan, Yugoslavia, Brazil (bound to Canada and Rhodesia)	L/4702 & Add.1-6 (Letter by US Delegation of 18 March 1982)
98.	1.1.79	30.6.84	Norway	Various textile items	Global import quotas calculated on average imports 1974-76 from countries included in the quotas. Nondiscriminatory allocation to importers according to 1976-77 shares. Six bilateral agreements in force from 1.1.78 for 4 to 5 years could not be suspended by unilateral action and were not included in quotas. EFTA and EEC imports also excluded. 1980 (half-year) quotas adjusted to "revised and more precise conversion factors and changes in market demand".	Hong Kong, United States: Hong Kong brought dispute under Article XXIII.2.	L/4671, L/4689, L/4692 & Add.1-19, L/4815, C/M/126-128, 134, 135, 139 and 141. Panel report L/4959, BISD 27S/119
99.	6.1.79	Jan. 1982	US	Lag screws or bolts	Increased ad valorem tariff for two items; for two other items ad valorem duties introduced in addition to an existing specific duty.	Japan, Canada, EEC	L/4742 & Add.1-27
100.	8.1.79	31.12.80	Iceland	Furniture, cupboards and cabinets, windows and doors	Import deposit (35% of invoice amount, blocked for ninety days). Deposit not required in case of amounts below Ikr 20,000 per transaction.		L/4771
101.	23.2.79	23.2.84	US	Clothespins	Global quota for imports valued above a certain price. Separate quota allocation for three different price brackets. Allocations may be shifted from unutilized to filled categories	Poland, Germany, Romania, Netherlands	L/4759 & Add.1-3
102.	17.1.80	17.1.84	US	Porcelain-on-steel cooking ware	Additional specific duty, to be phased down and out over four years, applied to all ware below a certain price	Japan, Spain, Korea, Italy, France, (Mexico)	L/4889 & Add.1-15, Letter and memorandum concerning compensation from Spain (not published)

N°	Date introduced	Date terminated	Contracting party	Product	Measure taken	Affected countries, territories or customs unions, compensation, retaliation	References
103.	21.2.80 (retroactive to 1.1.80)	31.12.80	EEC (UK)	Yarn of synthetic fibres	Import authorization from third countries required up to maximum quantities set for polyester yarns and polyamide yarns. Exempted from measure: imports of about \$65 million from third countries which enter EC under free-trade agreement or under agreement concerning trade in textiles	US, Canada, Japan; <i>Compensation</i> to the US paid in the form of prior-to-schedule MTN tariff reductions on imports from US (Took place on 1.9.80 instead of 1.1.1981)	L/4942 & Add.1-6; Unpublished letters from EEC and US of 4.2.81
104.	15.4.80	31.12.84	EEC	Cultivated mushrooms in brine [CCCN 07.03E]	Import subject to production of an import document, issued to traditional importers on the basis of 1977-78 imports, within limits fixed periodically by the Commission. Provision made for licences to new suppliers	Hong Kong, Spain	L/4994 & Add.1. See also items 95 and 106; see OJ L330/1 of 18.12.84
105.	7.5.80 (6)	Dec. 1980 (Art. XIX action replaced by VERs)	Spain	Cheeses	Partial suspension of liberalization.	EEC, Austria, Finland	L/4978 & Add.1-2 See also item 42.
106.	16.5.80	31.12.80	EEC	Cultivated mushrooms originating in Hong Kong and Spain [CCCN 20.02A]	Licences refused until solution found to difficulties (after imports liberalized 16.5.80, EEC market was exposed to threat of serious injury as a result of licence applications for imports from these countries substantially in excess of traditional EEC imports from them).	Hong Kong, Spain	L/4994 & Add.1, L/5105, L/5207. See items 95 and 104.
107.	15.3.80 (7)	1.4.82	Australia	Certain works trucks and stackers	Licensing limited to \$3 million for all goods specified: \$1 million for 1.4.-30.9.80 and \$2 million for 1.10.80-31.3.81. Importers' quota entitlements based on performance in calendar year 1978, transferable between products and importers. Quotas applied to imports from all sources, but goods of Papua New Guinea origin (PATCRA goods) exempted.	EEC, Japan	L/5026/Rev.1 & Add.1-20
108.	1.11.80	1.11.83	US	Preserved mushrooms	Increased duties for three years	Canada	L/5027, L/5088 and Add. 1-16

N°	Date introduced	Date terminated	Contracting party	Product	Measure taken	Affected countries, territories or customs unions, compensation, retaliation	References
109.	1.12.81	30.11.88 (full termination); partial termination 30.11.85 (see Add.19 and 25)	Canada	Non-leather footwear	Global quotas	EEC, United States, LDCs (Korea); <i>retaliation proposed twice by EEC</i> (see Add. 8 and 21)	L/5263 & Add.1-36
110.	3.8.81	20.11.81	EEC (UK, Ireland)	Frozen cod filets	Embargo for products below certain reference price	Canada	L/5193 & Add.1-4
111.	9.7.82	30.11.88 (full termination); partial termination 30.11.85 & 1.4.86 (see Add.20, 27, 30)	Canada	Leather footwear	Global quota; later exemption of higher priced footwear (see Add.9).	EEC, Brazil, Spain, US; <i>retaliation proposed twice by EEC</i> (see Add.3/Rev.1 and Add.22)	L/5351 & Add.1-39
112.	27.8.82	31.12.83	Australia	Hoop and strip of iron and steel	Tariff quota		L/5365 & Corr.1 & Add.1
113.	3.9.82	10.10.82	Switzerland	Dessert grapes, fresh	Increased tariff	EEC	L/5364, L/5371
114.	15.10.82	15.3.83	Canada	Yellow onions	Tariff surtax	US	L/5392 & Add.1-10
115.	13.10.82		EEC	Dried grapes	Compensatory tax	Australia, US	L/5399 & Add.1-50
116.	1.1.83	16.4.83 (replaced by VER)	EEC (France, UK)	Tableware and other articles ... of stoneware	Global quota	Korea; as from 16.4.83 Korea undertook to make exports of these products to France and UK subject to export licences and set quantitative limits for calendar years 1983-85 (see Commission Reg. No 873/83, OJ L 96/8, 15.4.83)	L/5447 & Add.1
117.	1.4.83	9.10.87	US	Heavyweight motorcycles	Increased duties	Japan	L/5493 & Add.1-17

N°	Date introduced	Date terminated	Contracting party	Product	Measure taken	Affected countries, territories or customs unions, compensation, retaliation	References
118.	20.7.83	30.9.89	US	Specialty steel	Additional tariffs and quotas	EEC, Brazil, Korea and others (OMAs concluded with Austria, Argentina, Canada, Japan, Poland, Spain, Sweden); <i>action under Article XIX:3(e) by Canada</i> concerning quota restriction (see Add.10 and 31) and EEC covering tariff and quota restriction (see Add.15, 50 + 74)	L/5524 & Add.1-128
119.	19.7.83	24.2.88	Australia	Certain filament lamps	Increased duties	Hungary, US, others	L/5526 & Add.1-18
120.	5.8.83	19.6.85	Australia	Non-electrical domestic refrigerators	Increased duties		L/5529 & Add.1-2
121.	20.4.84	31.12.86	EEC (France)	Certain electronic piezo-electric quartz watches with digital display	Global quotas (see Regulation (EEC) N° 1087 of 18.4.84)	Hong Kong, Japan, Korea, Macao, Taiwan	L/5645 & Add.1-16
122.	25.7.84	1.1.89	Chile	Sugar	Tariff surcharge		L/5672 & Add.1-4
123.	2.11.84		South Africa	Certain footwear	Increased duties; suspension of existing binding		L/5725, L/6318 (amendment of L/5725)
124.	27.11.84	1.1.89	Chile	Wheat	Additional specific duties		L/5861 & Add.1-5
125.	1.1.85	31.12.85	Canada	Fresh, chilled and frozen beef and veal	Global quota	Australia, EEC, New Zealand, Nicaragua; <i>retaliation proposed by EEC</i>	L/5767 & Add.1-10, L/5785
126.	18.6.85	13.7.89 (replaced by No. 141)	EEC	Morello cherries (processed)	Charge on imports below a minimum price; see Regulation (EEC) N° 1626/85 of 14.6.85	Hungary	L/5841 & Add.1-3
127.	9.8.85		South Africa	Malic Acid	Increased duties; suspension of existing binding		L/5860
128.	28.9.85	1.1.89	Chile	Edible vegetable oils	Increased duties		L/5935 & Add.1-3

N°	Date introduced	Date terminated	Contracting party	Product	Measure taken	Affected countries, territories or customs unions, compensation, retaliation	References
129.	17.1.86	21.9.91	EEC	Provisionally preserved raspberries	Charge on imports below a certain price; see Regulation (EEC) N° 67/86 of 15.1.86		L/5957
130.	19.4.86	1987 (date not supplied)	EEC	Sweet potatoes	Suspension of issue of import certificate; see Regulation (EEC) N° 1146/86 of 18.4.86		L/5988
131.	6.86		South Africa	Tall oil fatty acids; Certain pipettes, flasks etc.; Certain high carbon steel wire; Certain sparking plugs	Increased duties		L/6002
132.	2.6.86	14.11.86	Finland	Porous fiberboard impregnated with bitumen	Import surcharge		L/6026
133.	19.3.87	31.10.91	Austria	Broken rice	Quotas	EEC (Italy)	L/6144, L/6144/ Add.1
134.	30.3.87	Terminated, date not supplied	EEC (Spain)	Certain steel products	Quotas; see Commission Recommendation N° 77/328/CECA of 15.4.77	Canada, Turkey	L/6179 & Add.1-6
135.	20.10.87	15.4.88	South Africa	Optical fibres and optical fibre bundles	Suspension of tariff bindings		L/6228 & Add.1
136.	12.87	31.10.88	EEC	Frozen squid	Suspension of imports at certain price levels	Canada	L/6271 & Add.1
137.	5.88	Terminated, date not supplied	EEC (Portugal)	Refrigerators and freezers	Quotas; See OJ C/116 of 3.5.88		L/6344
138.	13.7.89		EEC	Processed cherries	Charges on imports under certain conditions; See Regulation (EEC) N° 1989/89 of 4.7.89		L/6560 & Add.1-5
139.	19.3.90	4.94	Austria	Prepared fowls other than in containers of glass or airtight metal containers	Import quotas; initial restriction for last 6 months of 1991 extended to 30 June 1992 and then to 30 June 1993		L/6653 & Add.1-2

N°	Date introduced	Date terminated	Contracting party	Product	Measure taken	Affected countries, territories or customs unions, compensation, retaliation	References
140.	1.1.91	25.9.91	EEC	Certain semi-processed red fruits	Charges on imports under certain conditions; see Regulation (EEC) N° 3797/90		L/6820 & Add.1
141.	1.1.91	30.4.92	EEC	Provisionally preserved cultivated mushrooms	Maximum import quantity allocated by means of import licences; see Regulation (EEC) N° 809/91		L/6821 & Add.1
142.	1.9.91	4.94	Austria	Certain types of cement and certain preparations containing cement	Import quota; increased for period 1 Sept. 1991 - 31 Dec. 1992. Country-specific quotas of 300,000 tonnes in total for 11-month period starting 1 February 1993 for imports from Poland, Romania, Czech Republic and Slovak Republic; additional global quota of 100,000 tonnes introduced for twelve-month period starting 1 April 1993. Imports originating in EC or EFTA member States exempted.	Poland, Romania, Czech Republic and Slovak Republic	L/6899 & Add.1-8, Add.7/Suppl. 1; C/M/252
143.	18.9.91	31.12.91	Czech & Slovak Republic	Agricultural products: live bovine animals, beef, butter, potatoes, starches and inulin, rape or colza seeds and oil, margarine, glucose and glucose syrup, molasses, grape wine	Global import quotas	Waiver of Article II granted 4 December 1991 for renegotiation of Schedule X	L/6907, L/6968
144.	9.11.91	31.5.92	EEC	Atlantic salmon	Minimum import price	Norway, Canada, Chile	L/6977
145.	8.4.92	31.12.92	Hungary	Cement	Temporary surcharge		L/6996
146.	8.4.92	31.12.92	Hungary	Intra-ocular lenses	Import quota		L/6996
147.	15.11.92	11.93	Hungary	Certain paper products	One-year import quotas administered by license on first-come-first-served basis; quotas apply for imports from all sources except Finland and EC.		L/7123

N°	Date introduced	Date terminated	Contracting party	Product	Measure taken	Affected countries, territories or customs unions, compensation, retaliation	References
148.	26.2.93	30.6.93	EEC	Whitefish (Cod, haddock, coalfish, hake, monkfish)	Minimum price for imports: extended on 13 March 1993 to cover Alaska pollack.		L/7194
149.	15.4.93	11.93	Austria	Certain types of fertilizers	Global import quotas of 30,000 tonnes for mixtures of ammonium nitrate with calcium carbonate or other inorganic non-fertilizing substances, 30,000 tonnes for fertilizers containing nitrogen, phosphorus and potassium, for 1-year period starting 15 April 1993; imports originating in EC or EFTA member States exempted.	Czech Republic, Romania, Slovak Republic	L/7204 & Add.14, L/7204/Suppl.1
150.	21.6.93	31.12.94	Canada	Boneless beef	Surat of 25 percent of value for duty applied on boneless beef imports in excess of 48,014,000 kg; imports originating in US exempted.	Australia, New Zealand	L/7219 & Add. 1-18

NOTES:

- (1) Date of notification to the secretariat.
- (2) **Date of L/ document.**
- (3) Date of notification.
- (4) Date of communication.
- (5) Date of communication.
- (6) Date of notification.
- (7) Date of notification. Backdated to quota year starting 1.4.80.

ARTICLE XX

GENERAL EXCEPTIONS

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I. TEXT OF ARTICLE XX AND INTERPRETATIVE NOTE AD ARTICLE XX**Article XX*****General Exceptions***

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the importations or exportations of gold or silver;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
- (e) relating to the products of prison labour;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;*
- (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;
- (j) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

Interpretative Note *Ad* Article XX from Annex I

Sub-paragraph (h)

The exception provided for in this sub-paragraph extends to any commodity agreement which conforms to the principles approved by the Economic and Social Council in its resolution 30 (IV) of 28 March 1947.

II. INTERPRETATION AND APPLICATION OF ARTICLE XX

A. SCOPE AND APPLICATION OF ARTICLE XX

1. General

The 1984 Panel Report on “Canada - Administration of the Foreign Investment Review Act” notes, with regard to the argument that certain measures fell within Article XX(d):

“Since Article XX(d) is an exception to the General Agreement it is up to Canada, as the party invoking the exception, to demonstrate that the purchase undertakings are necessary to secure compliance with the Foreign Investment Review Act”.¹

The 1989 Panel Report on “United States - Section 337 of the Tariff Act of 1930” found that “... it is up to the contracting party seeking to justify measures under Article XX(d) to demonstrate that those measures are ‘necessary’ within the meaning of that provision”.²

The 1991 Panel Report on “United States - Restrictions on Imports of Tuna”, which has not been adopted, includes the following finding regarding the presentation of arguments to a panel concerning both the positive prescriptions of the General Agreement and the exceptions in Article XX:

“The Panel noted that the United States had argued that its direct embargo under the MMPA could be justified under Article XX(b) or Article XX(g), and that Mexico had argued that a contracting party could not simultaneously argue that a measure is compatible with the general rules of the General Agreement and invoke Article XX for that measure. The Panel recalled that previous panels had established that Article XX is a limited and conditional exception from obligations under other provisions of the General Agreement, and not a positive rule establishing obligations in itself.³ Therefore, the practice of panels has been to interpret Article XX narrowly, to place the burden on the party invoking Article XX to justify its invocation,⁴ and not to examine Article XX exceptions unless invoked.⁵ Nevertheless, the Panel considered that a party to a dispute could argue in the alternative that Article XX might apply, without this argument constituting *ipso facto* an admission that the measures in question would otherwise be inconsistent with the General Agreement. Indeed, the efficient operation of the dispute settlement process required that such arguments in the alternative be possible”.⁶

2. Preamble of Article XX

The preamble was inserted into the exceptions article of the commercial policy chapter of the draft ITO Charter during the London session of the Preparatory Committee. At that time one delegation stated that “Indirect protection is an undesirable and dangerous phenomenon. ... Many times the stipulations ‘to protect animal or plant life or health’ are misused for indirect protection. It is recommended to insert a clause which prohibits expressly [the use of] such measures [to] constitute an indirect protection ...”.⁷ In discussions in the Technical Sub-committee of Committee II at London, the following proposal was made.

¹L/5504, adopted on 7 February 1984, 30S/140, 64, para. 5.20.

²L/6439, adopted on 7 November 1989, 36S/345, 393, para. 5.27.

³The note to this sentence refers to the Panel Report on “United States - Section 337 of the Tariff Act of 1930”, adopted on 7 November 1989, BISD 36S/345, 385, para. 5.9.

⁴The note to this sentence refers to the Panel Reports on “Canada - Administration of the Foreign Investment Review Act”, adopted on 7 February 1984, 30S/140, 164, para. 5.20 and “United States - Section 337 of the Tariff Act of 1930”, adopted on 7 November 1989, 36S/345, 393 para. 5.27.

⁵The note to this sentence refers to, e.g., the panel report on “EEC - Regulation of Parts and Components”, adopted on 16 May 1990, L/6657, 37S/132, para. 5.11.

⁶DS21/R (unadopted), dated 3 September 1991, 39S/155, 197, para. 5.22.

⁷EPCT/C.II/32 (Note of the Netherlands and the Belgo-Luxembourg Economic Union, 30 October 1946).

“... it had been the practice in international agreements to include such exceptions as those laid down in Article 32 [XX], but only exceptions to provisions on import prohibitions and restrictions. The exceptions of Article 32 [XX] covered a far wider field.

“In order to prevent abuse of the exceptions of Article 32 ... the following sentence should be inserted as an introduction: ‘The undertakings in Chapter IV of this Charter relating to import and export restrictions shall not be construed to prevent the adoption or enforcement by any Member of the following measures, provided that they are not applied in such a manner as to constitute a means of arbitrary discrimination between countries where the same conditions prevail, or a disguised restriction on international trade’.”⁸

This suggestion was generally accepted subject to later review of its wording, particularly as to whether the scope of the Article should be limited to import and export restrictions.⁹ See also Article XX(b) below.

(1) “arbitrary or unjustifiable discrimination between countries where the same conditions prevail”

In the 1982 Panel Report on “United States - Prohibition of Imports of Tuna and Tuna Products from Canada”, the Panel examined a US prohibition on imports of tuna and tuna products from Canada, imposed 31 August 1979 following the seizure by Canadian authorities of US fishing vessels and fishermen in disputed waters.

“The Panel noted the preamble to Article XX. The United States’ action of 31 August 1979 had been taken exclusively against imports of tuna and tuna products from Canada, but similar actions had been taken against imports from Costa Rica, Ecuador, Mexico and Peru and then for similar reasons. The Panel felt that the discrimination of Canada in this case might not necessarily have been arbitrary or unjustifiable. ...”¹⁰

The 1983 Panel Report on “United States - Imports of Certain Automotive Spring Assemblies” examined a ban on imports, under an “exclusion order” of the U.S. International Trade Commission, of certain automotive spring assemblies which the Commission had found under Section 337 of the Tariff Act of 1930 infringed United States patents. The Panel decided to first examine the applicability of Article XX(d).

“Looking first at the Preamble, the Panel interpreted the word ‘measure’ to mean the exclusion order issued by the United States International Trade Commission (ITC) under the provisions and procedures of Section 337 since, in the view of the Panel, it was the exclusion order which operated as the measure preventing the importation of the infringing product.

“The Panel noted that the exclusion order was directed against imports of certain automotive spring assemblies produced in violation of a valid United States patent from all foreign sources, and not just from Canada. It found, therefore, that the exclusion order was ‘not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against countries where the same conditions prevail’.”¹¹

The Panel Report was adopted “on the understanding that this shall not foreclose future examination of the use of Section 337 to deal with patent infringement cases from the point of view of consistency with Articles III and XX of the General Agreement”.¹² Such examination took place during the panel proceedings on “United States - Section 337 of the Tariff Act of 1930”.

⁸EPCT/C.II/50, p. 7.

⁹*Ibid.*, p. 9; EPCT/C.II/54/Rev.1, p. 36.

¹⁰L/5198, adopted on 22 February 1982, 29S/91, 108, para. 4.8.

¹¹L/5333, adopted on 26 May 1983, 30S/107, 125, paras. 54-55.

¹²C/M/168, p. 10.

(2) “disguised restriction on international trade”

The 1982 Panel Report on “United States - Prohibition of Imports of Tuna and Tuna Products from Canada” notes that the Panel “felt that the United States’ action should not be considered to be a disguised restriction on international trade, noting that the United States’ prohibition of imports of tuna and tuna products from Canada had been taken as a trade measure and publicly announced as such”.¹³ In discussions on this report at the 22 February 1982 Council meeting, the representative of Canada noted that “Canada did not consider it sufficient for a trade measure to be publicly announced as such for it to be considered not to be a disguised restriction on international trade within the meaning of Article XX of the General Agreement”.¹⁴

The 1983 Panel Report on “United States - Imports of Certain Automotive Spring Assemblies” also notes that

“The Panel ... considered whether or not the exclusion order was ‘applied in a manner which would constitute ... a disguised restriction on international trade’. The Panel noted that the Preamble of Article XX made it clear that it was the application of the measure and not the measure itself that needed to be examined. Notice of the exclusion order was published in the Federal Register and the order was enforced by the United States Customs at the border. The Panel also noted that the ITC proceedings in this particular case were directed against the importation of automotive spring assemblies produced in violation of a valid United States patent and that, before an exclusion order could be issued under Section 337, both the validity of a patent and its infringement by a foreign manufacturer had to be clearly established. Furthermore, the exclusion order would not prohibit the importation of automotive spring assemblies produced by any producer outside the United States who had a licence from Kuhlman Corporation (Kuhlman) to produce these goods. Consequently, the Panel found that the exclusion order had not been applied in a manner which constituted a disguised restriction on international trade”.¹⁵

3. Paragraph (b)

(1) “necessary to protect human, animal or plant life or health”

During the Geneva session of the Preparatory Committee, in discussions concerning paragraph (b) and its relationship to the preamble of this article, it was agreed to delete the phrase (which had appeared in the New York draft of paragraph (b)) “if corresponding domestic safeguards under similar conditions exist in the importing country”. The reasons for the proposed deletion were that this would be difficult to implement, and “as for the protection needed for exporting countries, to see that this is not abused ... that is afforded one by the headnote to the Article ...”.¹⁶ It was stated at that time that “in view of the misuses which have been made in the past of sanitary regulations, and of damages caused in this way to exporting countries, it would be regrettable if we were to renounce any clarification of the provisions of sub-paragraph (b). However, the discussion which was raised here shows clearly that this Committee is against any possibility of this provision being used as a measure of protection in disguise”.¹⁷

The record of the discussions at the Havana Conference in the Third Committee on the corresponding provision in the Charter notes:

“The Committee agreed that quarantine and other sanitary regulations are a subject to which the Organization should give careful attention with a view to preventing measures ‘necessary to protect human, animal or plant life or health’ from being applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade and to advising Members how they can maintain such measures without causing such prejudice. In view of this, the Committee assumes that the Organization will establish a regular procedure with a view to investigating (in consultation, when it considers this advisable, with other intergovernmental specialized agencies of recognized scientific and

¹³L/5198, adopted on 22 February 1982, 29S/91, 108, para. 4.8.

¹⁴C/M/155.

¹⁵L/5333, adopted on 26 May 1983, 30S/107, 125, para. 56.

¹⁶EPCT/A/PV/30, p. 11; see also *ibid.* p. 14-15.

¹⁷EPCT/A/PV/30, p. 13.

technical competence, such as the FAO) any complaints that might be brought by a Member as to the use of the exception in sub-paragraph 1(a)(iii) of Article 45 [(b) of XX] in a manner inconsistent with the provisions of the preamble to that paragraph”.¹⁸

In the 1987 Panel Report on “Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages”, in discussing the claim of Japan that discriminatory or protective taxes on various alcoholic beverages could be justified as designed to meet the objective of taxation according to ability to pay, the Panel noted the scope provided to domestic tax systems under Article III; it also noted that “... The ‘general exceptions’ provided for in GATT Article XX might also justify internal tax differentiations among like or directly competitive products, for instance if ‘necessary to protect human ... or plant life or health’ (Article XX(b)). The Panel found, therefore, that the General Agreement reserved each contracting party a large degree of freedom to decide autonomously on the objectives, level, principles and methods of its internal taxation of goods”.¹⁹

The 1990 Panel Report on “Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes”²⁰ examined measures by Thailand prohibiting imports of cigarettes. The Panel found that these measures were inconsistent with Article XI. Thailand claimed that the restrictions were justified under Article XX(b) because measures which could only be effective if cigarette imports were prohibited had been adopted by the government to control smoking and because additives in United States cigarettes might make them more harmful than Thai cigarettes. The Panel heard from an expert of the World Health Organization (WHO).

“The Panel ... defined the issues which arose under [Article XX(b)]. In agreement with the parties to the dispute and the expert from the WHO, the Panel accepted that smoking constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of Article XX(b). The Panel noted that this provision clearly allowed contracting parties to give priority to human health over trade liberalization; however, for a measure to be covered by Article XX(b) it had to be ‘necessary’.

“The Panel noted that a previous panel had discussed the meaning of the term ‘necessary’ in the context of Article XX(d), which provides an exemption for measures which are ‘necessary to secure compliance with laws or regulations which are not inconsistent’ with the provisions of the General Agreement. The panel had stated that

‘a contracting party cannot justify a measure inconsistent with other GATT provisions as “necessary” in terms of Article XX(d) *if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it*. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions’.²¹

“The Panel could see no reason why under Article XX the meaning of the term ‘necessary’ under paragraph (d) should not be the same as in paragraph (b). In both paragraphs the same term was used and the same objective intended: to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable. The fact that paragraph (d) applies to inconsistencies resulting from the enforcement of GATT-consistent laws and regulations while paragraph (b) applies to those resulting from health-related policies therefore did not justify a different interpretation of the term ‘necessary’.

¹⁸E/CONF.2/C.3/SR.35.

¹⁹L/6216, adopted on 10 November 1987, 34S/83, 124, para. 5.13.

²⁰DS10/R, adopted on 7 November 1990, 37S/200.

²¹The note to this paragraph refers to the Panel Report on “United States - Section 337 of the Tariff Act of 1930”, L/6439, adopted on 7 November 1989, paragraph 5.26.

“The Panel concluded from the above that the import restrictions imposed by Thailand could be considered to be ‘necessary’ in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives. The Panel noted that contracting parties may, in accordance with Article III:4 of the General Agreement, impose laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of imported products provided they do not thereby accord treatment to imported products less favourable than that accorded to ‘like’ products of national origin. The United States argued that Thailand could achieve its public health objectives through internal measures consistent with Article III:4 and that the inconsistency with Article XI:1 could therefore not be considered to be ‘necessary’ within the meaning of Article XX(b). The Panel proceeded to examine this issue in detail.

“The Panel noted that the principal health objectives advanced by Thailand to justify its import restrictions were to protect the public from harmful ingredients in imported cigarettes, and to reduce the consumption of cigarettes in Thailand. The measures could thus be seen as intended to ensure the quality and reduce the quantity of cigarettes sold in Thailand.

“The Panel then examined whether the Thai concerns about the *quality* of cigarettes consumed in Thailand could be met with measures consistent, or less inconsistent, with the General Agreement. It noted that other countries had introduced strict, non-discriminatory labelling and ingredient disclosure regulations which allowed governments to control, and the public to be informed of, the content of cigarettes. A non-discriminatory regulation implemented on a national treatment basis in accordance with Article III:4 requiring complete disclosure of ingredients, coupled with a ban on unhealthy substances, would be an alternative consistent with the General Agreement. The Panel considered that Thailand could reasonably be expected to take such measures to address the quality-related policy objectives it now pursues through an import ban on all cigarettes whatever their ingredients.

“The Panel then considered whether Thai concerns about the *quantity* of cigarettes consumed in Thailand could be met by measures reasonably available to it and consistent, or less inconsistent, with the General Agreement. The Panel first examined how Thailand might reduce the *demand* for cigarettes in a manner consistent with the General Agreement. The Panel noted the view expressed by the WHO that the demand for cigarettes, in particular the initial demand for cigarettes by the young, was influenced by cigarette advertisements and that bans on advertisement could therefore curb such demand. At the Forty-third World Health Assembly a resolution was approved stating that the WHO is:

‘Encouraged by ... recent information demonstrating the effectiveness of tobacco control strategies, and in particular ... comprehensive legislative bans and other restrictive measures to effectively control the direct and the indirect advertising, promotion and sponsorship of tobacco’.²²

“The resolution goes on to urge all member states of the WHO

‘to consider including in their tobacco control strategies plans for legislation or other effective measures at the appropriate government level providing for: ...

- (c) progressive restrictions and concerted actions to eliminate eventually all direct and indirect advertising, promotion and sponsorship concerning tobacco’

“A ban on the advertisement of cigarettes of both domestic and foreign origin would normally meet the requirements of Article III:4. It might be argued that such a general ban on all cigarette advertising would create unequal competitive opportunities between the existing Thai supplier of cigarettes and new, foreign suppliers and was therefore contrary to Article III:4.²³ Even if this argument were accepted, such an inconsistency would have to be regarded as unavoidable and therefore necessary within the meaning of

²²The note to this paragraph refers to the Forty-third World Health Assembly, Fourteenth plenary meeting, Agenda Item 10, 17 May 1990 (A43/VR/14; WHA43.16).

²³The note to this sentence provides: “On the requirement of equal competitive opportunities, see the Report of the panel on ‘United States - Section 337 of the Tariff Act of 1930’ (L/6439, paragraph 5.26, adopted on 7 November 1989)’”.

Article XX(b) because additional advertising rights would risk stimulating demand for cigarettes. The Panel noted that Thailand had already implemented some non-discriminatory controls on demand, including information programmes, bans on direct and indirect advertising, warnings on cigarette packs, and bans on smoking in certain public places.

“The Panel then examined how Thailand might restrict the *supply* of cigarettes in a manner consistent with the General Agreement. The Panel noted that contracting parties may maintain governmental monopolies, such as the Thai Tobacco Monopoly, on the importation and domestic sale of products.²⁴ The Thai Government may use this monopoly to regulate the overall supply of cigarettes, their prices and their retail availability provided it thereby does not accord imported cigarettes less favourable treatment than domestic cigarettes or act inconsistently with any commitments assumed under its Schedule of Concessions.²⁵ As to the pricing of cigarettes, the Panel noted that the Forty-third World Health Assembly, in its resolution cited above, stated that it was:

‘Encouraged by ... recent information demonstrating the effectiveness of tobacco control strategies, and in particular ... policies to achieve progressive increases in the real price of tobacco.’

“It accordingly urged all member states

‘to consider including in their tobacco control strategies plans for ... progressive financial measures aimed at discouraging the use of tobacco’.²⁶

“For these reasons the Panel could not accept the argument of Thailand that competition between imported and domestic cigarettes would necessarily lead to an increase in the total sales of cigarettes and that Thailand therefore had no option but to prohibit cigarette imports.

“The Panel then examined further the resolutions of the WHO on smoking which the WHO made available. It noted that the health measures recommended by the WHO in these resolutions were non-discriminatory and concerned all, not just imported, cigarettes. The Panel also examined the Report of the WHO Expert Committee on Smoking Control Strategies in Developing Countries. The Panel observed that a common consequence of import restrictions was the promotion of domestic production and the fostering of interests in the maintenance of that production and that the WHO Expert Committee had made the following recommendation relevant in this respect:

‘Where tobacco is already a commercial crop every effort should be made to reduce its role in the national economy, and to investigate alternative uses of land and labour. The existence of a tobacco industry of any kind should not be permitted to interfere with the implementation of educational and other measures to control smoking’.²⁷

“In sum, the Panel considered that there were various measures consistent with the General Agreement which were reasonably available to Thailand to control the quality and quantity of cigarettes smoked and which, taken together, could achieve the health policy goals that the Thai government pursues by restricting the importation of cigarettes inconsistently with Article XI:1. The Panel found therefore that Thailand’s practice of permitting the sale of domestic cigarettes while not permitting the importation of foreign cigarettes was an inconsistency with the General Agreement not ‘necessary’ within the meaning of Article XX(b)”.²⁸

²⁴The note to this sentence provides: “Cf. Articles III:4, XVII and XX(d)”.

²⁵The note to this sentence provides: “Cf. Articles III:2 and 4 and II:4”.

²⁶The note to this sentence refers to Forty-third World Health Assembly, Fourteenth plenary meeting, Agenda Item 10, 17 May 1990 (A43/VR/14; WHA43.16).

²⁷The note to this sentence refers to 1982 Expert Committee on ‘Smoking Control Strategies in Developing Countries’, page 69; cited at page 16 in the WHO Submission to the Panel of 19 July 1990.

²⁸DS10/R, adopted on 7 November 1990, 37S/200, 222-226, paras. 73-81.

In the November 1990 Council discussion preceding the adoption of this Panel Report, the representative of Thailand stated that “it was clear from the present Panel report that Thailand’s cigarette régime was based on public health policy considerations. His Government intended to take all measures necessary to prevent an increase in tobacco consumption, and to reduce it if possible. Thailand took heart from the report that a set of GATT-consistent measures could be taken to control both the supply of and demand for cigarettes, as long as they were applied to both domestic and imported cigarettes on a national-treatment basis. He concluded by saying that as a contracting party, Thailand intended to abide by its GATT obligations. It had lifted its import ban, and its present laws and regulations were in accordance with the national-treatment principle. On the other hand, Thailand needed to ensure that it would not be forced to accept conditions imposed above and beyond its GATT obligations”.²⁹

In the 1991 Panel Report on “United States - Restrictions on Imports of Tuna”, which has not been adopted, the Panel examined the provisions of the Marine Mammal Protection Act (MMPA) providing for a prohibition of imports of certain yellowfin tuna and yellowfin tuna products, and the import ban imposed under these provisions.

“The Panel noted that the United States considered the prohibition of imports of certain yellowfin tuna and certain yellowfin tuna products from Mexico, and the provisions of the MMPA on which this prohibition is based, to be justified by Article XX(b) because they served solely the purpose of protecting dolphin life and health and were ‘necessary’ within the meaning of that provision because, in respect of the protection of dolphin life and health outside its jurisdiction, there was no alternative measure reasonably available to the United States to achieve this objective. Mexico considered that Article XX(b) was not applicable to a measure imposed to protect the life or health of animals outside the jurisdiction of the contracting party taking it and that the import prohibition imposed by the United States was not necessary because alternative means consistent with the General Agreement were available to it to protect dolphin lives or health, namely international co-operation between the countries concerned.

“The Panel noted that the basic question raised by these arguments, namely whether Article XX(b) covers measures necessary to protect human, animal or plant life or health outside the jurisdiction of the contracting party taking the measure, is not clearly answered by the text of that provision. It refers to life and health protection generally without expressly limiting that protection to the jurisdiction of the contracting party concerned. The Panel therefore decided to analyze this issue in the light of the drafting history of Article XX(b), the purpose of this provision, and the consequences that the interpretations proposed by the parties would have for the operation of the General Agreement as a whole.

“The Panel noted that the proposal for Article XX(b) dated from the Draft Charter of the International Trade Organization (ITO) proposed by the United States, which stated in Article 32, ‘Nothing in Chapter IV [on commercial policy] of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures: ... (b) necessary to protect human, animal or plant life or health’. In the New York Draft of the ITO Charter, the preamble had been revised to read as it does at present, and exception (b) read: ‘For the purpose of protecting human, animal or plant life or health, if corresponding domestic safeguards under similar conditions exist in the importing country’. This added proviso reflected concerns regarding the abuse of sanitary regulations by importing countries. Later, Commission A of the Second Session of the Preparatory Committee in Geneva agreed to drop this proviso as unnecessary.³⁰ Thus, the record indicates that the concerns of the drafters of Article XX(b) focused on the use of sanitary measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country.

“The Panel further noted that Article XX(b) allows each contracting party to set its human, animal or plant life or health standards. The conditions set out in Article XX(b) which limit resort to this exception, namely that the measure taken must be ‘necessary’ and not ‘constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade’, refer to the trade measure requiring justification under Article XX(b), not however to the life or health standard chosen by the

²⁹C/M/246, 23 November 1990.

³⁰The note to this sentence refers to EPCT/A/PV/30/7-15.

contracting party. The Panel recalled the finding of a previous panel that this paragraph of Article XX was intended to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable.³¹ The Panel considered that if the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.

“The Panel considered that the United States’ measures, even if Article XX(b) were interpreted to permit extrajurisdictional protection of life and health, would not meet the requirement of necessity set out in that provision. The United States had not demonstrated to the Panel - as required of the party invoking an Article XX exception - that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas. Moreover, even assuming that an import prohibition were the only resort reasonably available to the United States, the particular measure chosen by the United States could in the Panel’s view not be considered to be necessary within the meaning of Article XX(b). The United States linked the maximum incidental dolphin taking rate which Mexico had to meet during a particular period in order to be able to export tuna to the United States to the taking rate actually recorded for United States fishermen during the same period. Consequently, the Mexican authorities could not know whether, at a given point of time, their policies conformed to the United States’ dolphin protection standards. The Panel considered that a limitation on trade based on such unpredictable conditions could not be regarded as necessary to protect the health or life of dolphins.

“On the basis of the above considerations, the Panel found that the United States’ direct import prohibition imposed on certain yellowfin tuna and certain yellowfin tuna products of Mexico and the provisions of the MMPA under which it is imposed could not be justified under the exception in Article XX(b).”³²

In this connection see also the unadopted 1994 Panel Report on “United States - Restrictions on Imports of Tuna”.³³

See also the “Streamlined Mechanism for Reconciling the Interests of Contracting Parties in the Event of Trade-Damaging Acts”, discussed below, which provides, *inter alia*, that “A measure taken by an importing contracting party should not be any more severe, and should not remain in force any longer, than necessary to protect the human, animal or plant life or health involved, as provided in Article XX(b)”.³⁴

(2) Publication, notification and consultations concerning measures taken under paragraph (b)

The provisions of Article XXII in the 30 October 1947 text of the General Agreement (and the corresponding provisions in Article 41 of the Havana Charter) provided for consultations concerning “such representations as may be made by any other contracting party with respect to [various enumerated matters and] sanitary laws and regulations for the protection of human, animal or plant life or health, and generally all matters affecting the operation of this Agreement”. The listing of specific matters in Article XXII was deleted as unnecessary during the 1954-55 Review Session; see Section III under Article XXII.

³¹The footnote to this sentence refers to the Panel Report on ‘Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes’, adopted on 7 November 1990, 37S/200, 222-223, DS10/R, paras. 73-74.

³²DS21/R (unadopted), dated 3 September 1991, 39S/155, 198-200, paras. 5.24-5.29.

³³DS29/R, dated 16 June 1994, paras. 5.28-5.39.

³⁴C/M/236, pp. 6-7; 36S/67.

During discussions in the Third Committee at the Havana Conference,

“The Committee agreed that quarantine and other sanitary regulations as well as other types of regulations must be published under Article 37 [X] and that the provisions for consultation in Article 41 [XXII] required Members to supply full information as to the reason for and operation of such regulations”.³⁵

According to the Interpretative Note *Ad* Article 41 of the Havana Charter

“The provisions for consultation require Members, subject to the exceptions specifically set forth in this Charter, to supply to other Members, upon request, such information as will enable a full and fair appraisal of the matters which are the subject of such consultation, including the operation of sanitary laws and regulations for the protection of human, animal or plant life or health, and other matters affecting the application of Chapter IV”.

In 1969, the United Kingdom notified new measures imposed in the wake of the 1967/68 outbreak of foot-and-mouth disease in the United Kingdom, including a ban on certain meat imports and imposition of requirements regarding compliance with animal health requirements, hygiene and public health inspection with respect to imports of boneless beef from countries where foot-and-mouth disease is endemic. The measures were accompanied by a reduction of the duty on beef imports. The notification stated “It must be emphasized the new measures are being taken solely as a result of the need to maintain high standards of animal and public health in the United Kingdom. There is no question of attempting to provide protection for our domestic industry and we consider the new measures to be fully compatible with the GATT and with Article XX in particular”.³⁶

Following the nuclear accident at Chernobyl in the Soviet Union, the EEC in May 1986 suspended imports of live animals, fresh meat and certain other fresh foods from certain East European countries. In the May 1986 meeting of the Council, the representative of Hungary stated that the selection of countries within a 1000 kilometer radius of the accident was unjustified and arbitrary; the radiation level had risen throughout most of Europe since the accident, and certain countries outside that radius had experienced a greater level of radiation than some within it. Hungary also recalled the recommendation of the World Health Organization according to which there was no public health justification to ban imports from East European countries. He expressed Hungary’s willingness to have its food products checked for radiation at the border by importing countries, and/or to certify freedom from radioactive contamination for each shipment. The representative of the EEC stressed that the measures were temporary and conservative, and stated that necessary data on radiation levels had not yet been received.³⁷ Austria notified the contracting parties of a temporary prohibition on imports of certain dairy, vegetable and fruit products originating in certain countries of Eastern and Southern Europe, following the Chernobyl accident; the prohibition was stated to be “in accordance with Article XX(b)”.³⁸

At the May 1989 Council meeting, Chile drew attention to the problem it had faced regarding the United States’ suspension of imports of Chilean fruit on the basis of suspected food contamination. Chile suggested that the Chairman hold consultations with interested contracting parties to study ways of setting up machinery which, while protecting the rights of contracting parties, would minimize the damage caused by similar measures. The delegate of Chile stated that “The measures taken had ... involved hundreds of millions of dollars of fruit and vegetables which had had to be destroyed or re-exported, confiscated or prohibited from entry because two grapes had been found to contain toxic chemicals. This situation had led Chile to believe that contracting parties should have a permanent expeditious system to hold consultations speedily, to exchange information and to arrive jointly at decisions – in short, a crisis management body ... to ensure that measures adopted would be in keeping with the dimension of the threat”.³⁹ A number of contracting parties supported this proposal, underlining the importance of the issues raised by Chile for food exporting countries. Others

³⁵E/CONF.2/C.3/SR.35, pp. 6-7.

³⁶L/3251.

³⁷C/M/198, p. 28-31.

³⁸L/5998, 27 May 1986; removal of measures, Add.1, 11 June 1986.

³⁹C/M/232, p. 24.

stated that governments had to be free to act expeditiously when human health was endangered, and could not be expected to consult extensively on the trade impact of their actions before responding to an urgent threat to human health.⁴⁰

At its meeting on 11 October 1989, the Chairman read out an agreed text, which noted that “During the course of the consultations and in the light of comments made by delegations, there seems to have emerged a consensus amongst the participating delegations that the matter under discussion is of interest to all contracting parties. Another element which emerged during the informal consultations was that some delegations, despite their recognition that a genuine problem exists, are doubtful whether it will be possible for their respective authorities in capitals to agree on a formalized GATT structure to deal with the problem”. The Council agreed to the Chairman’s proposal that the Council take note of his recommendation, entitled “Streamlined Mechanism for Reconciling the Interests of Contracting Parties in the Event of Trade-Damaging Acts”, that the following guidelines be used in the event of a trade-damaging act:

- “1. A measure taken by an importing contracting party should not be any more severe, and should not remain in force any longer, than necessary to protect the human, animal or plant life or health involved, as provided in Article XX(b).
- “2. The importing contracting party should notify the Director-General as quickly as possible. A notification by telephone should be followed immediately by a written communication from the importing contracting party, which would be circulated to contracting parties.
- “3. The importing contracting party would be expected to agree to expeditious informal consultations with the principally concerned contracting party as soon as a trade-damaging act has occurred, with a view to reaching a common view about the dimension of the problem and the best way to deal with it effectively.”⁴¹

In December 1989, at the Forty-fifth Session, Austria informed the CONTRACTING PARTIES that with effect from 1 December 1989, Austria had limited traffic of certain heavy trucks during night hours on certain Austrian transit roads; the representative of Austria stated that “This measure has become unavoidable due to the intolerable increase in heavy traffic on certain transit routes causing extreme noise and pollution seriously endangering the health of the adjacent Austrian population. This measure has been taken in accordance with Article XX(b) of the General Agreement”. The measure applied to trucks of all nationalities, including Austrian trucks. Austria also noted that in retaliation Germany had decided to ban as of 1 January 1990 the circulation of 212,000 Austrian lorries during night hours in the entire territory of Germany. Consultations were held under Article XXII:1 regarding the German measure in spring 1990.⁴²

In 1991, Peru drew the Council’s attention to restrictions imposed on exports of Peru following the cholera epidemic in Peru, and sought application of these 1989 guidelines, referring to a World Health Assembly resolution calling on member States not to apply to countries affected by the cholera epidemic import restrictions not justifiable on public health grounds. Pursuant to the 1989 guidelines, the EEC notified a prohibition on imports from Peru of certain food products unless accompanied by a certificate of freedom from cholera, and Austria notified with reference to Article XX(b) a prohibition on imports of fishery products from Peru.⁴³ In October 1993, Austria notified two prohibitions on importation of certain live animals and animal products from specific countries or districts, imposed in line with Article XX(b) and in order to prevent the introduction of classical swine fever and of foot-and-mouth disease into Austria; the notification was without reference to the 1989 guidelines. In July and October 1994 Austria again notified such restrictions.⁴⁴

⁴⁰C/M/232, p. 23-29; see further C/M/231, C/M/234, C/M/235.

⁴¹C/M/236, pp. 6-7; 36S/67.

⁴²SR.45/ST/22, DS14/1, C/M/241.

⁴³C/M/248, 249, 250, 251; statement of Peru with relevant WHO press releases, Spec(91)12; communication from Peru, L/7038; EEC notification, L/6845 (notification of modification of measures in L/6845/Add.1); notification by Austria, L/6917.

⁴⁴L/7302, L/7303 (1993); L/7503, L/7544 (1994).

A Secretariat Note of 1991 on “Trade and Environment” includes a list of quantitative restrictions for which Article XX(b) has been cited as a justification. The list was drawn from the Inventory of Quantitative Restrictions maintained by the Secretariat.⁴⁵

4. Paragraph (c): “relating to the importation or exportation of gold and silver”

The Panel Report on “Canada - Measures Affecting the Sale of Gold Coins”, which has not been adopted, examined a tax measure of the province of Ontario imposing a retail sales tax on gold coins and exempting from this tax Maple Leaf gold coins struck by the Canadian Mint. The Panel noted that while both the Maple Leaf and the Krugerrand were legal tender in their respective countries of origin, both were normally purchased as investment goods, and therefore considered that the Maple Leaf and Krugerrand gold coins were not only means of payment but also “products” within the meaning of Article III:2.⁴⁶

5. Paragraph (d)

(1) *General*

The Working Party on “The Haitian Tobacco Monopoly” in 1955 examined whether the licensing of tobacco imports by the Tobacco Régie required a release under the provisions of Article XVIII:12: “... the representative of Haiti stated that the measure was necessary to secure compliance with the Law of 16 February 1948, which established the Tobacco Régie ... and that it was ‘not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.’ In the light of this statement the Working Party considered that Article [XX(d)] would be applicable to the measure if the basic regulations were not in conflict with any provision of the Agreement”.⁴⁷

The 1989 Panel Report on “United States - Section 337 of the Tariff Act of 1930” dealt with the claim by the European Economic Community that the special “Section 337” procedure for enforcing patent claims against imported products treated such products less favourably than the procedures applicable to patent claims involving products of domestic origin, contrary to Article III:4, and that this special procedure was not justified under Article XX(d) as “necessary” to enforce U.S. patent laws against imports.

“The Panel noted that the parties to the dispute agreed that, for the purposes of Article XX(d), Section 337 can be considered as ‘measures ... to secure compliance with’ United States patent law ... and ... examined whether, in respect of the elements of Section 337 found to be inconsistent with Article III:4 of the General Agreement, the conditions specified in Article XX(d) to justify measures otherwise inconsistent with the GATT are met. These are:

- that the ‘laws or regulations’ with which compliance is being secured are themselves ‘not inconsistent’ with the General Agreement;
- that the measures are ‘necessary to secure compliance’ with those laws or regulations;
- that the measures are ‘not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade’.

“The Panel noted that each of these conditions must be met if an inconsistency with another GATT provision is to be justifiable under Article XX(d). A measure which does not meet any one of these

⁴⁵L/6896, p. 93. Concerning the Inventory of Quantitative Restrictions, see under Article XI in this Index.

⁴⁶L/5863 (unadopted), dated 17 September 1985, para. 51.

⁴⁷L/454, adopted on 22 November 1955, 4S/38, 39, para. 6. Before the revision of Article XVIII in the Review Session, Article XVIII:12 provided for notification and concurrence with regard to certain measures affecting imports which were not otherwise permitted by the General Agreement. See also references to this report under Article III.

conditions, for example the condition that it must be ‘necessary to secure compliance’ with a law consistent with the GATT, cannot be justified under Article XX(d).⁴⁸

(2) “*necessary*”

The 1983 Panel Report on “United States - Imports of Certain Automotive Spring Assemblies” examined claims by Canada regarding an exclusion order issued by the U.S. International Trade Commission (ITC) under Section 337 of the Tariff Act of 1930, including arguments that “The exception under Article XX(d) did not justify trade restrictive measures taken pursuant to Section 337 on two grounds: (1) differential treatment of foreign products involving a separate adjudicating process was not ‘necessary’ to secure compliance with United States patent laws, and (2) the law with which compliance was sought (Section 337) was ‘inconsistent with the provisions of this agreement’, i.e. Article III of the GATT”.⁴⁹ In its findings,

“The Panel considered whether the ITC action, in making the exclusion order, was ‘necessary’ in the sense of paragraph (d) of Article XX to secure compliance with United States patent law. In this connection the Panel examined whether a satisfactory and effective alternative existed under civil court procedures which would have provided the patent holder Kuhlman with a sufficiently effective remedy against the violation of its patent by foreign producers including the Canadian producer Wallbank Manufacturing Co. Ltd. ...

“... it was the view of the Panel that the only way in which, under existing United States law, Kuhlman’s right to the exclusive use of its patent in the United States domestic market could be effectively protected against the importation of the infringing product would be to resort to the exclusion order procedure. For the above reasons, therefore, the Panel found that the exclusion order issued by the ITC under Section 337 of the United States Tariff Act of 1930 was ‘necessary’ in the sense of Article XX(d) to prevent the importation and sale of automotive spring assemblies infringing the patent, thus protecting the patent holder’s rights and securing compliance with United States patent law.”⁵⁰

“The Panel did not ... exclude the strong possibility that there might be cases ... where a procedure before a United States court might provide the patent holder with an equally satisfactory and effective remedy against infringement of his patent rights. In such cases the use of an exclusion order under Section 337 might not be necessary in terms of Article XX(d) to secure compliance with laws and regulations (i.e. United States patent law) which were not inconsistent with the General Agreement.”⁵¹

“... The Panel pointed out that its finding ... that the exclusion order issued by the ITC was ‘necessary’ within the meaning of Article XX(d) had been made on the basis of existing United States law. It carried no implication that the use of Section 337 was an entirely satisfactory means of dealing with patent based cases”.⁵²

In the Council discussion of the Panel Report, the representative of Canada stated “that the Panel qualified its conclusions by emphasizing that it was under existing United States law that Section 337 orders would often be necessary. This would seem to suggest that if a contracting party elects not to equip itself with effective enforcement procedures with respect to imports for its law of general application, then it is free to deny national treatment, even to the extent of having a discriminatory adjudicative process”.⁵³ Some other contracting parties also expressed concern at the Panel conclusions.⁵⁴ The Panel Report was adopted “on the understanding that this shall not foreclose future examination of the use of Section 337 to deal with patent infringement cases from the point of view of consistency with Articles III and XX of the General Agreement”.⁵⁵

⁴⁸L/6439, adopted on 7 November 1989, 36S/345, 392, paras. 5.22-5.23.

⁴⁹L/5333, adopted on 26 May 1983, 30S/107, 120, para. 37.

⁵⁰*Ibid.*, 30S/126, paras. 58, 60.

⁵¹*Ibid.*, 30S/127, para. 66.

⁵²*Ibid.*, 30S/128, para. 68.

⁵³C/M/161, p. 11; C/W/396, para. 4.

⁵⁴C/M/161, pp. 12-16.

⁵⁵C/M/168, p. 10.

The 1984 Panel Report on “Canada - Administration of the Foreign Investment Review Act” examined the argument by Canada that, if the Panel were to find purchase undertakings entered into between foreign investors and the government of Canada to be inconsistent with Article III:4, these would fall under Article XX(d) because the purchase undertakings were “necessary to secure compliance” with the Foreign Investment Review Act.

“... On the basis of the explanations given by Canada the Panel could not ... conclude that the purchase undertakings that were found to be inconsistent with Article III:4 are necessary for the effective administration of the Act. The Panel is in particular not convinced that, in order to achieve the aims of the Act, investors submitting applications under the Act had to be bound to purchasing practices having the effect of giving preference to domestic products. It was not clear to the Panel why a detailed review of investment proposals without purchasing requirements would not be sufficient to enable the Canadian government to determine whether the proposed investments were or were likely to be of significant benefit to Canada within the meaning of Section 2 of the Foreign Investment Review Act.”⁵⁶

The 1989 Panel Report on “United States - Section 337 of the Tariff Act of 1930” contains the following passage:

“The Panel noted that the United States and the Community interpret the term ‘necessary’ differently. They differ as to whether it requires the use of the least trade-restrictive measure available. They also differ as to whether ‘necessity’ to use measures that accord less favourable treatment to imported products can be created by a contracting party’s choice, in its national legislation, of enforcement measures against domestic products that would not be effective against imports ...

“It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as ‘necessary’ in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions. The Panel wished to make it clear that this does not mean that a contracting party could be asked to change its substantive patent law or its desired level of enforcement of that law, provided that such law and such level of enforcement are the same for imported and domestically-produced products. However, it does mean that, if a contracting party could reasonably secure that level of enforcement in a manner that is not inconsistent with other GATT provisions, it would be required to do so.

“Bearing in mind the foregoing and that it is up to the contracting party seeking to justify measures under Article XX(d) to demonstrate that those measures are ‘necessary’ within the meaning of that provision, the Panel considered whether the inconsistencies that it had found with Article III:4 can be justified as ‘necessary’ in terms of Article XX(d). The Panel first examined the argument of the United States that the Panel should consider not whether the individual elements of Section 337 are ‘necessary’ but rather whether Section 337 as a system is ‘necessary’ for the enforcement of United States patent laws. ... The Panel did not accept this contention since it would permit contracting parties to introduce GATT inconsistencies that are not necessary simply by making them part of a scheme which contained elements that are necessary. In the view of the Panel, what has to be justified as ‘necessary’ under Article XX(d) is each of the inconsistencies with another GATT Article found to exist, i.e. in this case, whether the differences between Section 337 and federal district court procedures that result in less favourable treatment of imported products within the meaning of Article III:4, as outlined above ... are necessary.”⁵⁷

The Panel went on to discuss the necessity of certain aspects of Section 337 which it had found were inconsistent with Article III:4:

⁵⁶L/5504, adopted on 7 February 1984, 30S/140, 164-165, para. 5.20.

⁵⁷L/6439, adopted on 7 November 1989, 36S/345, 392-393, paras. 5.25-5.27.

“The United States suggested that Section 337 can be justified because, under United States law, it provides the only means of enforcement of United States patent rights against imports of products manufactured abroad by means of a process patented in the United States. ... The Panel considered that, even if it were accepted that a different scheme for imports alleged to infringe process patents is necessary, this could not in itself justify as ‘necessary’ in terms of Article XX(d) any of the specific inconsistencies with Article III:4 summarised in paragraph 5.20 above. In any event, the Panel did not consider that a different scheme for imports alleged to infringe process patents is necessary, since many countries grant to their civil courts jurisdiction over imports of products manufactured abroad under processes protected by patents of the importing country. The Panel noted that, in the 1988 Omnibus Trade and Competitiveness Act, the United States has in fact amended its law to this effect (see Annex II).

“The United States also suggested that certain features of Section 337 are necessary in order to permit Presidential review, which is in the interests of respondents ... The Panel did not believe that this provided an argument for necessity in terms of Article XX(d), since Presidential review is not necessary in order to secure compliance with United States patent legislation; it is not, of course, available in United States patent litigation involving challenged products of domestic origin.

“The United States suggested that Section 337 is needed because of difficulties with service of process on and enforcement of judgments against foreign manufacturers As regards service of process, the difference in procedures between Section 337 and federal district courts was not itself alleged to be inconsistent with any GATT provision; and the Panel did not see why any of the inconsistencies with Article III:4 are a necessary accompaniment of arrangements for effective service of process where imported products are concerned. However, as noted in paragraph 5.19 above, the Panel found the differences in procedures for the enforcement of judgments to be inconsistent with Article III:4 in that they provide for the possibility of *in rem* general exclusion orders against imported products when no equivalent remedy is available against products of United States origin; and that they provide for automatic customs enforcement of exclusion orders while the enforcement of a court injunction requires the initiation of proceedings by the successful party.

“The United States stressed the importance to its system of enforcement of *in rem* orders, and the Panel considered this question at some length. The Panel agreed with the United States that taking action against infringing products at the source, that is at the point of their production, would generally be more difficult in respect of imported products than in respect of products of national origin: imported products are produced outside the jurisdiction of national enforcement bodies and it is seldom feasible to secure enforcement of the rulings of a court of the country of importation by local courts in the country of production. *In personam* action against importers would not in all cases be an adequate substitute for action against the manufacturer, not only because importers might be very numerous and not easily brought into a single judicial proceeding, but also, and more importantly, because as soon as activities of known importers were stopped it would often be possible for a foreign manufacturer to find another importer. For these reasons the Panel believed that there could be an objective need in terms of Article XX(d) to apply limited *in rem* exclusion orders to imported products, although no equivalent remedy is applied against domestically-produced products.

“A limited *in rem* order applying to imported products can thus be justified, for the reasons presented in the previous paragraph, as the functional equivalent of an injunction enjoining named domestic manufacturers. However, these reasons do not justify as ‘necessary’ in terms of Article XX(d) the inconsistency with Article III:4 found in respect of general exclusion orders; this is that such orders apply to products produced by persons who have not been named as respondents in the litigation, while no equivalent measure applicable to non-parties is available where products of United States origin are concerned. The United States informed the Panel that the situations which under Section 337 could justify a general exclusion order against imported products are a widespread pattern of unauthorised use of the patented invention or process and a reason to infer that manufacturers other than respondents to the investigation might enter the United States market with infringing products. However, the Panel saw no reason why these situations could not also occur in respect of products produced in the United States. Nevertheless, the Panel did not rule out entirely that there could sometimes be objective reasons why general *in rem* exclusion orders might be ‘necessary’ in terms of Article XX(d) against imported products

even though no equivalent measure was needed against products of United States origin. For example, in the case of imported products it might be considerably more difficult to identify the source of infringing products or to prevent circumvention of orders limited to the products of named persons, than in the case of products of United States origin. Of course, the United States could bring the provision of general exclusion orders into consistency with Article III:4 by providing for the application in like situations of equivalent measures against products of United States origin.

“As noted above, the Panel found an inconsistency with Article III:4 in the fact that Section 337 exclusion orders are automatically enforced by the Customs Service, whereas the enforcement of injunctions against products of United States origin requires the successful plaintiff to bring individual proceedings. However, in this case the Panel accepted the argument of necessity in terms of Article XX(d). A United States manufacturer which has been enjoined by a federal district court order can normally be expected to comply with that injunction, because it would know that failure to do so would incur the risk of serious penalties resulting from a contempt proceeding brought by the successful plaintiff. An injunction should therefore normally suffice to stop enjoined activity without the need for subsequent action to enforce it. As far as imported products are concerned, enforcement at the border by the customs administration of exclusion orders can be considered as a means necessary to render such orders effective.

“The Panel considered the argument of the United States that many of the procedural aspects of Section 337 reflect the need to provide expeditious prospective relief against infringing imports. ... The Panel understood this argument to be based on the notion that, in respect of infringing imports, there would be greater difficulty than in respect of infringing products of domestic origin in collecting awards of damages for past infringement, because foreign manufacturers are outside the jurisdiction of national courts and importers might have little by way of assets. In the Panel’s view, given the issues at stake in typical patent suits, this argument could only provide a justification for rapid *preliminary* or conservatory action against imported products, combined with the necessary safeguards to protect the legitimate interests of importers in the event that the products prove not to be infringing. The tight time-limits for the *conclusion* of Section 337 proceedings, when no comparable time-limits apply in federal district court, and the other features of Section 337 inconsistent with Article III:4 that serve to facilitate the expeditious completion of Section 337 proceedings, such as the inadmissibility of counterclaims, cannot be justified as ‘necessary’ on this basis.

“The United States did not advance, nor was the Panel aware of, any other arguments that might justify as necessary any of the elements of Section 337 that had been found to be inconsistent with Article III:4 of the General Agreement. On the basis of the preceding review and analysis, the Panel *found* that the system of determining allegations of violation of United States patent rights under Section 337 of the United States Tariff Act cannot be justified as necessary within the meaning of Article XX(d) so as to permit an exception to the basic obligation contained in Article III:4 of the General Agreement. The Panel, however, repeats that, as indicated in paragraphs 5.32 and 5.33 above, some of the inconsistencies with Article III:4 of individual aspects of procedures under Section 337 could be justified under Article XX(d) in certain circumstances”.⁵⁸

The 1992 Panel Report on “United States - Measures Affecting Alcoholic and Malt Beverages” examined, *inter alia*, the invocation of Article XX(d) with respect to a discriminatory requirement that imported beer be distributed through in-state wholesalers:

“The Panel then recalled the United States alternative argument that the requirement that imported beer be distributed through in-state wholesalers, which requirement was not imposed in the case of beer from in-state breweries, was justified under Article XX(d) as a measure necessary to secure compliance with laws or regulations which were not inconsistent with the provisions of the General Agreement. ...

⁵⁸*Ibid.*, 36S/393-396, paras. 5.28-5.35.

“... The Panel also noted the practice of the CONTRACTING PARTIES of interpreting these Article XX exceptions narrowly, placing the burden on the party invoking an exception to justify its use.

“The Panel recalled the position of the United States that there was no reasonable alternative to the existing regulatory scheme in the various states which required out-of-state and imported beer to be distributed to retailers via in-state wholesalers while allowing in-state beer to be shipped directly from producers to retailers. The United States considered that the wholesaler was the only reasonable place for beer excise taxes to be collected for out-of-state and foreign products, but that there was no such necessity with respect to products from in-state producers that were, by definition, under the jurisdiction of the state. The Panel further recalled the position of Canada that the burden was on the United States to specify and demonstrate the consistency with the General Agreement of the laws for which it was trying to secure compliance and to show that there were no less trade restrictive measures available to secure compliance with them.

“The Panel was of the view that even if, as argued by the United States, the requirement to use wholesalers is considered as a ‘measure to secure compliance’ in terms of Article XX(d) and the respective state liquor laws are considered as ‘laws ... not inconsistent with the provisions of this Agreement’ notwithstanding the above-mentioned Panel findings on inconsistency with Article III, the United States has not demonstrated that discriminatory requirements to use wholesalers are ‘necessary’ in terms of Article XX(d) to enforce the liquor tax laws. The Panel recalled a finding of an earlier panel ‘that a contracting party cannot justify a measure inconsistent with another GATT provision as “necessary” in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it’.⁵⁹ The Panel considered that the United States has not met its burden of showing that the specific inconsistency with Article III:4 of the discriminatory wholesaler requirements in the various states is the only reasonable measure available to secure enforcement of state excise tax laws. The fact that not all fifty states maintain discriminatory systems indicates to the Panel that alternative measures for enforcement of state excise tax laws do indeed exist”.⁶⁰

The same Panel also examined the United States’ invocation of Article XX(d) with respect to a requirement in some states that alcoholic beverages transported into the state be transported by state-licensed common carriers while in-state producers could deliver their product in their own vehicles.

“The Panel was of the view that its considerations with respect to Article XX(d) in relation to the wholesaler requirement apply equally here. It was incumbent upon the United States to demonstrate that particular laws for which compliance is being sought are consistent with the General Agreement and that the inconsistency with Article III:4 of the discriminatory common carrier requirement for imported beer and wine is necessary to secure compliance with those laws. In the view of the Panel, the United States has not demonstrated that the common carrier requirement is the least trade restrictive enforcement measure available to the various states and that less restrictive measures, e.g. record-keeping requirements of retailers and importers, are not sufficient for tax administration purposes. In this regard, the Panel noted that not all fifty states of the United States maintain common carrier requirements. It thus appeared to the Panel that some states have found alternative, and possibly less trade restrictive, and GATT-consistent, ways of enforcing their tax laws. The Panel accordingly found that the United States has not met its burden of proof in respect of its claimed Article XX(d) justification for the common carrier requirement of the various states”.⁶¹

(3) “to secure compliance”

In the Panel Report on “EEC - Regulation on Imports of Parts and Components” the Panel examined the consistency with the General Agreement of Article 13:10 of Council Regulation No. 2176/84 on anti-dumping.

⁵⁹The footnote to this sentence in the panel report refers to the Report of the Panel on “United States - Section 337 of the Tariff Act of 1930, adopted on 7 November 1989, 36S/345, 392.

⁶⁰DS23/R, adopted on 19 June 1992, 39S/206, 282-283, paras. 5.40-5.43.

⁶¹*Ibid.*, 39S/287-288, para. 5.52.

This provision was intended to prevent circumvention of anti-dumping duties on finished products through the importation of parts or materials for use in the assembly or production of like finished products within the EEC. Japan considered this provision to be inconsistent with the EEC's obligations under Articles I and II or III, and not justified by Article VI of the General Agreement. The EEC considered both the application of Article 13:10 and the Article itself to be justified by Article XX(d). "The Panel considered that the '*measure*' referred to in Article XX is the measure requiring justification under Article XX and that, therefore, the imposition of anti-circumvention duties inconsistent with Article III:2 is the '*measure*' in the present case. It further considered that the '*laws or regulations*' to be examined under sub-paragraph (d) are the laws or regulations the contracting party invoking Article XX(d) claims to secure compliance with, in the present case the Council Regulations Nos. 2176/84 and 2423/88 (except for the anti-circumvention provision) and the individual Council regulations imposing definitive anti-dumping duties on finished products from Japan."⁶²

"The Panel noted that, in order for a measure to be covered by Article XX(d), it must '*secure compliance with*' laws or regulations that are not inconsistent with the General Agreement. The Panel therefore proceeded to examine the question of whether the imposition of anti-circumvention duties inconsistent with Article III:2 is a measure '*to secure compliance with*' the EEC's general anti-dumping regulations and the individual regulations imposing definitive anti-dumping duties. The essential argument of Japan on this point was that Article XX(d) permits contracting parties to take only measures to enforce the obligations provided for in the laws or regulations consistent with the General Agreement. The only part of the EEC's anti-dumping regulations that requires enforcement is the part establishing the obligation to pay anti-dumping duties. The anti-circumvention duties do not serve to secure the payment of these duties and can therefore in the view of Japan not be considered to be securing compliance with the EEC's anti-dumping regulations. The essential argument of the EEC was that the terms '*to secure compliance with*' should be interpreted more broadly to cover not only the enforcement of laws and regulations *per se* but also the prevention of actions which have the effect of undermining the objectives of laws and regulations. In the view of the EEC, the anti-circumvention duties, being levied only in narrowly defined circumstances in which the objectives of the EEC's anti-dumping regulations are clearly being undermined, therefore secure compliance with these regulations within the meaning of Article XX(d).

"The Panel concluded from the above that the interpretative issue before it was: Does the qualification '*to secure compliance with laws or regulations*' mean that the measure must prevent actions inconsistent with the obligations set out in laws or regulations, or does it support a more expansive interpretation according to which it would also cover a measure which prevents actions that are consistent with laws or regulations but undermine their objectives?

"The Panel first examined this interpretative issue in the light of the *text of Article XX(d)*. The Panel noted that this provision does not refer to objectives of laws or regulations but only to laws or regulations. This suggests that Article XX(d) merely covers measures to secure compliance with laws and regulations as such and not with their objectives. The examples of the laws and regulations indicated in Article XX(d), namely '*those relating to customs enforcement, the enforcement of monopolies ..., the protection of patents ... and the prevention of deceptive practices*' (emphasis added) also suggest that Article XX(d) covers only measures designed to prevent actions that would be illegal under the laws or regulations. This conclusion is further supported by the fact that the provision corresponding to Article XX(d) in the 1946 Suggested Charter for an International Trade Organization used the terms '*to induce compliance with*' while Article XX(d) of the General Agreement uses the stricter language '*to secure compliance with*' (emphasis added).

"The Panel then examined the alternative interpretations in the light of the *purpose of Article XX(d)* and found the following. If the qualification '*to secure compliance with laws and regulations*' is interpreted to mean '*to enforce obligations under laws and regulations*', the main function of Article XX(d) would be to permit contracting parties to act inconsistently with the General Agreement whenever such inconsistency is necessary to ensure that the obligations which the contracting parties may impose consistently with the General Agreement under their laws or regulations are effectively enforced.

⁶²L/6657, adopted on 16 May 1990, 37S/132, 194-195, para. 5.12.

If the qualification ‘to secure compliance with laws and regulations’ is interpreted to mean ‘to ensure the attainment of the objectives of the laws and regulations’, the function of Article XX(d) would be substantially broader. Whenever the objective of a law consistent with the General Agreement cannot be attained by enforcing the obligations under that law, the imposition of further obligations inconsistent with the General Agreement could then be justified under Article XX(d) on the grounds that this secures compliance with the objectives of that law. This cannot, in the view of the Panel, be the purpose of Article XX(d): each of the exceptions in the General Agreement - such as Articles VI, XII or XIX - recognizes the legitimacy of a policy objective but at the same time sets out conditions as to the obligations which may be imposed to secure the attainment of that objective. These conditions would no longer be effective if it were possible to justify under Article XX(d) the enforcement of obligations that may not be imposed consistently with these exceptions on the grounds that the objective recognized to be legitimate by the exception cannot be attained within the framework of the conditions set out in the exception.

“For the reasons indicated in the preceding paragraphs, the Panel found that Article XX(d) covers only measures related to the enforcement of obligations under laws or regulations consistent with the General Agreement. The Panel noted that the general anti-dumping Regulation of the EEC does not establish obligations that require enforcement; it merely establishes a legal framework for the authorities of the EEC. Only the individual regulations imposing definitive anti-dumping duties give rise to obligations that require enforcement, namely the obligation to pay a specified amount of anti-dumping duties. The Panel noted that the anti-circumvention duties do not serve to enforce the payment of anti-dumping duties. The Panel could, therefore, not establish that the anti-circumvention duties ‘secure compliance with’ obligations under the EEC’s anti-dumping regulations. The Panel concluded for these reasons that the duties could not be justified under Article XX(d).”⁶³

(4) “laws or regulations which are not inconsistent with the provisions of this Agreement”

In discussing a proposed amendment to the Havana Charter provision corresponding to Article XX(d), “designed to exempt measures against so-called ‘social dumping’ from the provisions of Chapter IV, the Subcommittee expressed the view that this objective was covered for short-term purposes by paragraph 1 of Article 40 [XIX] and for long-term purposes by Article 7 in combination with Articles 93, 94 [XXIII] and 95”.⁶⁴

The 1983 Panel Report on “United States - Imports of Certain Automotive Spring Assemblies” notes that the Panel “concluded that the laws and regulations which were not inconsistent with the General Agreement and with which compliance was to be secured were the patent laws of the United States, since the case in question was based on the allegation of an infringement of patent rights under United States patent law.”⁶⁵

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” examined certain import quotas maintained by Japan. In response to the invocation of Article XX(d) by Japan in relation to import restrictions administered by an import monopoly, the Panel found that “Article XX(d) only exempts from the obligations under the General Agreement measures necessary to secure compliance with those laws and regulations ‘which are not inconsistent with the provisions of [the General] Agreement’. Article XX(d) therefore does not permit contracting parties to operate monopolies inconsistently with the other provisions of the General Agreement. ... The Panel therefore found that the enforcement of laws and regulations providing for an import restriction made effective through an import monopoly inconsistent with Article XI:1 was not covered by Article XX(d).”⁶⁶

⁶³*Ibid.*, 37S/195-197, paras. 5.14-5.18.

⁶⁴Havana Reports, p. 84, para. 19.

⁶⁵L/5333, adopted on 26 May 1983, 30S/102, 125, para. 57.

⁶⁶L/6253, adopted on 2 February 1988, 35S/163, 230, para. 5.2.2.3.

The 1991 Panel Report on “United States - Restrictions on Imports of Tuna”, which has not been adopted, examined the “intermediary nations” embargo on imports of tuna under the US Marine Mammal Protection Act (MMPA), which required that the United States authorities implement a prohibition on imports of yellowfin tuna and yellowfin tuna products from “intermediary nations”; at the time of this panel proceeding the United States customs authorities refused entry to shipments of yellowfin tuna unless the importer declared that no yellowfin tuna or yellowfin tuna product in the shipment were harvested with purse-seine nets in the Eastern Tropical Pacific Ocean by vessels of Mexico. The Panel found that these measures and the provisions of the MMPA mandating them were inconsistent with Article XI:1.

“The Panel then proceeded to examine the consistency of the ‘intermediary nations’ embargo with Article XX(d), which the United States had invoked. ...

“The Panel noted that Article XX(d) requires that the ‘laws or regulations’ with which compliance is being secured be themselves ‘not inconsistent’ with the General Agreement. The Panel noted that the United States had argued that the ‘intermediary nations’ embargo was necessary to support the direct embargo because countries whose exports were subject to such an embargo should not be able to nullify the embargo’s effect by exporting to the United States indirectly through third countries. The Panel found that, given its finding that the direct embargo was inconsistent with the General Agreement, the ‘intermediary nations’ embargo and the provisions of the MMPA under which it is imposed could not be justified under Article XX(d) as a measure to secure compliance with ‘laws or regulations not inconsistent with the provisions of this Agreement’.”⁶⁷

In this connection, see also the unadopted Panel Report of 1994 on “United States - Taxes on Automobiles”.⁶⁸

(5) “the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII”

The London Report on discussions in the Preparatory Committee notes that “There was general agreement that restrictions or prohibitions on private trade might be imposed in order to protect the position of state-trading enterprises operated under other articles ...”.⁶⁹ Accordingly, the London and New York Charters included in Article 25:2 [XI:2] an exception to the general prohibition on quantitative restrictions, for import and export prohibitions or restrictions on private trade for the purpose of establishing a new, or maintaining an existing, monopoly of trade for a state-trading enterprise operating consistent with the Charter articles on state trading. During discussions at the Geneva session of the Preparatory Committee, it was agreed to delete this provision from the article on quantitative restrictions, and to add language clarifying that such measures would be covered by the commercial policy exceptions clause corresponding to the present GATT Article XX(d).⁷⁰ The proposal to make this change was explained as follows:

“... these examples given under sub-paragraph (g) [XX(d)] are, in fact, only examples ... if any law or regulation is consistent with Chapter V, then any measure which is necessary for the enforcement of that law is taken care of here. ... the sole reason for mentioning state trading monopolies specifically here was that, in the case of a monopoly, the enforcement of that monopoly depends upon a prohibition against private trade, and in order to make it perfectly clear to certain Delegates that that was permitted, state trading monopolies were inserted as one of the examples”.⁷¹

It was also noted that “It is only if and when you have a monopoly that you need it protected by a restriction on imports. If by any chance you have a State-trading enterprise which is not a monopoly, it would no doubt simply go into the market and buy and sell alongside private traders, and there would be no occasion to have any restriction in that case at all”.⁷²

⁶⁷DS21/R (unadopted), dated 3 September 1991, 39S/155, 202, paras. 5.39-5.40.

⁶⁸DS31/R, dated 11 October 1994, para. 5.67.

⁶⁹London Report, p. 12, para. III.C.1(i).

⁷⁰See EPCT/W/208 (US proposal), EPCT/W/223 p. 8-9, discussion at EPCT/A/PV/21 p. 4-8,

⁷¹EPCT/A/PV/33 p. 12-13.

⁷²EPCT/A/PV/33, p. 15.

In the 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”, in response to an argument by Japan concerning certain import restrictions administered through import monopolies:

“The Panel further examined whether Article XX(d) of the General Agreement justified import restrictions made effective through import monopolies. The Panel noted that Article XX(d) permits measures necessary to the enforcement of monopolies. Article XX(d) therefore permits measures necessary to enforce the exclusive possession of the trade by the monopoly, such as measures limiting private imports that would undermine the control of the trade by the monopoly. However, Article XX(d) only exempts from the obligations under the General Agreement measures necessary to secure compliance with those laws and regulations ‘which are not inconsistent with the provisions of [the General] Agreement’. Article XX(d) therefore does not permit contracting parties to operate monopolies inconsistently with the other provisions of the General Agreement. The General Agreement contains detailed rules designed to preclude protective and discriminatory practices by import monopolies (cf. in particular Article II:4, the note to Articles XI, XII, XIII, XIV and XVIII, and Article XVII). These rules would become meaningless if Article XX(d) were interpreted to exempt from the obligations under the General Agreement protective or discriminatory trading practices by such monopolies. The Panel therefore found that the enforcement of laws and regulations providing for an import restriction made effective through an import monopoly inconsistent with Article XI:1 was not covered by Article XX(d).”⁷³

(6) “protection of patents, trade marks and copyrights”

Drafts for an “Agreement on Measures to Discourage the Importation of Counterfeit Goods” were circulated in 1979 and 1982.⁷⁴ The preamble of the revised draft noted, *inter alia*, “that the contracting parties are exercising their rights under Article XX of the General Agreement, *inter alia*, to adopt or enforce laws and regulations relating to the protection of trademarks”. Following the Decision on Trade in Counterfeit Goods contained in the Ministerial Declaration of 29 November 1982,⁷⁵ the Director-General held consultations with the Director-General of the World Intellectual Property Organization (WIPO) on legal and institutional aspects involved in trade in counterfeit goods.⁷⁶ See also the 1985 Report of the Group of Experts on Trade in Counterfeit Goods.⁷⁷

In the 1983 Panel Report on “United States - Imports of Certain Automotive Spring Assemblies”, “The Panel noted that, as far as it had been able to ascertain, this was the first time a specific case of patent infringement involving Article XX(d) had been brought before the CONTRACTING PARTIES”.⁷⁸ “The Panel noted that the GATT recognized, by the very existence of Article XX(d), the need to provide that certain measures taken by a contracting party to secure compliance with its national laws or regulations which otherwise would not be in conformity with the GATT obligations of that contracting party would, through the application of this provision under the conditions stipulated therein, be in conformity with the GATT provided that the national laws or regulations concerned were not inconsistent with the General Agreement. In this connection the Panel noted in particular that the protection of patents was one of the few areas of national laws and regulations expressly mentioned in Article XX(d).”⁷⁹

In the Panel Report on “United States - Section 337 of the Tariff Act of 1930”, “The Panel noted that in the dispute before it the ‘laws or regulations’ with which Section 337 secures compliance are the substantive patent laws of the United States and that the conformity of these laws with the General Agreement is not being challenged”.⁸⁰ In relation to the criterion of “necessary” in terms of Article XX(d), “The Panel wished to make it clear that this does not mean that a contracting party could be asked to change its substantive patent

⁷³L/6253, adopted on 2 February 1988, 35S/163, 229-230, para. 5.2.2.3.

⁷⁴L/4817, L/5382.

⁷⁵L/5424, 29S/19.

⁷⁶See the Report by the Director-General on these consultations in C/W/418.

⁷⁷L/5878, dated 9 October 1985; see also background note by the Secretariat on “Trade in Counterfeit Goods”, MDF/W/19, dated 10 January 1985.

⁷⁸L/5333, adopted on 26 May 1983, 30S/107, 124, para. 51.

⁷⁹*Ibid.*, 30S/124-125, para. 53.

⁸⁰L/6439, adopted on 7 November 1989, 36S/345, 392, para. 5.24.

law or its desired level of enforcement of that law, provided that such law and such level of enforcement are the same for imported and domestically-produced products. However, it does mean that if a contracting party could reasonably secure that level of enforcement in a manner that is not inconsistent with other GATT provisions, it would be required to do so”.⁸¹

(7) “the prevention of deceptive practices”

It was agreed during discussions at the London sessions of the Preparatory Committee that the words “deceptive practices” were broad enough to cover cases of false marking of geographical origin.⁸²

In 1987, during the Working Party on the Accession of Portugal and Spain to the EEC, in response to a question regarding an EEC regulation on the use of the term “sherry”, the EEC stated that the regulation in question “constitutes a measure designed to prevent deceptive practices. It is therefore justified under Article XX(d) of the General Agreement”.⁸³

(8) Preshipment inspection

A 1989 Background Note by the Secretariat on “Preshipment Inspection”⁸⁴ discusses the application of Article XX(d) in this connection.

6. Paragraph (g): “relating to the conservation of exhaustible natural resources”

(1) “relating to ... conservation”

In the 1988 Panel Report on “Canada - Measures Affecting Exports of Unprocessed Herring and Salmon”, the Panel examined the issue of whether export prohibitions of certain unprocessed salmon and unprocessed herring, conceded to be contrary to Article XI:1 of the General Agreement, were or were not justified by, *inter alia*, Article XX(g).

“... The Panel noted that both parties agreed that Canada maintains a variety of measures for the conservation of salmon and herring stocks and imposes limitations on the harvesting of salmon and herring. The Panel agreed with the parties that salmon and herring stocks are ‘exhaustible natural resources’ and the harvest limitations are ‘restrictions on domestic production’ within the meaning of Article XX(g). Having reached this conclusion the Panel examined whether the export prohibitions on certain unprocessed salmon and unprocessed herring are ‘relating to’ the conservation of salmon and herring stocks ...

“Article XX(g) does not state how the trade measures are to be related to the conservation and how they have to be conjoined with the production restrictions. This raises the question of whether *any* relationship with conservation and *any* conjunction with production restrictions are sufficient for a trade measure to fall under Article XX(g) or whether a *particular* relationship and conjunction are required. The Panel noted that the only previous case in which the CONTRACTING PARTIES took a decision on Article XX(g) was the case examined by the Panel on ‘United States - Prohibition of Imports of Tuna and Tuna Products from Canada’ but that that Panel had found that the party invoking Article XX(g) did not maintain restrictions on the production or consumption of tuna and thus had not been required to interpret the terms ‘relating to’ and ‘in conjunction with’.⁸⁵ The Panel therefore decided to analyze the meaning of these terms in the light of the context in which Article XX(g) appears in the General Agreement and in the light of the purpose of that provision.

⁸¹*Ibid.*, 36S/393, para. 5.26.

⁸²EPCT/C.II/50, p. 5, 9; EPCT/C.II/54/Rev.1, p. 37.

⁸³L/5984/Add.2, p. 2.

⁸⁴MTN.GNG/NG2/W/II/Add.1, 19 October 1989.

⁸⁵The footnote to this sentence refers to 29S/91.

“The Panel noted that some of the subparagraphs of Article XX state that the measure must be ‘necessary’ or ‘essential’ to the achievement of the policy purpose set out in the provision (cf. subparagraphs (a), (b), (d) and (j)) while subparagraph (g) refers only to measures ‘relating to’ the conservation of exhaustible natural resources. This suggests that Article XX(g) does not only cover measures that are necessary or essential for the conservation of exhaustible natural resources but a wider range of measures. However, as the preamble of Article XX indicates, the purpose of including Article XX(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustible natural resources. The Panel concluded for these reasons that, while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be primarily aimed at the conservation of an exhaustible natural resource to be considered as ‘relating to’ conservation within the meaning of Article XX(g). The Panel, similarly, considered that the terms ‘in conjunction with’ in Article XX(g) had to be interpreted in a way that ensures that the scope of possible actions under that provision corresponds to the purpose for which it was included in the General Agreement. A trade measure could therefore in the view of the Panel only be considered to be made effective ‘in conjunction with’ production restrictions if it was primarily aimed at rendering effective these restrictions.

“Having reached these conclusions the Panel examined whether the export prohibitions on unprocessed salmon and unprocessed herring maintained by Canada were primarily aimed at the conservation of salmon and herring stocks and rendering effective the restrictions on the harvesting of salmon and herring. The Panel noted Canada’s contention that the export prohibitions were not conservation measures *per se* but had an effect on conservation because they helped provide the statistical foundation for the harvesting restrictions and increase the benefits to the Canadian economy arising from the Salmonid Enhancement Program. The Panel carefully examined this contention and noted the following: Canada collects statistical data on many different species of fish, including certain salmon species, without imposing export prohibitions on them. Canada maintains statistics on all fish exports. If certain unprocessed salmon and unprocessed herring were exported, statistics on these exports would therefore be collected. The Salmonid Enhancement Program covers salmon species for which export prohibitions apply and other species not subject to export prohibitions. The export prohibitions do not limit access to salmon and herring supplies in general but only to certain salmon and herring supplies in unprocessed form. Canada limits purchases of these unprocessed fish only by foreign processors and consumers and not by domestic processors and consumers. In light of all these factors taken together, the Panel found that these prohibitions could not be deemed to be primarily aimed at the conservation of salmon and herring stocks and at rendering effective the restrictions on the harvesting of these fish. The Panel therefore concluded that the export prohibitions were not justified by Article XX(g).”⁸⁶

In the 1991 Panel Report on “United States - Restrictions on Imports of Tuna”, which has not been adopted, the Panel also examined whether the prohibition on imports of certain yellowfin tuna and certain yellowfin tuna products from Mexico and the provisions of the Marine Mammal Protection Act (MMPA) under which it was imposed could be justified under the exception in Article XX(g).

“... The Panel noted that the United States, in invoking Article XX(g) with respect to its direct import prohibition under the MMPA, had argued that the measures taken under the MMPA are measures primarily aimed at the conservation of dolphin, and that the import restrictions on certain tuna and tuna products under the MMPA are ‘primarily aimed at rendering effective restrictions on domestic production or consumption’ of dolphin. The Panel also noted that Mexico had argued that the United States measures were not justified under the exception in Article XX(g) because, *inter alia*, this provision could not be applied extrajurisdictionally.

“The Panel noted that Article XX(g) required that the measures relating to the conservation of exhaustible natural resources be taken ‘in conjunction with restrictions on domestic production or consumption’. A previous panel had found that a measure could only be considered to have been taken ‘in conjunction with’ production restrictions ‘if it was primarily aimed at rendering effective these

⁸⁶L/6268, adopted on 22 March 1988, 35S/98, 113-115, paras. 4.4-4.7.

restrictions’.⁸⁷ A country can effectively control the production or consumption of an exhaustible natural resource only to the extent that the production or consumption is under its jurisdiction. This suggests that Article XX(g) was intended to permit contracting parties to take trade measures primarily aimed at rendering effective restrictions on production or consumption within their jurisdiction.

“The Panel further noted that Article XX(g) allows each contracting party to adopt its own conservation policies. The conditions set out in Article XX(g) which limit resort to this exception, namely that the measures taken must be related to the conservation of exhaustible natural resources, and that they not ‘constitute a means of arbitrary or unjustifiable discrimination ... or a disguised restriction on international trade’ refer to the trade measure requiring justification under Article XX(g), not however to the conservation policies adopted by the contracting party. The Panel considered that if the extrajurisdictional interpretation of Article XX(g) suggested by the United States were accepted, each contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The considerations that led the Panel to reject an extrajurisdictional application of Article XX(b) therefore apply also to Article XX(g).

“The Panel did not consider that the United States measures, even if Article XX(g) could be applied extrajurisdictionally, would meet the conditions set out in that provision. A previous panel found that a measure could be considered as ‘relating to the conservation of exhaustible natural resources’ within the meaning of Article XX(g) only if it was primarily aimed at such conservation.⁸⁸ The Panel recalled that the United States linked the maximum incidental dolphin-taking rate which Mexico had to meet during a particular period in order to be able to export tuna to the United States to the taking rate actually recorded for United States fishermen during the same period. Consequently, the Mexican authorities could not know whether, at a given point of time, their conservation policies conformed to the United States conservation standards. The Panel considered that a limitation on trade based on such unpredictable conditions could not be regarded as being primarily aimed at the conservation of dolphins.

“On the basis of the above considerations, the Panel found that the United States direct import prohibition on certain yellowfin tuna and certain yellowfin tuna products of Mexico directly imported from Mexico, and the provisions of the MMPA under which it is imposed, could not be justified under Article XX(g).”⁸⁹

In this connection, see also the unadopted Panel Report of 1994 on “United States - Restrictions on Imports of Tuna”⁹⁰ and the unadopted Panel Report of 1994 on “United States - Taxes on Automobiles”.⁹¹

(2) “*exhaustible natural resources*”

The New York (Drafting Committee) Report notes in this context that “As it seemed to be generally agreed that electric power should not be classified as a commodity, two delegates did not find it necessary to reserve the right for their countries to prohibit the export of electric power”.⁹²

In the 1982 Panel Report on “United States - Prohibition of Imports of Tuna and Tuna Products from Canada”, “The Panel ... noted that both parties considered tuna stocks, including albacore tuna, to be an exhaustible natural resource in need of conservation management”⁹³; see the material from this report directly below. In the 1988 Panel Report on “Canada - Measures Affecting Exports of Unprocessed Herring and

⁸⁷The footnote to this sentence refers to the Panel Report on “Canada - Measures Affecting Exports of Unprocessed Herring and Salmon”, L/6268, adopted on 22 March 1988, 35S/98, 114, para. 4.6.

⁸⁸The footnote to this sentence refers to the same Panel Report, same paragraph: 35S/98, 114, para. 4.6.

⁸⁹DS21/R (unadopted), dated 3 September 1991, 39S/155, 200-201, paras. 5.30-5.34.

⁹⁰DS29/R, dated 16 June 1994, paras. 5.11-5.17, 5.21-5.27.

⁹¹DS31/R, dated 11 October 1994, paras. 5.56, 5.59-5.66.

⁹²New York Report, p. 31, general comments on Article 37; see also source at EPCT/C.6/89, p. 4.

⁹³L/5198, adopted on 22 February 1982, 29S/91, 108, para. 4.9.

Salmon”, the Panel “agreed with the parties that salmon and herring stocks are ‘exhaustible natural resources’”.⁹⁴

In this connection, see also the unadopted Panel Report of 1994 on “United States - Restrictions on Imports of Tuna”,⁹⁵ and the unadopted Panel Report of 1994 on “United States - Taxes on Automobiles”.⁹⁶

(3) “made effective in conjunction with restrictions on domestic production or consumption”

The US Draft Charter included an exception to the commercial policy chapter for “measures ... relating to the conservation of exhaustible natural resources if such measures are taken pursuant to international agreements or are made effective in conjunction with restrictions on domestic production and consumption” and a corresponding exception in the chapter on commodity agreements for “intergovernmental commodity agreements which appropriately relate to ... the conservation of reserves of exhaustible natural resources ... Provided that such agreements are not used to accomplish results inconsistent with the objectives of [the chapters on commodity agreements or restrictive business practices]”.⁹⁷ During the London session of the Preparatory Committee, the proposal was made to drop the proviso regarding restrictions on domestic consumption citing the case of a country with deposits of manganese, “which is very ample for our present and prospective domestic consumption but which is not very ample if we allow free exports of it”.⁹⁸ It was stated in response that “One of the ways in which export prohibitions could be used ... is for protective purposes. ... It is possible for a raw material producing country, which wishes to industrialize, to do so behind a protective arrangement which is extremely effective, and that is preventing anybody else getting the raw material to use in his already existing industries”.⁹⁹ The proposal was not accepted.¹⁰⁰

In the 1982 Panel Report on “United States - Prohibition of Imports of Tuna and Tuna Products from Canada” the Panel found that the import ban in question was inconsistent with Article XI:1 and not justified by Article XI:2(c), and examined the US argument that its measures were justified by Article XX(g).

“The Panel noted that the decision of the United States Government was based on Section 205 of the United States Fishery Conservation and Management Act of 1976. The Panel was informed that the purpose of the Fishery Conservation and Management Act of 1976 was to ensure that certain stocks of fish were properly conserved and managed, to support and encourage the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species, and to encourage the negotiation and implementation of such additional agreements as necessary. It furthermore noted that Section 205 of the Fishery Conservation and Management Act of 1976 contained provisions designed to discourage other countries from seeking to manage tuna unilaterally and from seizing United States fishing vessels which were fishing more than 12 miles off their coasts.

“The Panel also noted that the United States had applied limitations on the catch of some species of tuna (e.g. Pacific and Atlantic Yellowfin and Atlantic bluefin and bigeye), during the time the import prohibitions on tuna and tuna products from Canada had been in force. The Panel found, however, that even if an import restriction could, at least partly, have been necessary to the enforcement of measures taken to restrict the catches of certain tuna species, an import prohibition on all tuna and tuna products from Canada as applied by the United States from 31 August 1979 to 4 September 1980 would not sufficiently meet the requirements of Article XI:2, firstly because the measure applied to species for which the catch had not so far been restricted in the United States (such as albacore and skipjack) and secondly because it was maintained when restrictions on the catch were no longer maintained (e.g. Pacific yellowfin tuna in 1980). ...

⁹⁴L/6268, adopted on 22 March 1988, 35S/98, 113, para. 4.4.

⁹⁵DS29/R, dated 16 June 1994, paras. 5.13-5.20.

⁹⁶DS31/R, dated 11 October 1994, para. 5.57.

⁹⁷US Draft Charter, Articles 32 and 49; see London Report pp. 60, 63.

⁹⁸EPCT/C.II/QR/PV/1, p. 15 (proposal of Brazil).

⁹⁹EPCT/C.II/QR/PV/1, p. 20-21.

¹⁰⁰See discussion at EPCT/C.II/QR/PV/5, p. 77-82, report at EPCT/C.II/59, p. 5, para. 11.

“The Panel ... noted that both parties considered tuna stocks, including albacore tuna, to be an exhaustible natural resource in need of conservation management and that both parties were participating in international conventions aimed, *inter alia*, at a better conservation of such stocks. However, attention was drawn to the fact that Article XX(g) contained a qualification on measures relating to the conservation if they were to be justified under that Article, namely that such measures were made effective in conjunction with restrictions on domestic production or consumption.

“The Panel noted that the action taken by the United States applied to imports from Canada of all tuna and tuna products, and that the United States could at various times apply restrictions to species of tuna covered by the IATTC [Inter-American Tropical Tuna Commission] and the ICCAT [International Convention for the Conservation of Atlantic Tunas]. However, restrictions on domestic production (catch) had so far been applied only to Pacific yellowfin tuna, from July to December 1979 under the Tuna Convention Act (related to the IATTC) and to Atlantic yellowfin tuna, bluefin tuna and bigeye tuna under the Atlantic Tunas Convention Act (related to the ICCAT), and no restrictions had been applied to the catch or landings of any other species of tuna, such as for instance albacore.

“The Panel also noted that the United States representative had provided no evidence that domestic consumption of tuna and tuna products had been restricted in the United States.

“The Panel could therefore not accept it to be justified that the United States prohibition of imports of all tuna and tuna products from Canada as applied from 31 August 1979 to 4 September 1980, had been made effective in conjunction with restrictions on United States domestic production or consumption on all tuna and tuna products”.¹⁰¹

In the 1988 Panel Report on “Canada - Measures Affecting Exports of Unprocessed Herring and Salmon”,

“... The Panel noted that both parties agreed that Canada maintains a variety of measures for the conservation of salmon and herring stocks and imposes limitations on the harvesting of salmon and herring. The Panel agreed with the parties that ... the harvest limitations [are] ‘restrictions on domestic production’ within the meaning of Article XX(g)”.¹⁰²

A Secretariat Note of 1991 on “Trade and Environment” includes a list of quantitative restrictions for which Article XX(g) has been cited as a justification. The list was drawn from the Inventory of Quantitative Restrictions maintained by the Secretariat.¹⁰³

7. Paragraph (h): “undertaken in pursuance of obligations under [a] commodity agreement”

In order for a measure to be covered by Article XX(h) and the Interpretative Note *Ad* Article XX(h), the intergovernmental agreement in question must: (a) conform to criteria submitted to the CONTRACTING PARTIES and not disapproved by them; (b) be itself submitted and not disapproved; or (c) conform to the principles approved by the Economic and Social Council in its Resolution 30(IV) of 28 March 1947.

The US Draft Charter provided for a chapter on commodity policy, and therefore its article on elimination of quantitative restrictions provided for an exception for “export or import quotas imposed under inter-governmental commodity agreements concluded in accordance with the provisions of Chapter VI.” The London Report notes that “There was general agreement that ... import or export quotas imposed under inter-governmental commodity agreements concluded under the Charter might be used”¹⁰⁴ and accordingly the London and New York Draft Charters provided for such an exception in Article 25:2 (corresponding to GATT Article XI:2). The London Report also notes that it was agreed that an exception from the general rule of non-discrimination in quantitative restrictions was necessary where “Some element of discrimination in import and

¹⁰¹L/5198, adopted on 22 February 1982, 29S/91, 107-109, paras. 4.5-4.6, 4.9-4.12.

¹⁰²L/6268, adopted on 22 March 1988, 35S/98, 113, para. 4.4.

¹⁰³L/6896, p. 94. Concerning the Inventory of Quantitative Restrictions, see material at the end of the chapter on Article XI.

¹⁰⁴London Report, p. 12, para. III.C.1(i).

export restrictions may be needed in order to carry out inter-governmental commodity agreements under the commodity policy provisions of the Charter ...".¹⁰⁵

The Preparatory Committee at its London session adopted a resolution noting that governments were already taking action on the lines proposed in the Charter chapter on commodity agreements, and requesting the United Nations to appoint an Interim Co-ordinating Committee for International Commodity Arrangements.¹⁰⁶ In response, the Economic and Social Council of the United Nations on 28 March 1947 adopted ECOSOC Resolution 30(IV), as follows:

"The Economic and Social Council,

"Noting that inter-governmental consultations are going forward actively with respect to certain internationally traded commodities, and

"Considering the significant measure of agreement regarding commodity problems and the co-ordination of commodity consultations already reached both in the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, and in the Preparatory Commission on World Food Proposals of the Food and Agriculture Organisation of the United Nations:

"*Recommends* that, pending the establishment of the International Trade Organization, Members of the United Nations adopt as a general guide in inter-governmental consultation or action with respect to commodity problems the principles laid down in Chapter VII as a whole - i.e., the chapter on inter-governmental commodity arrangements of the draft Charter appended to the Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - although recognizing that discussion in future sessions of the Preparatory Committee of the United Nations Conference, as well as in the Conference itself, may result in modifications of the provisions relating to commodity arrangements, and

"*Requests* the Secretary-General to appoint an interim co-ordinating committee for international commodity arrangements to keep informed of and to facilitate by appropriate means such inter-governmental consultation or action with respect to commodity problems, the committee to consist of a chairman to represent the Preparatory Committee of the United Nations Conference on Trade and Employment, a person nominated by the Food and Agriculture Organization of the United Nations to be concerned in particular with agricultural primary commodities, and a person to be concerned in particular with non-agricultural primary commodities."¹⁰⁷

During discussions at the Geneva session of the Preparatory Committee, it was agreed that the exception for measures under commodity agreements should be applicable to all provisions of the commercial policy chapter of the Charter. Accordingly, the article on general exceptions to the commercial policy chapter was amended to insert an exception for measures undertaken in pursuance of obligations under intergovernmental commodity agreements concluded in accordance with the Charter chapter on such agreements.¹⁰⁸ The rationale behind this change was stated as follows:

"... the implication is that the only exceptions to Chapter V which would be necessitated by the provisions of any possible commodity arrangement would be the use of quotas. We venture to doubt that and think that it would be wrong for the Charter to express the thought that the only way of dealing with the commodity problem is by a quota scheme. ... There is also the point that one can easily think of exceptions which might be needed under other Articles. I might mention one, and that is Article 31

¹⁰⁵London Report, p. 14, para. III.C.3(d)(iv).

¹⁰⁶London Report Annexure 9, p. 48.

¹⁰⁷Text reprinted in *Review of International Commodity Arrangements*, ICCICA, Geneva, November 1947, p. 8-9. Subsequent ECOSOC Resolutions (110(VI), 296(XI), 373(XIII) and 462 (XV)) substituted first ICITO and later the CONTRACTING PARTIES to the General Agreement as the body to nominate the Chairman of ICCICA; the last of these provided for an additional member familiar with the problems of developing countries. See also G/17 and G/17/Add.1 on ICCICA activities 1947-1952.

¹⁰⁸See EPCT/W/137 (proposal by U.K.), EPCT/W/208 (proposal by U.S.), EPCT/103 p. 47, EPCT/W/223 p. 4-5, EPCT/B/PV/5 p. 44-46, EPCT/A/PV/25 p. 32-34, EPCT/A/SR/30 p. 2, EPCT/A/PV/30 p. 4-6.

[XVII] which is headed ‘Non-discriminatory administration of state-trading enterprises’. Clearly, if the State were a party to a commodity arrangement and it were also a trader in that commodity, it would be bound to give precedence in its state-trading operations to the provisions of the commodity arrangement into which it had entered, and not so much to the considerations to which its attention is directed by Paragraph 1 of Article 31.”¹⁰⁹

Thus, in the General Agreement as concluded 30 October 1947, paragraph (h) (Article XX:I(h)) provided an exception for measures “undertaken in pursuance of obligations under intergovernmental commodity agreements, conforming to the principles approved by the Economic and Social Council of the United Nations in its Resolution of March 28, 1947, establishing an Interim Co-ordinating Committee for International Commodity Arrangements”. The “principles” referred to in the ECOSOC Resolution are, as noted above, those of the Charter chapter on commodity agreements, which became in due course Chapter VI of the Havana Charter. Chapter VI of the Charter provided for intergovernmental commodity agreements with respect to “primary commodities”, defined as “any product of farm, forest or fishery or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade”.¹¹⁰ Chapter VI also provided certain general principles and procedural requirements for agreements concluded thereunder.

Article XXIX:1 of the General Agreement provides that the contracting parties “undertake to observe to the fullest extent of their executive authority the general principles of Chapters I to VI inclusive ... of the Havana Charter”. A proposal to give provisional effect to Chapter VI of the Havana Charter pending entry into force of the Charter was submitted to the Executive Committee of ICITO when it met at Annecy on 22 July 1949. A Working Party prepared a proposal which was not acted upon.¹¹¹

During the Review Session of 1954-55, paragraph (h) was examined in the Review Working Party on Organizational and Functional Arrangements in the context of the question of the GATT’s involvement in the area of commodity trade generally, and in the context of an ECOSOC Resolution of 5 August 1954 establishing the Advisory Commission on International Trade with some of the responsibilities formerly assigned to ICCICA.¹¹² Certain delegations sought insertion into the General Agreement of provisions on the lines of Chapter VI of the Charter.

In response, a separate Working Party on Commodity Problems was established and met during the Review Session to consider “specific proposals for principles and objectives to govern international action designed to overcome problems arising in the field of international trade in primary commodities and the form of an international agreement necessary to administer and apply those principles; ... the relationship between the parties to such an agreement with, on the one hand, the CONTRACTING PARTIES and, on the other hand, with any other international organizations exercising responsibilities in the field of international trade in primary commodities ...”.¹¹³ The Working Party drafted a Special Agreement on Commodity Arrangements containing “general principles governing provisions of all commodity arrangements” and setting out procedural and institutional provisions for dealing with commodity agreements. The draft Agreement contemplated the negotiation of agreements among governments, the implementing measures for which would possibly conflict with GATT obligations unless provision were made. It was envisaged that the GATT and the proposed Special Agreement would be linked by an amendment to Article XX:I(h).¹¹⁴ Discussions concerning this draft during the Review Session did not result in consensus, and the Working Party was held over to the Tenth Session.¹¹⁵

¹⁰⁹EPCT/B/PV/5, p. 44-45. See also EPCT/A/PV/19 p. 13.

¹¹⁰This same definition was used for the (linked) Charter obligations with regard to export subsidies on primary commodities, and is utilized in the definition of “primary products” in paragraph 2 of the note *ad* Section B of Article XVI of the General Agreement (also referred to in the interpretative note to Article XXXVI:4). See the material in this Index on Article XVI and its drafting history.

¹¹¹GATT/CP.3/72; see also ICITO/19, ICITO/20, ICITO/21, ICITO/22.

¹¹²L/189/Add.2.

¹¹³L/301; see 3S/238.

¹¹⁴See L/320, Interim Report of the Working Party, February 1955, including the annexed draft Special Agreement on Commodity Arrangements.

¹¹⁵See discussion at SR.9/18, 19, 23, 27, 34, 38.

Meanwhile, in the context of the Review it had been agreed to amend Article XX. The Report of the Review Working Party on “Organizational and Functional Arrangements” notes as follows:

“The Working Party felt that, in view of the steps being taken to develop new principles relating to the conclusion of commodity agreements, Article XX:I(h) required amendment. Accordingly, the Working Party recommends the substitution for the existing sub-paragraph of the Article of a new text. The Working Party considered that Article XX:I(h) does not itself establish principles for the conclusion of commodity agreements, but stipulates conditions under which measures taken pursuant to commodity agreements may be excepted from the provisions of the General Agreement ...

“In order that the exception provided for in the present Article XX:I(h) might continue to apply to commodity agreements concluded or which may be concluded, in accordance with the principles approved by the Economic and Social Council in its Resolution of 28 March 1947, the Working Party recommends that an Interpretative Note be added to the amended Article.”¹¹⁶

The interpretative note to Article XX(h) states: “The exception provided by this sub-paragraph extends to any commodity agreement which conforms to the principles approved by the Economic and Social Council in its Resolution 30(IV) of 28 March 1947.”

At the Tenth Session in the fall of 1955, discussions on commodity issues continued. The Working Party on Commodity Problems submitted a final report which included the draft Special Agreement “with the recommendation of the Working Party that subject as far as possible to resolution of outstanding differences, it be accepted by them as embodying the criteria to which intergovernmental commodity arrangements should conform in order to benefit from the exception provided in the first part of paragraph (h) of Article XX of the General Agreement as revised at the Ninth Session. The Working Party assumes, that, if the CONTRACTING PARTIES find this Agreement satisfactory for that purpose, they will record their intention of recognizing formally when the revised GATT comes into effect that the Agreement has been considered under Article XX(h) and not disapproved.”¹¹⁷ However, due to differences of view concerning various issues, the Working Party report and its draft Agreement were not adopted, and the issue was deferred to the Eleventh Session.¹¹⁸ At the Eleventh Session in the fall of 1956, it was recognized that it was unlikely that agreement could be reached on the lines of the draft Special Agreement. Instead, an alternative approach was adopted, embodied in the Resolution of the CONTRACTING PARTIES on “Particular Difficulties connected with Trade in Primary Commodities”¹¹⁹ which focused on general multilateral review, problem-specific consultations and the possible convening of an intergovernmental meeting on a case-by-case basis. The Working Party Report on “Particular Difficulties connected with Trade in Primary Commodities” notes that

“The Working Party gave consideration to the question whether the Resolution should include a statement of objectives to be sought and principles to be applied in inter-governmental commodity arrangements. The view was widely held in the Working Party that such objectives and principles would need to take into account the circumstances of the particular commodity agreement under negotiation and should, therefore, be left to each negotiating conference subject, so far as the contracting parties are concerned, to any review by the CONTRACTING PARTIES in accordance with the relevant provisions of the General Agreement”.¹²⁰

¹¹⁶L/327, adopted on 28 February, 5 and 7 March 1955, 3S/231, 239, paras. 20, 22.

¹¹⁷L/416, Final Report of the Working Party, October 1955, p. 2, para. 5. See also Tenth Session discussions, SR.10/13, 14, 19.

¹¹⁸See Chairman’s statement on points of difference, SR.10/14 p. 158; decision to defer at SR.10/19, p. 219-220.

¹¹⁹5S/26; see L/592/Rev.1, Report of the Working Party on “Particular Difficulties Connected with Trade in Primary Commodities, adopted on 17 November 1956, 5S/87, para. 1. See Eleventh Session discussions at SR.11/2 and adoption of the Resolution at SR.11/18, as well as later reports on commodity problems at L/1103, adopted on 20 November 1959, 8S/76; and L/1656, adopted on 4 December 1961, 10S/83.

¹²⁰L/592/Rev.1, adopted on 17 November 1956, 5S/87, 89, para. 7.

See also the material on consultations on commodity issues under Articles XVIII:5, XXII:2 and XXV:1. See also the unadopted Panel Report of 1994 on “EEC - Import Régime for Bananas”.¹²¹

In response to arguments that commodity matters lay outside the competence of GATT, the CONTRACTING PARTIES ruled at the Tenth Session in 1955 that they were competent, pursuant to Article XXV:1, to deal with commodity problems.¹²² This view was confirmed in subsequent reports on commodity trade problems.

Article XXXVIII:2(a), which was added to the General Agreement by the 1965 Part IV Protocol, provides that the CONTRACTING PARTIES “shall ... where appropriate, take action, including action through international arrangements, to provide improved and acceptable conditions of access to world markets for primary products of particular interest to less-developed contracting parties and to devise measures designed to stabilize and improve conditions of world markets in these products including measures designed to attain stable, equitable and remunerative prices for exports of such products”. See also the corresponding provisions in Article XXXVI:4.

A Memorandum of Agreement on Basic Elements for the Negotiation of a World Grains Arrangement is attached to the Geneva (1967) Protocol to the General Agreement on Tariffs and Trade.¹²³ The International Grains Arrangement, consisting of a Wheat Trade Convention and a Food Aid Convention, was negotiated under the auspices of the International Wheat Council in cooperation between the FAO and UNCTAD in 1967, and has expired. The Arrangement Regarding Bovine Meat¹²⁴ and the International Dairy Arrangement¹²⁵ were negotiated during the Tokyo Round of multilateral trade negotiations.

A Secretariat Note of 1991 on “Trade and Environment” includes a list of quantitative restrictions for which Article XX(h) has been cited as a justification. The list was drawn from the Inventory of Quantitative Restrictions maintained by the Secretariat.¹²⁶

No contracting party has ever submitted a complaint under Articles XXII or XXIII that a measure taken in pursuance of a commodity agreement was inconsistent with the General Agreement, and no commodity agreement has ever been formally submitted to the CONTRACTING PARTIES under Article XX(h).

8. Paragraph (i)

This paragraph was proposed by New Zealand at the Geneva session of the Preparatory Committee in 1947. New Zealand explained it as follows:

“The purpose of this amendment is to provide for the case of countries like New Zealand which maintain as a matter of permanent policy price stabilization schemes covering, generally, the whole range of their economy. Any country which, like New Zealand, stabilizes its general price levels is faced with the problem that the world price for certain commodities, particularly raw materials which it exports, will be substantially higher than the stabilized domestic price for the like commodity.

“The best way of explaining that is, I think, to give a practical example. In New Zealand the price of leather to domestic users such as, for instance, the footwear industry is sold at a price very much below the world level. Now, in the circumstances it becomes necessary to ensure, by means of export controls, that the local requirements of leather are satisfied - otherwise, if that is not done, there would be no leather for the local market or, alternatively, it would be necessary to let the local price of leather rise to the world level. We do not assume that it would be contemplated that the effect of the Charter would be to compel the abandonment of the price stabilization schemes, and therefore we have brought

¹²¹DS38/R, dated 11 February 1994, para. 166.

¹²²SR.10/19, p. 218.

¹²³15S/18.

¹²⁴26S/84.

¹²⁵26S/91.

¹²⁶L/6896, p. 95. Concerning the Inventory of Quantitative Restrictions, see under Article XI in this Index.

forward this amendment. It is true that it has been suggested that the same result can be achieved by the method of export taxes, but we, and I think other countries who have tried that method, have found it unsatisfactory and, indeed, impracticable, because the world price of primary commodities is subject to such wide variations that the rate of tax has to be varied too frequently".¹²⁷

During the discussion of this proposal, it was "pointed out that the provision only applied in cases where a general scheme of internal price stabilization was in operation, and it could not be used to afford protection to national industry by a country which had no such plan".¹²⁸ The various concerns expressed at the danger of abuse in the utilization of this exception clause led to the addition of the proviso contained in the second part of paragraph (i).

The 1950 Report of the Working Party on "The Use of Quantitative Restrictions for Protective and Other Commercial Purposes"¹²⁹ examined, *inter alia*, the use of export restrictions on raw materials to promote a domestic fabricating industry.

"... The Working Party took note of the fact that since the exemption provided for in [Article XX(i)] referred to export restrictions associated with a governmental stabilization plan, and not to the plan itself, the various provisos listed in [Article XX(i)] were meant to apply only to the export restrictions and not to other aspects of such a plan.

"The Working Party concluded that the Agreement does not permit the imposition of restrictions upon the export of a raw material in order to protect or promote a domestic industry, whether by affording a price advantage to that industry for the purchase of its materials, or by reducing the supply of such materials available to foreign competitors, or by other means. However, it was agreed that the question of the objective of any given export restriction would have to be determined on the basis of the facts in each individual case.

"There was some discussion of certain cases in which, on the one hand, a country would be maintaining export restrictions on a raw material which had the effect of assisting a domestic industry processing that material, and on the other hand would be maintaining a prohibition or a severe restriction on imports of the finished product. There was general agreement that in such a case a contracting party, in considering whether the export restrictions were justified by [Article XX(i)], would have to give close examination to the question whether these export restrictions in fact operated to increase the protection afforded to the domestic industry".¹³⁰

9. Paragraph (j)

(1) "local short supply"

The report on discussions in the London session of the Preparatory Committee notes that "The Preparatory Committee agreed that during a post-war transitional period it should be permissible to use [quantitative] restrictions to achieve the equitable distribution of products in short supply, the orderly maintenance of war-time price control by countries undergoing shortages as a result of the war, and the orderly liquidation of temporary surpluses of government-owned stocks and of industries, which were set up owing to the exigencies of war, but which it would be uneconomic to maintain in normal times. ... all these exceptions would be limited to a specified post-war transitional period, which might, however, be subject to some extension in particular cases".¹³¹ These three situations were provided for in Article 25:2 of the London and New York Drafts of the Charter (corresponding to GATT Article XI:2).

¹²⁷EPCT/A/PV.36, p. 22.

¹²⁸EPCT/A/SR.40(2), p. 13.

¹²⁹GATT/CP.4/33 (Sales No. GATT/1950-3).

¹³⁰*Ibid.*, paras. 11-13.

¹³¹London Report, p. 11, para. III.C.1(b).

During the Geneva session of the Preparatory Committee, it was decided to move these three postwar temporary exceptions to Article 43 (general exceptions to the commercial policy chapter) as a new second part of Article 43. Measures of these three types were to be removed in principle not later than 1 January 1951; it was stated that “The effect of this would be to permit during the transitional period the use of differential internal taxes and mixing regulations as well as quantitative restrictions in order to distribute goods in short supply, to give effect to price controls based on shortages and to liquidate surplus stocks or uneconomic industries carried over from the war period”.¹³² Accordingly, Article XX in the 30 October 1947 text of the General Agreement included a Part II consisting of three paragraphs corresponding to the three situations noted above. Paragraph XX:II(a) provided for measures

“essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with any multilateral arrangements directed to an equitable international distribution of such products or, in the absence of such arrangements, with the principle that all contracting parties are entitled to an equitable share of the international supply of such products”.

It was stated during the course of the discussion at Geneva in 1947 that the phrase “general or local short supply” was “understood to include cases where a product, although in international short supply, was not necessarily in short supply in all markets throughout the world. It was not used in the sense that every country importing a commodity was in short supply otherwise it would not be importing it”.¹³³

Part II of Article XX further provided that “Measures instituted or maintained under part II of this Article which are inconsistent with the other provisions of this Agreement shall be removed as soon as the conditions giving rise to them have ceased, and in any event not later than January 1, 1951; *Provided* that this period may, with the concurrence of the CONTRACTING PARTIES, be extended in respect of the application of any particular measure to any particular product by any particular contracting party for such further periods as the CONTRACTING PARTIES may specify”.

At the Fifth Session in 1950, it was decided to prolong the validity of all three paragraphs of Article XX:II until 1 January 1952, by a decision under Article XXV:5 waiving until that date the obligation of contracting parties instituting or maintaining measures under part II of Article XX to discontinue them or seek permission for their continuance.¹³⁴ Further such decisions extended this waiver until 1 January 1954¹³⁵ and 1 July 1955¹³⁶. In the Review Session of 1954-55, it was agreed that the substance of paragraph (a) of Section II should be retained for the time being, subject to review not later than 30 June 1960, but that the remainder of paragraph XX:II should be deleted.¹³⁷ A Resolution on “Liquidation of Strategic Stocks” was also adopted.¹³⁸ The Report of the Review Working Party on “Other Barriers to Trade” notes in this connection:

“In connexion with the proposed suppression of Section II of Article XX, one member of the Working Party made the point that the need for the exception in Section II(b) was not limited to shortages subsequent to the war, but might be needed in the event of a natural catastrophe. The Working Party considered, however, that other provisions of the Agreement were adequate to cover the application of restrictions when required by any natural catastrophe, and therefore did not consider it necessary to retain or amend the exception in Section II(b)”.¹³⁹

Section II(a) then became paragraph (j) of Article XX. This change was effected through the Protocol Amending the Preamble and Parts II and III of the General Agreement and entered into effect on 7 October 1957.

¹³²Passage cited from EPCT/A/PV/30 p. 22; report at EPCT/W/245; discussion at EPCT/A/SR/30 p. 3-5, EPCT/A/PV/30 p. 21-27, EPCT/A/SR/33 p. 1-2, EPCT/A/PV/33 p. 2-7.

¹³³EPCT/A/SR.40(2), p. 15.

¹³⁴Decision of 30 November 1950 on Extension of Time-Limit in Article XX Part II, GATT/CP/94; see Report on “Amendment to the Last Paragraph of Part II of Article XX”, GATT/CP.5/32, II/46, 48, paragraph 7.

¹³⁵II/28.

¹³⁶2S/27.

¹³⁷L/334, and Addendum, adopted on 3 March 1955, 3S/222, 230, para. 41.

¹³⁸Resolution of 4 March 1955, 3S/51. See also references to this Resolution under Articles X, XVII and XXII in this Index.

¹³⁹L/334, and Addendum, adopted on 3 March 1955, 3S/222, 230-231, para. 42.

In 1949, Czechoslovakia complained that export restrictions applied by the United States discriminated against Czechoslovakia because the export licensing system favoured countries in the European Recovery Program (the OEEC area). The United States stated that these measures were consistent with Article XXI, and also stated that they were consistent with the short-supply exception in Article XX which required “that any controls exercised to promote the distribution of commodities in short supply shall be consistent with any multilateral arrangements directed to an equitable international distribution of such products”.¹⁴⁰

The 1950 Report of the Working Party on “The Use of Quantitative Restrictions for Protective and Other Commercial Purposes”¹⁴¹ also examined the use of export restrictions for short-supply items under then-Article XX:II(a).

“... The Working Party discussed the proviso ... requiring the observation of the principle of equitable shares for all contracting parties in the distribution of the international supply of a product in local or general short supply, and noted that the word ‘equitable’ is used in Article XX:II(a) and not the word ‘non-discriminatory’ which is used in Article XIII.

“In respect of this type of restriction, general agreement existed on the following statements:

“(a) Apart from situations to which the provisions of Article XX:II(a) are applicable, the practice referred to is inconsistent with the provisions of the Agreement.

“(b) Although the requirement of Article XX:II(a) relates to the total international supply and not the supply of an individual contracting party, nevertheless if a contracting party divert an excessive share of its own supply to individual countries (which may or may not be contracting parties) this may well defeat the principle that all contracting parties are entitled to an equitable share of the international supply of such a product.

“(c) What would not be regarded as an equitable share if it were the result of a unilateral allotment by a contracting party could not appropriately be defended as equitable within the meaning of Article XX:II(a) simply because it had been the consequence of an agreement between two contracting parties.

“(d) The determination of what is ‘equitable’ to all the contracting parties in any given set of circumstances will depend upon the facts in those circumstances.”¹⁴²

(2) “The CONTRACTING PARTIES shall review the need for this sub-paragraph”

When the need for paragraph (j) was reviewed at the Sixteenth Session in 1960, the CONTRACTING PARTIES noted “that the contracting parties have resorted to the provisions of this sub-paragraph in a relatively limited number of cases and that it is generally recognized that it would be appropriate to retain such provisions to enable contracting parties to meet emergency situations which may arise in the future”. It was decided to retain the paragraph and to review the matter again in 1965.¹⁴³ At the Twenty-second Session in 1965, the CONTRACTING PARTIES decided that paragraph (j) “should be retained for the time being” and to review the need for it again in 1970.¹⁴⁴ At the Twenty-sixth Session in 1970, the CONTRACTING PARTIES adopted a recommendation of the Council that paragraph (j) be retained with no provision for further review.¹⁴⁵

¹⁴⁰CP.3/38.

¹⁴¹GATT/CP.4/33 (Sales No. GATT/1950-3).

¹⁴²*Ibid.*, paras. 8-9.

¹⁴³9S/17.

¹⁴⁴Decision of 15 March 1965, 13S/18.

¹⁴⁵Decision of 20 February 1970, L/3361, 17S/18; see L/3350.

10. Trade and environment

See the discussion at the Council meetings of 6 February, 12 March and 8 October 1991, and in the minutes and working papers of the Group on Environmental Measures and International Trade and the Subcommittee on Trade and Environment of the Preparatory Committee for the WTO.¹⁴⁶

B. RELATIONSHIP BETWEEN ARTICLE XX AND OTHER ARTICLES OF THE GENERAL AGREEMENT

1. Article III

The 1983 Panel Report on “United States - Imports of Certain Automotive Spring Assemblies” examined the consistency of Section 337 of the Tariff Act of 1930 and its application to the imports of certain spring assemblies from Canada with Articles III and XX(d). The Panel found Article XX(d) to apply and “considered that an examination of the United States action in the light of the other GATT provisions referred to ... was not required”.¹⁴⁷ This Panel Report was adopted subject to an understanding that its adoption “shall not foreclose future examination of the use of Section 337 to deal with patent infringement cases from the point of view of consistency with Articles III and XX of the General Agreement”.¹⁴⁸

The 1989 Panel on “United States - Section 337 of the Tariff Act of 1930” found, concerning the relation between Article III and Article XX(d):

“The Panel noted that Article XX is entitled ‘General Exceptions’ and that the central phrase in the introductory clause reads: ‘nothing in this Agreement shall be construed to prevent the adoption or enforcement ... of measures ...’. Article XX(d) thus provides for a limited and conditional exception from obligations under other provisions. The Panel therefore concluded that Article XX(d) applies only to measures inconsistent with another provision of the General Agreement, and that, consequently, the application of Section 337 has to be examined first in the light of Article III:4. If any inconsistencies with Article III:4 were found, the Panel would then examine whether they could be justified under Article XX(d)”.¹⁴⁹

The 1990 Panel on “Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes” referred to the use of non-discriminatory measures consistent with Article III in interpreting the scope of “necessary” measures under Article XX(b); see page 566 above.

2. Articles XXII and XXIII

In discussions of the article on exceptions to the commercial policy chapter of the Charter in the London Session of the Preparatory Committee, it was stated in relation to Article 30 of the draft Charter [XXII and XXIII] that “one of the main objectives of Article 30 was to prevent evasion of the provisions of Chapter IV. If a Member country used the exceptions of sub-paragraph (b) [XX(b)] as a means of protection, Article 30 provided that another Member might make representations to the ITO and so obtain satisfaction. It was almost impossible to draft exceptions which could not be abused, if good faith was lacking. The League of Nations had adopted an Article on the lines of Article 30, precisely because they had been unable to formulate exceptions which would exclude all possibility of abuse”.¹⁵⁰

¹⁴⁶C/M/247, C/M/248, C/M/250, SR.49/2; TRE/1-14, TRE/W/1-21, and documents in PC/SCTE series. See also Decision of the CONTRACTING PARTIES on follow-up to the recommendations in the area of trade of the United Nations Conference on Environment and Development, SR.48/1, p. 12-16, 39S/330; debate on environmental labelling at C/M/260, p. 40-56; Secretariat Note on the UN Conference on Environment and Development held in Rio de Janeiro, Brazil, from 3 to 14 June 1992, L/6892/Add.3, 39S/303, and earlier notes on the UNCED Preparatory Committee at L/6892 and Add.1-2; Minutes of Council meeting on UNCED followup, C/M/269; and Report of the EMIT group at L/7402. The Secretariat has also issued to the public summaries of meetings of the EMIT and SCTE groups, in the TE document series.

¹⁴⁷L/5333, adopted on 26 May 1983, 30S/107, 126, para. 61.

¹⁴⁸C/M/168.

¹⁴⁹L/6439, adopted on 7 November 1989, 36S/345, 385, para. 5.9.

¹⁵⁰EPCT/C.II/50, p. 6.

3. Article XXIV

In 1987, during the Working Party on the Accession of Portugal and Spain to the EEC, in response to a question regarding an EEC regulation permitting the use of the term “sherry” to describe certain liqueur wines of the United Kingdom, Ireland and Cyprus but not liqueur wines of South Africa, the EEC stated that the regulation in question “constitutes a measure designed to prevent deceptive practices. It is therefore justified under Article XX(d) of the General Agreement” and that the preferential treatment of certain products was “consistent with the GATT by virtue of Article XXIV, which permits customs unions to be formed in accordance with the needs of the integration process they plan to carry out”.¹⁵¹

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

Provisions corresponding to those in Article XX appear in the US Proposals in Chapter III-G; in the US Draft Charter in Article 32; in the London and New York Drafts, in Article 37; in the Geneva Draft in Article 43; and in the Havana Charter in Article 45. In each of these drafts these provisions were exceptions to the commercial policy provisions of the Charter. Separate policy-based exceptions were provided for the Charter chapters on commodity agreements and restrictive business practices.

The article on commercial policy exceptions originally included four national security provisions which were separated during the Geneva session of the preparatory committee and became exceptions to all obligations in the Charter; see Section III under Article XXI.

At Havana, an exception was added for measures “necessary to the enforcement of laws and regulations relating to public safety”, which term, in the view of the drafters, included the legal concept of “public order” (“ordre public”).¹⁵² In addition, an exception was added for measures “taken in pursuance of any intergovernmental agreement which relates solely to the conservation of fisheries resources, migratory birds or wild animals”, as a corollary to a similar provision added to Article 70, the exceptions provision in the chapter on commodity agreements.¹⁵³ The Working Party on “Modifications to the General Agreement”, which met during the Second Session in September 1948 and considered which of the changes made at Havana should be brought into the text of the General Agreement, did not decide to take either of these changes into the General Agreement.

See above at pages 589 and 593 concerning the amendments to sub-paragraph (h) and Section II of Article XX agreed during the Review Session of 1954-55. These changes were effected through the Protocol Amending the Preamble and Parts II and III, which entered into force on 7 October 1957.

¹⁵¹L/5984/Add.2, p. 2.

¹⁵²Havana Reports, p. 84, para. 18, referring to Charter Article 45:1(a)(ii); see also French text of same document (para. 18, p. 92).

¹⁵³Havana Reports, p. 84-85, para. 21, referring to paragraph 1(a)(x) of Article 45 of the Charter.

IV. RELEVANT DOCUMENTS*London*

Discussion: EPCT/C.II/12, 32, 35
 EPCT/C.II/QR/PV/1, 5
 Report: EPCT/C.II/54/Rev.1, 59

New York

Discussion: EPCT/C.6/41

Geneva

Discussion: EPCT/EC/SR.2/3, 5, 22
 EPCT/A/SR/19, 21, 25, 30, 32,
 33, 36, 40(1), 40(2)
 EPCT/A/PV/22+Corr.1-5,
 23+Corr.1-2, 26+Corr.1-3, 30
 EPCT/WP.1/SR/10,11
 EPCT/TAC/SR/11
 EPCT/TAC/PV/28
 Reports: EPCT/103+Corr.3, 135, 141,
 142, 154+Corr.1-3, 180, 186,
 189, 196, 212, 214/Add.1/Rev.1
 Other: EPCT/W/23, 24, 28+Corr.1, 44,
 45, 46, 62, 98, 137, 145,
 157/Rev.1, 194, 208, 212, 223,
 227, 252/Rev.1, 260+Corr.1,
 263, 264, 269, 272, 280, 281,
 284, 293, 301, 313

Havana

Discussion: E/CONF.2/C.3/SR.17, 32, 33, 35
 Report: E/CONF.2/C.3/37

Review Session

Discussion: SR.9/17, 27, 47
 Reports: W.9/105, 122, 123, 177, 213,
 231, 236/Add.1; L/334, L/327;
 3S/230, 239
 Other: L/189+Add.2, L/261/Add.1,
 L/264/Add.1, L/273, L/274,
 L/275, L/276
 W.9/20/Add.1, 50, 78

ARTICLE XXI

SECURITY EXCEPTIONS

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I. TEXT OF ARTICLE XXI

Article XXI

Security Exceptions

Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
 - (i) relating to fissionable materials or the materials from which they are derived;
 - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
 - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

II. INTERPRETATION AND APPLICATION OF ARTICLE XXI

A. SCOPE AND APPLICATION OF ARTICLE XXI

1. Paragraphs (a) and (b): “it considers ... essential security interests”

During discussions in the Geneva session of the Preparatory Committee, in response to an inquiry as to the meaning of “essential security interests”, it was stated by one of the drafters of the original Draft Charter that “We gave a good deal of thought to the question of the security exception which we thought should be included in the Charter. We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: ‘by any Member of measures relating to a Member’s security interests,’ because that would permit anything under the sun. Therefore we thought it well to draft provisions which would take care of real security interests and, at the same time, so far as we could, to limit the exception so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance. ... there must be some latitude here for security measures. It is really a question of balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose”. The Chairman of Commission A suggested in response that the spirit in which Members of the Organization would interpret these provisions was the only guarantee against abuses of this kind.¹

During the discussion of the complaint of Czechoslovakia at the Third Session in 1949 (see page 602) it was stated, *inter alia*, that “every country must be the judge in the last resort on questions relating to its own security. On the other hand, every contracting party should be cautious not to take any step which might have the effect of undermining the General Agreement”.²

In 1961, on the occasion of the accession of Portugal, Ghana stated that its boycott of Portuguese goods was justified under the provisions of Article XXI:(b)(iii), noting that

“... under this Article each contracting party was the sole judge of what was necessary in its essential security interest. There could therefore be no objection to Ghana regarding the boycott of goods as justified by security interests. It might be observed that a country’s security interests might be threatened by a potential as well as an actual danger. The Ghanaian Government’s view was that the situation in Angola was a constant threat to the peace of the African continent and that any action which, by bringing pressure to bear on the Portuguese Government, might lead to a lessening of this danger, was therefore justified in the essential security interests of Ghana”.³

During the Council discussion in 1982 of trade restrictions applied for non-economic reasons by the EEC, its member States, Canada and Australia against imports from Argentina (see page 603), the representative of the EEC stated that “the EEC and its member States had taken certain measures on the basis of their inherent rights, of which Article XXI of the General Agreement was a reflection. The exercise of these rights constituted a general exception, and required neither notification, justification nor approval, a procedure confirmed by thirty-five years of implementation of the General Agreement. He said that in effect, this procedure showed that every contracting party was - in the last resort - the judge of its exercise of these rights”. The representative of Canada stated that “Canada’s sovereign action was to be seen as a political response to a political issue ... Canada was convinced that the situation which had necessitated the measures had to be satisfactorily resolved by appropriate action elsewhere, as the GATT had neither the competence nor the responsibility to deal with the political issue which had been raised. His delegation could not, therefore, accept the notion that there had been a violation of the General Agreement”.⁴ The representative of Australia “stated that the Australian measures were in conformity with the provisions of Article XXI:(c), which did not require notification or justification”.⁵ The representative of the United States stated that “The General Agreement left to each contracting party the judgment as to what it

¹EPCT/A/PV/33, p. 20-21 and Corr.3; see also EPCT/A/SR/33, p. 3.

²GATT/CP.3/SR.22, Corr. 1.

³SR.19/12, p. 196.

⁴C/M/157, p. 10.

⁵C/M/157, p. 11.

considered to be necessary to protect its security interests. The CONTRACTING PARTIES had no power to question that judgement".⁶

The representative of Argentina noted that it had attempted to submit to GATT only the trade aspects of this case and stated "that in order to justify restrictive measures a contracting party invoking Article XXI would specifically be required to state reasons of national security ... there were no trade restrictions which could be applied without being notified, discussed and justified".⁷

Paragraph 7(iii) of the Ministerial Declaration adopted 29 November 1982 at the Thirty-eighth Session of the CONTRACTING PARTIES provides that "... the contracting parties undertake, individually and jointly: ... to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement".⁸

The question of whether and to what extent the CONTRACTING PARTIES can review the national security reasons for measures taken under Article XXI was discussed again in the GATT Council in May and July 1985 in relation to the US trade embargo against Nicaragua which had taken effect on 7 May 1985.⁹ While a panel was established to examine the US measures, its terms of reference stated that "the Panel cannot examine or judge the validity or motivation for the invocation of Article XXI(b)(iii) by the United States".¹⁰ In the Panel Report on "United States - Trade Measures affecting Nicaragua", which has not been adopted,

"... The Panel noted that, while both parties to the dispute agreed that the United States, by imposing the embargo, had acted contrary to certain trade-facilitating provisions of the General Agreement, they disagreed on the question of whether the non-observance of these provisions was justified by Article XXI(b)(iii) ...

"The Panel further noted that, in the view of Nicaragua, this provision should be interpreted in the light of the basic principles of international law and in harmony with the decisions of the United Nations and of the International Court of Justice and should therefore be regarded as merely providing contracting parties subjected to an aggression with the right of self-defence. The Panel also noted that, in the view of the United States, Article XXI applied to any action which the contracting party taking it considered necessary for the protection of its essential security interests and that the Panel, both by the terms of Article XXI and by its mandate, was precluded from examining the validity of the United States' invocation of Article XXI.

"The Panel did not consider the question of whether the terms of Article XXI precluded it from examining the validity of the United States' invocation of that Article as this examination was precluded by its mandate. It recalled that its terms of reference put strict limits on its activities because they stipulated that the Panel could not examine or judge the validity of or the motivation for the invocation of Article XXI(b)(iii) by the United States ... The Panel concluded that, as it was not authorized to examine the justification for the United States' invocation of a general exception to the obligations under the General Agreement, it could find the United States neither to be complying with its obligations under the General Agreement nor to be failing to carry out its obligations under that Agreement".¹¹

2. Paragraph (a): "furnish ... any information"

During the discussion at the Third Session of a Czechoslovak complaint concerning United States national security export controls, in response to a request by Czechoslovakia for information under Article XIII:3 on the export licensing system concerned, the US representative stated that while it would comply with a substantial part of the request, "Article XXI ... provides that a contracting party shall not be required to give information which it considers contrary to its essential security interests. The United States does consider it contrary to its security

⁶C/M/159, p. 19; see also C/M/157, p. 8.

⁷C/M/157, p. 12; C/M/159, pp. 14-15.

⁸L/5424, adopted on 29 November 1982, 29S/9, 11.

⁹C/M/188, pp. 2-16; C/M/191, pp. 41-46.

¹⁰C/M/196 at p. 7.

¹¹L/6053, dated 13 October 1986 (unadopted), paras. 5.1-5.3.

interest - and to the security interest of other friendly countries - to reveal the names of the commodities that it considers to be most strategic".¹²

The "Decision Concerning Article XXI of the General Agreement" of 30 November 1982 (see page 605 below) provides *inter alia* that "Subject to the exception in Article XXI:a, contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI".¹³

3. Paragraph (b): "action"

(1) *"relating to fissionable materials or the materials from which they are derived"*

The records of the Geneva discussions of the Preparatory Committee indicate that the representative of Australia withdrew its reservation on the inclusion of a reference to "fissionable materials" in the light of a statement that the provisions of Article 35 [XXIII] would apply to Article XXI; see below at page 606.¹⁴

(2) *"relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment"*

During discussions in the Geneva session of the Preparatory Committee, in connection with a proposal to modify Article 37(g) [XX(g)] to permit export restrictions on raw materials for long-term defense purposes, the question was put whether the phrase "for the purpose of supplying a military establishment" would permit restrictions on the export of iron ore when it was believed that the ore would be used by ordinary smelting works and ultimately for military purposes by another country. It was stated in response that "if a Member exporting commodities is satisfied that the purpose of the transaction was to supply a military establishment, immediately or ultimately, this language would cover it".¹⁵

At the Third Session in 1949, Czechoslovakia requested a decision under Article XXIII as to whether the US had failed to carry out its obligations under Articles I and XIII, by reason of the 1948 US administration of its export licensing controls (both short-supply controls and new export controls instituted in 1948 discriminating between destination countries for security reasons). The US stated that its controls for security reasons applied to a narrow group of exports of goods which could be used for military purposes¹⁶ and also stated that "the provisions of Article I would not require uniformity of formalities, as applied to different countries, in respect of restrictions imposed for security reasons".¹⁷ It was also stated by one contracting party that "goods which were of a nature that could contribute to war potential" came within the exception of Article XXI.¹⁸ The complaint was rejected by a roll-call vote of 17 to 1 with 3 abstentions.¹⁹

(3) *"taken in time of war or other emergency in international relations"*

The 1970 Working Party Report on "Accession of the United Arab Republic" notes that in response to concerns raised regarding the Arab League boycott against Israel and the secondary boycott against firms having relations with Israel, the representative of the UAR stated that "the history of the Arab boycott was beyond doubt related to the extraordinary circumstances to which the Middle East area had been exposed. The state of war which had long prevailed in that area necessitated the resorting to this system. ... In view of the political character of this issue, the United Arab Republic did not wish to discuss it within GATT. ... It would not be reasonable to ask that the United Arab Republic should do business with a firm that transferred all or part of its profits from sales to the United Arab Republic to an enemy country".²⁰ Several members of the

¹²GATT/CP.3/38, p. 9.

¹³L/5426, 29S/23-24, para. 1.

¹⁴EPCT/A/PV/33, p. 29; see also EPCT/A/PV/33/Corr. 3.

¹⁵EPCT/A/PV/36, p. 19; see also proposal referred to at EPCT/W/264.

¹⁶GATT/CP.3/38; GATT/CP.3/SR.22, p. 8.

¹⁷GATT/CP.3/SR.22, p. 4-5.

¹⁸GATT/CP.3/SR.20, p. 3-4.

¹⁹GATT/CP.3/SR.22, p. 9; Decision of 8 June 1949 at II/28.

²⁰L/3362, adopted on 27 February 1970, 17S/33, 39, para. 22.

working party supported the views of the representative of the UAR that the background of the boycott measures was political and not commercial.²¹

In November 1975 Sweden introduced a global import quota system for certain footwear. The Swedish Government considered that the measure was taken in conformity with the spirit of Article XXI and stated, *inter alia*, that the “decrease in domestic production has become a critical threat to the emergency planning of Sweden’s economic defence as an integral part of the country’s security policy. This policy necessitates the maintenance of a minimum domestic production capacity in vital industries. Such a capacity is indispensable in order to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations”.²² In the discussion of this measure in the GATT Council, “Many representatives ... expressed doubts as to the justification of these measures under the General Agreement ... Many delegations reserved their rights under the GATT and took note of Sweden’s offer to consult”.²³ Sweden notified the termination of the quotas as far as leather and plastic shoes were concerned as of 1 July 1977.²⁴

In April 1982, the EEC and its member states, Canada, and Australia suspended indefinitely imports into their territories of products of Argentina. In notifying these measures they stated that “they have taken certain measures in the light of the situation addressed in the Security Council Resolution 502 [the Falkland/Malvinas issue]; they have taken these measures on the basis of their inherent rights of which Article XXI of the General Agreement is a reflection”.²⁵ Argentina took the position that, in addition to infringing the principles and objectives underlying the GATT, these measures were in violation of Articles I:1, II, XI:1, XIII, and Part IV. The legal aspects of these trade restrictions affecting Argentina were discussed extensively in the Council.²⁶ The measures were removed in June 1982. Argentina sought an interpretation of Article XXI; these efforts led to the inclusion of paragraph 7(iii) in the Ministerial Declaration of November 1982, which provides that “... the contracting parties undertake, individually and jointly: ... to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement”²⁷ and also led to the adoption of the text below at page 605.

On 7 May 1985 the US notified the contracting parties of an Executive Order prohibiting all imports of goods and services of Nicaraguan origin, all exports from the US of goods to or destined for Nicaragua (except those destined for the organized democratic resistance) and transactions relating thereto.²⁸ In Council discussions of this matter, Nicaragua stated that these measures contravened Articles I, II, V, XI, XIII and Part IV of the GATT, and that “this was not a matter of national security but one of coercion”.²⁹ Nicaragua further stated that Article XXI could not be applied in an arbitrary fashion; there had to be some correspondence between the measures adopted and the situation giving rise to such adoption.³⁰ Nicaragua stated that the text of Article XXI made it clear that the CONTRACTING PARTIES were competent to judge whether a situation of “war or other emergency in international relations” existed and requested that a Panel be set up under Article XXIII:2 to examine the issue.³¹ The United States stated that its actions had been taken for national security reasons and were covered by Article XXI(b)(iii) of the GATT; and that this provision left it to each contracting party to judge what action it considered necessary for the protection of its essential security interest.³² The terms of reference of the Panel precluded it from examining or judging the validity of the invocation of Article XXI(b)(iii) by the US. Concerning the Panel decision on this issue, see page 601 and the discussion of Article XXIII below. When the Council discussed the Panel Report, Nicaragua requested that the Council recommend removal of the embargo; authorize special support measures for Nicaragua so that countries wanting to do so could grant trade preferences aimed at re-establishing a balance in Nicaragua’s pre-embargo global trade relations and at compensating Nicaragua for the damage caused by the embargo; and

²¹*Ibid.*, 17S/40, para. 23.

²²L/4250, p. 3.

²³C/M/109, p. 8-9.

²⁴L/4250/Add.1; L/4254, p. 17-18.

²⁵L/5319/Rev.1.

²⁶L/5317, L/5336; C/M/157, C/M/159.

²⁷L/5424, adopted on 29 November 1982, 29S/9, 11.

²⁸L/5803.

²⁹C/M/188, p. 4.

³⁰C/M/188, p. 16.

³¹L/5802; C/M/191, pp. 41-46.

³²C/M/191, pp. 41, 46.

prepare an interpretative note on Article XXI. Consensus was not reached on any of these alternatives. The Panel Report has not been adopted. At the meeting of the Council on 3 April 1990 Nicaragua announced the lifting of the trade embargo. The representative of the US announced that the conditions which had necessitated action under Article XXI had ceased to exist, his country's national security emergency with respect to Nicaragua had been terminated, and all economic sanctions, including the trade embargo, had been lifted.³³

In November 1991, the European Community notified the contracting parties that the EC and its member States had decided to adopt trade measures against Yugoslavia "on the grounds that the situation prevailing in Yugoslavia no longer permits the preferential treatment of this country to be upheld. Therefore, as from 11 November, imports from Yugoslavia into the Community are applied m.f.n. treatment ... These measures are taken by the European Community upon consideration of its essential security interests and based on GATT Article XXI."³⁴ The measures comprised suspension of trade concessions granted to the Socialist Federal Republic of Yugoslavia under its bilateral trade agreement with the EC; application of certain limitations (previously suspended) to textile imports from Yugoslavia; withdrawal of GSP benefits; suspension of similar concessions and GSP benefits for ECSC products; and action to denounce or suspend the application of the bilateral trade agreements between the EC and its member states and Yugoslavia. On 2 December the Community and its member states decided to apply selective measures in favour of "those parties which contribute to progress toward peace". Economic sanctions or withdrawal of preferential benefits from the Yugoslavia were also taken by Australia, Austria, Canada, Finland, Japan, New Zealand, Norway, Sweden, Switzerland, and the United States.

At the Forty-seventh Session in December 1991, Yugoslavia referred to the Decision of 1982 on notification of measures taken under Article XXI (see page 605 below) and reserved its GATT rights. In February 1992 Yugoslavia requested establishment of a panel under Article XXIII:2, stating that the measures taken by the EC were inconsistent with Articles I, XXI and the Enabling Clause; departed from the letter and intention of paragraph 7(iii) of the Ministerial Decision of November 1982; and impeded the attainment of the objectives of the General Agreement. Yugoslavia further stated:

"The situation in Yugoslavia is a specific one and does not correspond to the notion and meaning of Article XXI(b) and (c). There is no decision or resolution of the relevant UN body to impose economic sanctions against Yugoslavia based on the reasoning embodied in the UN Charter....the 'positive compensatory measures' applied by the European Community to certain parts of Yugoslavia [are] contrary to the MFN treatment of 'products originating in or destined for the territories' - taken as a whole - 'of all contracting parties'".³⁵

In March 1992, the Council agreed to establish a panel with the standard terms of reference unless, as provided in the Decision of 12 April 1989, the parties agreed otherwise within twenty days.³⁶ At the April 1992 Council meeting, in discussion of the notification of the transformation of the Socialist Federal Republic of Yugoslavia (SFRY) into the Federal Republic of Yugoslavia (FRY) consisting of the Republics of Serbia and Montenegro, the EC representative said that until the question of succession to Yugoslavia's contracting party status had been resolved, the Panel process which had been initiated between the former SFRY and the EC no longer had any foundation and could not proceed.³⁷ At the May 1992 Council meeting, in a discussion concerning the status of the FRY as a successor to the former SFRY as a contracting party, the Chairman stated that "In these circumstances, without prejudice to the question of who should succeed the former SFRY in the GATT, and until the Council returned to this issue, he proposed that the representative of the FRY should refrain from participating in the business of the Council". The Council so agreed.³⁸ At the June 1993 Council meeting this decision was modified taking into account United Nations General Assembly Resolution

³³C/M/240, p. 31; L/6661.

³⁴L/6948.

³⁵DS27/2, dated 10 February 1992.

³⁶C/M/255, p. 18.

³⁷C/M/256, p. 32.

³⁸C/M/257 p. 3 and Corr.1.

47/1 to provide that the FRY could not continue automatically the contracting party status of the former SFRY and that it shall not participate in the work of the Council and its subsidiary bodies.³⁹

4. Paragraph (c): “any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security”

India’s 1994 background document for simplified balance-of-payments consultations notes that while almost all of India’s trading partners received most-favoured-nation treatment in the issue of import licences, import licences were not issued for imports from countries facing UN mandated sanctions, at present Iraq, Fiji, Serbia and Montenegro”.⁴⁰ Brazil’s 1994 notification on import licensing notes that the import licensing system of Brazil applies for goods entering from or exported to any country except for those covered by UN embargoes.⁴¹ The import licensing notification of Cyprus similarly notes that imports from certain countries are prohibited in accordance with United Nations resolutions.⁴² The 1993 licensing notification of Norway notes that all imports from Iraq and Serbia/Montenegro are prohibited.⁴³

5. Other invocations of Article XXI

The United States embargo on trade with Cuba, which was imposed by means of Proclamation 3447 by the President of the United States, dated 3 February 1962, was not formally raised in the CONTRACTING PARTIES but notified by Cuba in the inventory of non-tariff measures. The United States invoked Article XXI as justification for its action.⁴⁴

6. Procedures concerning notification of measures under Article XXI

During the Council discussion in 1982 of trade measures for non-economic reasons taken against Argentina (see page 603), it was stated by the countries taking these measures that “Article XXI did not mention notification” and that many contracting parties had, in the past, invoked Article XXI without there having been any notification or challenge to the situation in GATT.⁴⁵ Argentina sought an interpretation of Article XXI. Informal consultations took place during the Thirty-eighth Session in November 1982 in connection with the adoption of the Council report to the CONTRACTING PARTIES, in so far as it related to these trade restrictions.⁴⁶ As a result, on 30 November 1982 the CONTRACTING PARTIES adopted the following “Decision Concerning Article XXI of the General Agreement”:

“*Considering* that the exceptions envisaged in Article XXI of the General Agreement constitute an important element for safeguarding the rights of contracting parties when they consider that reasons of security are involved;

“*Noting* that recourse to Article XXI could constitute, in certain circumstances, an element of disruption and uncertainty for international trade and affect benefits accruing to contracting parties under the General Agreement;

“*Recognizing* that in taking action in terms of the exceptions provided in Article XXI of the General Agreement, contracting parties should take into consideration the interests of third parties which may be affected;

³⁹C/M/264, p. 3.

⁴⁰L/5640/Add.7/Rev.6, 18 August 1994; see also BOP/321 of 24 October 1994.

⁴¹L/5640/Add.54.

⁴²L/5640, 24 January 1994.

⁴³L/5640/Add.2/Rev.4, 13 October 1993.

⁴⁴COM.IND/6/Add.4, p. 53 (notification); MTN/3B/4, p. 559 (response citing binding resolution under Inter-American Treaty of Reciprocal Assistance). See also Council discussion May 1986 concerning US measures authorizing denial of sugar import quota to any failing to certify that it does not import sugar produced in Cuba for re-export to the US, stated by US to be a “procedural safeguard” against trans-shipment of sugar in violation of the embargo; C/M/198 p. 33, L/5980. See also statement by Cuba in L/7525.

⁴⁵C/M/159, p. 18.

⁴⁶See L/5414 (Council report); see also C/W/402, W.38/5, L/5426.

“That until such time as the CONTRACTING PARTIES may decide to make a formal interpretation of Article XXI it is appropriate to set procedural guidelines for its application;

The CONTRACTING PARTIES *decide* that:

“1. Subject to the exception in Article XXI:*a*, contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI.

“2. When action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement.

“3. The Council may be requested to give further consideration to this matter in due course”.⁴⁷

See the references to this Decision above in the case of EC measures on trade with Yugoslavia.

B. RELATIONSHIP BETWEEN ARTICLE XXI AND OTHER ARTICLES OF THE GENERAL AGREEMENT

1. Articles I and XIII

During the discussion at the Third Session of the complaint of Czechoslovakia that US export controls were administered inconsistently with Articles I and XIII (see page 602), the US representative stated that these restrictions were justified under Article XXI(b)(ii). In calling for a decision, the Chairman indicated that Article XXI “embodied exceptions to the general rule contained in Article I”. In a Decision of 8 June 1949 under Article XXIII:2, the CONTRACTING PARTIES rejected the contention of the Czechoslovak delegation.⁴⁸

2. Article XXIII

During discussions in Geneva in 1947 in connection with the removal of the provisions now contained in Article XXI and their relocation in a separate exception (Article 94) at the end of the Charter, the question was raised whether the dispute settlement provisions of Article 35 of the New York Draft [XXII/XXIII] would nevertheless apply. It was stated that “It is true that an action taken by a Member under Article 94 could not be challenged in the sense that it could not be claimed that a Member was violating the Charter; but if that action, even though not in conflict with the terms of Article 94, should affect another Member, I should think that that Member would have the right to seek redress of some kind under Article 35 as it now stands. In other words, there is no exception from the application of Article 35 to this or any other Article”.⁴⁹ The addition of a note to clarify that the provisions of paragraph 2 of Article 35 [XXIII] applied to Article 94 was rejected as unnecessary.⁵⁰

See the discussion above of the Czechoslovak complaint concerning export controls, in which the CONTRACTING PARTIES made a decision under Article XXIII:2 as to “whether the Government of the United States had failed to carry out its obligations under the Agreement through its administration of the issue of export licences”.⁵¹

During the discussion of the trade restrictions affecting Argentina applied for non-economic reasons, the view was expressed “that the provisions of Article XXI were subject to those of Article XXIII:2”. Argentina reserved its rights under Article XXIII in respect of any injury resulting from trade restrictions applied in the context of Article XXI.⁵²

⁴⁷L/5426, 29S/23.

⁴⁸GATT/CP.3/SR.22, p. 9; II/28.

⁴⁹EPCT/A/PV/33, p. 26-27.

⁵⁰EPCT/A/PV/33 p. 27-29 and EPCT/A/PV/33/Corr.3.

⁵¹GATT/CP.3/SR.22, p. 9.

⁵²C/M/157, p. 9; C/M/159, p. 14; C/M/165, p. 18.

Paragraph 2 of the “Decision Concerning Article XXI of the General Agreement” of 30 November 1982 stipulates that “... when action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement”.⁵³

The 1984 Panel Report on “United States - Imports of Sugar from Nicaragua” examined the action taken by the US government to reduce the share of the US sugar import quota allocated to Nicaragua and distribute the reduction in Nicaragua’s allocation to El Salvador, Honduras and Costa Rica. The Panel Report notes that “The United States stated that it was neither invoking any exceptions under the provisions of the General Agreement nor intending to defend its actions in GATT terms ... the action of the United States did of course affect trade, but was not taken for trade policy reasons”.⁵⁴

“The Panel noted that the measures taken by the United States concerning sugar imports from Nicaragua were but one aspect of a more general problem. The Panel, in accordance with its terms of reference ... examined those measures solely in the light of the relevant GATT provisions, concerning itself only with the trade issue under dispute.”⁵⁵

“... The Panel ... concluded that the sugar quota allocated to Nicaragua for the fiscal year 1983/84 was inconsistent with the United States’ obligations under Article XIII:2.

“The Panel noted that the United States had not invoked any of the exceptions provided for in the General Agreement permitting discriminatory quantitative restrictions contrary to Article XIII. The Panel therefore did not examine whether the reduction in Nicaragua’s quota could be justified under any such provision.”⁵⁶

The follow-up on the Panel report was discussed in the Council meetings of May and July 1984. The United States said that it “had not obstructed Nicaragua’s resort to GATT’s dispute settlement process; it had stated explicitly the conditions under which the issue might be resolved; and it recognized that Nicaragua had certain rights under Article XXIII which it had reserved and could continue to exercise”.⁵⁷ Nicaragua stated that it was aware of its rights under Article XXIII.

In July 1985, following a request by Nicaragua for the establishment of a panel to review certain US trade measures affecting Nicaragua, the right of a contracting party to invoke Article XXIII in cases involving Article XXI was discussed again in the GATT Council.⁵⁸ At its meetings in October 1985 and March 1986 respectively the Council established a panel with the following terms of reference to deal with the complaint by Nicaragua:

“To examine, in the light of the relevant GATT provisions, of the understanding reached at the Council on 10 October 1985 that the Panel cannot examine or judge the validity of or motivation for the invocation of Article XXI(b)(iii) by the United States, of the relevant provisions of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (BISD 26S/211-218), and of the agreed Dispute Settlement Procedures contained in the 1982 Ministerial Declaration (BISD 29S/13-16), the measures taken by the United States on 7 May 1985 and their trade effects in order to establish to what extent benefits accruing to Nicaragua under the General Agreement have been nullified or impaired, and to make such findings as will assist the CONTRACTING PARTIES in further action in this matter”.⁵⁹

In the Panel Report on “United States - Trade Measures affecting Nicaragua”, which has not been adopted, the Panel noted the different views of the parties regarding whether the United States’ invocation of Article XXI(b)(iii) was proper, and concluded that this issue was not within its terms of reference; see above at page 601. With regard to Nicaragua’s claim of non-violation nullification or impairment, the Panel “decided not

⁵³29S/24.

⁵⁴L/5607, adopted on 13 March 1984, 31S/67, 72, para. 3.10.

⁵⁵*Ibid.*, 31S/73, para. 4.1.

⁵⁶*Ibid.*, 31S/74, paras. 4.3-4.4.

⁵⁷C/M/178, p. 27.

⁵⁸C/M/191, pp.41-46.

⁵⁹C/M/196, p. 7.

to propose a ruling in this case on the basic question of whether actions under Article XXI could nullify or impair GATT benefits of the adversely affected contracting party”.⁶⁰

When the Panel’s report was discussed by the Council in November 1986, the US representative stated that “Nullification or impairment when no GATT violation had been found was a delicate issue, linked to the concept of ‘reasonable expectations’. It was not simply a question of trade damage, since no one doubted the existence of trade damage. Applying the concept of ‘reasonable expectations’ to a case of trade sanctions motivated by national security considerations would be particularly perilous, since at a broader level those security considerations would nevertheless enter into expectations ... the Panel had acted wisely in refraining from a decision that could create a precedent of much wider ramifications for the scope of GATT rights and obligations ...”.⁶¹ The representative of Nicaragua stated that her delegation could not support adoption of the report, *inter alia* because it could only be adopted once the Council was in a position to make recommendations.⁶²

C. RELATIONSHIP BETWEEN ARTICLE XXI AND GENERAL INTERNATIONAL LAW

The 1986 Panel Report on “United States - Trade Measures Affecting Nicaragua”, which has not been adopted, notes the different views of the parties to the dispute concerning the relationship between Article XXI and general international law including decisions of the United Nations and the International Court of Justice.⁶³

In discussion at the Forty-seventh Session in December 1991 concerning trade measures for non-economic purposes against Yugoslavia, the representative of India stated that “India did not favour the use of trade measures for non-economic reasons. Such measures should only be taken within the framework of a decision by the United Nations Security Council. In the absence of such a decision or resolution, there was a serious risk that such measures might be unilateral or arbitrary and would undermine the multilateral trading system”.⁶⁴

III. PREPARATORY WORK

In the US Draft Charter, and London and New York Draft Charter texts, the Article on exceptions to the commercial policy chapter included the provisions of what is now GATT Article XXI (see Article 32, US draft; Article 37, London and New York drafts). Also in these drafts, the exceptions clause for the chapter on commodity agreements included provisions excepting arrangements relating to fissionable materials; to the traffic in arms, ammunition and implements of war and traffic in goods and materials for the purpose of supplying a military establishment; or in time of war or other emergency in international relations, to the protection of the essential security interests of a member (Article 49:2, US Draft; Article 59(2), London Draft; Article 59(c), New York Draft). At Geneva it was decided to take paragraphs (c), (d), (e) and (k) of Article 37 and place them in a separate Article.⁶⁵ It was agreed that this Article would be a general exception applicable to the entire Charter.⁶⁶ The corresponding security exception was also removed from the commodity chapter. The security exception provisions became Article 94 in Chapter VII of the Geneva draft Charter, which was virtually identical to the present text of Article XXI.

The text of Article 94 was extensively discussed at Havana in the Sixth Committee on Organization. Article 94 became Article 99 of the Charter on General Exceptions, of which paragraphs 1(a) and (b) were almost identical to those of Article XXI, the only differences being (i) an addition in the first line of paragraph (b) as follows: “to prevent any Member from taking, *either singly or with other States*, any action ...”, and (ii) an addition to paragraph (b)(ii) as follows: “a military establishment *of any other country*”. Article 99 also included a paragraph 1(c) exempting intergovernmental military supply agreements⁶⁷; a paragraph 1(d) on

⁶⁰L/6053 (unadopted), dated 13 October 1986, paras. 5.4-5.11.

⁶¹C/M/204, p. 9.

⁶²C/M/204, p. 17. See also communication from Nicaragua at C/W/506.

⁶³L/6053, unadopted, dated 13 October 1986, para. 5.2.

⁶⁴SR.47/3, p. 5.

⁶⁵See proposal at EPCT/W/23, reports on discussions in Commission A (commercial policy) at EPCT/WP.1/SR/11, EPCT/103 p. 43, EPCT/A/PV/25 p. 38-42.

⁶⁶EPCT/A/PV/25 p.39-42.

⁶⁷See Havana Reports, p. 118, para. 32 and p. 145-147.

trade relations between India and Pakistan (dealt with in the General Agreement by the provisions of Article XXIV:11); and a paragraph 2 providing that nothing in the Charter would override the provisions of peace treaties resulting from the Second World War or UN instruments creating trust territories or other special regimes.

However, “on examining several of the proposals submitted by delegations relating to action taken in connection with political matters or with the essential interests of Members, the Committee concluded that the provisions regarding such action should be made in connection with an article on ‘Relations with the United Nations’, since the question of the proper allocation of responsibility as between the Organization and the United Nations was involved”.⁶⁸ Accordingly a new Article 86 of the Charter on “Relations with the United Nations” was drafted, including the former paragraph 1(c) of Article 94 [XXI:(c)].

Article 86 of the Charter dealt with various institutional questions such as the conclusion of a specialized agency agreement between the ITO and the UN. It also stated, in paragraphs 3 and 4, that:

“3. The Members recognize that the Organization should not attempt to take action which would involve passing judgement in any way on essentially political matters. Accordingly, and in order to avoid conflict of responsibility between the United Nations and the Organization with respect to such matters, any measure taken by a Member directly in connection with a political matter brought before the United Nations in accordance with the provisions of Chapters IV or VI of the United Nations Charter shall be deemed to fall within the scope of the United Nations, and shall not be subject to the provisions of this Charter.

“4. No action, taken by a Member in pursuance of its obligations under the United Nations Charter for the maintenance or restoration of international peace and security, shall be deemed to conflict with the provisions of this Charter”.

The interpretative notes to paragraph 3 provided that:

“1. If any Member raises the question whether a measure is in fact taken directly in connection with a political matter brought before the United Nations in accordance with the provisions of Chapters IV or VI of the United Nations Charter, the responsibility for making a determination on the question shall rest with the Organization. If, however, political issues beyond the competence of the Organization are involved in making such a determination, the question shall be deemed to fall within the scope of the United Nations.

“2. If a Member which has no direct political concern in a matter brought before the United Nations considers that a measure taken directly in connection therewith and falling within the scope of paragraph 3 of Article 86 constitutes a nullification or impairment within the terms of paragraph 1 of Article 93, it shall seek redress only by recourse to the procedures set forth in Chapter VIII of this Charter”.

The purpose of these provisions was explained by the Sixth Committee as follows:

“Paragraph 3 of Article [86], which like paragraph 4 is independent in its operation, is designed to deal with any measure which is directly in connection with a political matter brought before the United Nations in a manner which will avoid conflict of responsibility between the United Nations and the Organization with respect to political matters. The Committee agreed that this provision would cover measures maintained by a Member even though another Member had brought the particular matter before the United Nations, so long as the measure was taken directly in connection with the matter. It was also agreed that such a measure, as well as the political matter with which it was directly connected, should remain within the jurisdiction of the United Nations and not within that of the Organization. The Committee was of the opinion that the important thing was to maintain the jurisdiction of the United Nations over political matters and over economic measures of this sort taken directly in connection with such a political matter, and nothing in Article [86] could be held to prejudice the freedom of action of the United Nations to settle such matters and to take steps to deal with such economic measures in accordance with the provisions of the Charter of the United Nations if they see fit to do so.

⁶⁸Havana Reports, p. 153, para. (a).

“It was the view of the Committee that the word ‘measure’ in paragraph 3 of Article [86] refers only to a measure which is taken directly in connection with a political matter brought before the United Nations in accordance with Chapters IV and VI of the Charter of the United Nations and does not refer to any other measure”.⁶⁹

The Charter provisions in Articles 86 and 99 were not taken into the General Agreement. While Article XXIX:1 provides that “The contracting parties undertake to observe ... the general principles of Chapters I to VI inclusive and of Chapter IX of the Havana Charter”, the Note *Ad* Article XXIX:1 provides that “Chapters VII and VIII ... have been excluded from paragraph 1 because they generally deal with the organization, functions and procedures of the International Trade Organization”. In this connection, during the discussion at the Sixth Session of the CONTRACTING PARTIES of the US suspension of trade relations with Czechoslovakia it was stated with reference to Article 86, paragraph 3 of the Havana Charter that “although Chapter VII of the Charter was not specifically included by reference in Article XXIX of the Agreement, it had surely been the general intention that the principles of the Charter should be guiding ones for the CONTRACTING PARTIES”.⁷⁰

The present text of Article XXI dates from the 30 October 1948 Geneva Final Act. It has never been amended. Amendment of Article XXI was neither proposed nor discussed in the 1954-55 Review Session.

IV. RELEVANT DOCUMENTS

Geneva

Discussion: EPCT/WP.1/SR/11
 EPCT/A/SR/25, 30, 33, 40(2)
 EPCT/A/PV/25, 30, 33, 40(2)
 Reports: EPCT/103
 Other: EPCT/W/23

See also London, New York and Geneva document references concerning Article XX.

Havana

Discussion: E/CONF.2/C.5/SR.14
 E/CONF.2/C.6/SR.18, 19, 37 and
 Add.1
 Reports: E/CONF.2/C.5/14
 E/CONF.2/C.6/45, 93, 104
 Other: E/CONF.2/C.6/12/Add.9
 E/CONF.2/C.6/W/48

⁶⁹Havana Reports, p. 153-154, paras. (b)-(c).

⁷⁰GATT/CP.6/SR.12, p. 4.

ARTICLE XXII

CONSULTATION

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I. TEXT OF ARTICLE XXII

Article XXII

Consultation

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.

2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

II. INTERPRETATION AND APPLICATION OF ARTICLE XXII**A. SCOPE AND APPLICATION OF ARTICLE XXII****1. General*****(1) Procedural provisions regarding consultations under Article XXII******(a) 1958 "Procedures under Article XXII on Questions Affecting the Interests of a Number of Contracting Parties"***

At the Thirteenth Session, by a Decision of 10 November 1958, the CONTRACTING PARTIES adopted the following "Procedures under Article XXII on Questions Affecting the Interests of a Number of Contracting Parties":¹

"1. Any contracting party seeking a consultation under Article XXII shall, at the same time, so inform the Executive Secretary for the information of all contracting parties.

"2. Any other contracting party asserting a substantial trade interest in the matter shall, within forty-five days of the notification by the Executive Secretary of the request for consultation, advise the consulting countries and the Executive Secretary of its desire to be joined in the consultation.

"3. Such contracting party shall be joined in the consultation provided that the contracting party or parties to which the request for consultation is addressed agree that the claim of substantial interest is well founded; in that event they shall so inform the contracting parties concerned and the Executive Secretary.

"4. If the claim to be joined in the consultation is not accepted, the applicant contracting party shall be free to refer its claim to the CONTRACTING PARTIES.

"5. At the close of the consultation, the consulting countries shall advise the Executive Secretary for the information of all contracting parties of the outcome.

"6. The Executive Secretary shall provide such assistance in these consultations as the parties may request".

These procedures originated in discussions in the Intersessional Committee in April and May 1958 concerning the provisions of the Treaty of Rome on the Association of the Overseas Territories to the European Common Market. In these discussions, "Some members ... proposed ... that some procedures be set up which provided for multilateral consultations between the Six and producing countries which considered that their trade would be affected with a view to discussing the value and extent of any measures that could be taken to alleviate any resulting damage to their trade; each commodity could be dealt with separately and some co-ordinating machinery should be established to supervise the discussions. Most members ... considered that traditional GATT principles and methods of procedure, in particular the provisions for consultations under Article XXII, were flexible enough to deal effectively with the problem".² In response, the representative of the Community stated, *inter alia*:

"... Article XXII of the General Agreement provides a bilateral procedure as a first stage and a multilateral procedure as a second stage. Full use has not yet been made of these procedures. In certain cases where injury had been caused, Article XXII has been resorted to in order to remedy such injury, but there is nothing in the wording of this Article which prevents us from invoking and applying it where serious injury is threatened. Why not then turn to Article XXII in order to find a solution to these consultation problems which are before us?"³

¹7S/24.
²IC/SR.38, p. 19.
³*Ibid.*, p. 29.

The Report of the Intersessional Committee in 1958 on “The Treaty Establishing the European Economic Community” records the following:

“At the Twelfth Session the CONTRACTING PARTIES instructed the Intersessional Committee to continue the examination, in the light of the provisions of the General Agreement, of the relevant provisions of the Treaty of Rome, the problems likely to arise in its practical application, and the means that might be developed to establish effective and continuing co-operation between the CONTRACTING PARTIES and the European Economic Community (EEC).

...

“In the light of ... statements and reports [on the Treaty] the Committee felt that it would be more fruitful if attention could be directed to specific and practical problems, leaving aside for the time being questions of law ... The Committee noted that the normal procedure of the General Agreement and the techniques and traditions of the CONTRACTING PARTIES in applying them, were well adapted to the handling of such problems and suggested that in the first instance the procedures of Article XXII would be the most appropriate for this purpose.

“Accordingly, the Committee agreed upon procedures for dealing with specific and practical problems by means of consultations between members of the Community and other contracting parties. These procedures were later approved by the Council and the Commission of the EEC”.⁴

These procedures for consultations under Article XXII were thus initially agreed in April and May 1958.⁵ After the first requests for consultations under these procedures had been received, further discussions took place in the Intersessional Committee. “It was suggested that the procedures could be improved if a time-limit were fixed for requests to be joined in a consultation, and it was understood that approval for a request to be joined in a consultation was required only from the contracting party to whom the request was addressed. ... The question was raised in the Committee as to whether the procedures were intended to permit only contracting parties with an exporting or a producing interest to participate in the consultations, or whether contracting parties with an importing interest might also be joined. The Committee did not enter into a discussion of principle on this point, it being understood that ... if a case arose in any particular consultation where a claim of substantial interest was disputed the matter could be referred to the CONTRACTING PARTIES.”⁶

A revised text of the Procedures was then adopted at the Thirteenth Session, as indicated above. In his summing-up of the discussion on this item at the Session, the Chairman indicated that “The principal purpose of these procedures was to provide the framework within which a consultation initiated by a contracting party could be broadened, so as to include other contracting parties having a ‘substantial trade interest’ in the matter under discussion and which wished to be joined in the consultation. ... It was intended that such multilateral consultations on questions affecting the interests of a number of contracting parties would facilitate the observance of the basic principles and objectives of the General Agreement. Thus, the procedures proposed by the Committee were not intended to relate only to consultations between contracting parties and Members of the European Economic Community, but for any consultations under Article XXII on matters affecting the interests of more than one contracting party”.⁷

In a few instances Article XXII consultations have been held at the suggestion of the Chairman of the CONTRACTING PARTIES; see the table at the end of this chapter.⁸

⁴TS/69-70, paras. 1, 3-4; see also L/822 and Add.1 (EEC approval of the Article XXII procedures), and L/886 (original of document reproduced in part at TS/69-70).

⁵See procedures as initially agreed, IC.SR/38 p. 21-22, L/886.

⁶L/886, p. 2-3, 4, referring to discussion recorded in IC/SR.41 p. 7-10 and IC/SR.42 p. 4.

⁷SR.13/15, p. 128.

⁸See, e.g. consultations listed on German import restrictions (1958), Turkish request for renegotiations under Article XXVIII (1965).

(b) 1979 “*Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*”

The “Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance”, adopted 28 November 1979, provides with regard to consultations:

“Contracting parties reaffirm their resolve to strengthen and improve the effectiveness of consultative procedures employed by contracting parties. In that connexion, they undertake to respond to requests for consultations promptly and to attempt to conclude consultations expeditiously, with a view to reaching mutually satisfactory conclusions. Any requests for consultations should include the reasons therefor.

“During consultations, contracting parties should give special attention to the particular problems and interests of less-developed contracting parties”.⁹

(c) 1989 *Decision on “Improvements to the GATT Dispute Settlement Rules and Procedures”*

The Decision on “Improvements to the GATT Dispute Settlement Rules and Procedures”, adopted in April 1989, provides with regard to Article XXII consultations:

“If a request is made under Article XXII:1 or XXIII:1, the contracting party to which the request is made shall, unless otherwise mutually agreed, reply to the request within ten days after its receipt and shall enter into consultations in good faith within a period of no more than thirty days from the date of the request, with a view to reaching a mutually satisfactory solution. If the contracting party does not respond within ten days, or does not enter into consultations within a period of no more than thirty days, or a period otherwise mutually agreed, from the date of the request, then the contracting party that requested the holding of consultations may proceed directly to request the establishment of a panel or a working party.”

“In cases of urgency, including those which concern perishable goods en route, parties shall enter into consultations within a period of no more than ten days from the date of the request. If the consultations have failed to settle the dispute within a period of thirty days after the request, the complaining party may request the establishment of a panel or a working party”.¹⁰

This Decision provides generally that “Contracting parties agree that the existing rules and procedures of the GATT in the field of dispute settlement shall continue. It is further agreed that the improvements set out below, which aim to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, shall be applied on a trial basis from 1 May 1989 to the end of the Uruguay Round in respect of complaints brought during that period under Article XXII and XXIII ...”.¹¹ On 22 February 1994 the CONTRACTING PARTIES decided to keep the 1989 Decision in effect until the entry into force of the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”), contained in Annex 2 of the WTO Agreement.¹² On 1 January 1995 the WTO Agreement entered into force and with it the DSU. The 1989 Decision accordingly lapsed. See the provisions in the DSU on consultations.

(d) *Consultations on residual import restrictions*

In 1960 the CONTRACTING PARTIES approved “Procedures for dealing with new import restrictions applied for balance-of-payments reasons and residual import restrictions”. The procedures for residual import restrictions provide for notification of such import restrictions. Paragraph 8 of the Decision provides that bilateral consultations under Article XXII:1 may be sought by the contracting party applying the restrictions or by contracting parties affected by them, and that the Secretariat should be informed of requests “so that in cases where the restrictions in question affect the interests of a number of contracting parties, the procedures adopted

⁹L/4907, 26S/210, 211, paras. 4-5.

¹⁰L/6489, Decision of 12 April 1989, 36S/61, 62, paras. C.1, C.4.

¹¹*Ibid.*, 36S/61-62, para. A.3.

¹²L/7416, Decision adopted on 22 February 1994.

by the CONTRACTING PARTIES on 10 November 1958 should apply”.¹³ A number of instances of such consultations appear in the table at the end of this chapter.

(2) Scope of consultations under Article XXII

During the discussion at the Thirteenth Session of the Procedures above, the representative of France, speaking for the EEC, stated that

“The Six had agreed to submit to the normal consultation procedures as provided in Article XXII and had already initiated consultations. This procedure left aside the theoretical issues and envisaged, within the framework of Article XXII, a number of concrete cases. Under the consultation procedure an opportunity was afforded to examine step-by-step, as and when measures were taken by the Community, the extent to which these measures might create damage for other contracting parties, either actual or in the near future and predictable in a precise way. The Six were prepared to consult on problems arising from the implementation of the Treaty but not on the Community’s supposed or real intentions”.¹⁴

In summing up the discussion,

“The Chairman ... referred to the point made by many delegations that the implementation of the consultation procedures under Article XXII should not necessarily be postponed until there had been actual damage, or even until action which might result in damage had been taken. The representative of France, as spokesman of the six Member States, had pointed out that consultations should not be initiated on purely hypothetical grounds and that whatever procedures were adopted they should be generally applicable to all contracting parties and not specifically confined to the six Member States. In this connexion, the Chairman referred to the provisions of both Article XXII and the procedures the CONTRACTING PARTIES had just adopted for the implementation thereof. No reference was made in either case to ‘damage’ as such, and the text of Article XXII merely provided that sympathetic consideration and adequate opportunity for consultations be accorded to such ‘representations’ as might be made by any contracting party with respect to any matter affecting the operation of the General Agreement. The concept of a ‘representation’ did neither prejudice the basis for a consultation nor convey the implication that any damage must necessarily be established. The representative of France, as spokesman for the six Member States, had rightly observed that, for consultations under the procedure just approved to be fruitful, problems of a practical and concrete nature and not just vague apprehensions should be discussed. This did not preclude any contracting party wishing to put forward views on the effects on its trade of any possible action, making representations in order that the six Member States in formulating their commercial policy could have due regard to what might be the subject of future consultations. The view had been expressed that contracting parties should be kept informed of developments in the commercial policy of the Community as it was formulated. This desire seemed legitimate if effective use were to be made of the procedures for the implementation of the provisions of Article XXII”.¹⁵

At a later meeting in the Thirteenth Session, in connection with the adoption of conclusions on the Treaty of Rome, the representative of Cuba asked for a clarification of the following question: “... Article XXII established the obligation to give sympathetic consideration to any representations. This commitment had been undertaken by all contracting parties without reservation. Contracting parties had a right to ask and the corresponding obligation to accept consultations on trade matters even without the need for the CONTRACTING PARTIES to take a special decision to that effect. Was this interpretation mistaken and were the Six entitled to make their acceptance of consultations conditional upon the existence of concrete damage?”¹⁶ The Chairman’s summing up noted in response:

“Many delegations had addressed themselves to the status of damage as an element featuring in the consultations. In this connexion the Chairman referred to the broad lines of his summing up on this point at the previous debate (SR.13/15) to which [the representative of the Six] had expressed his concurrence. The

¹³9S/18, 19, para. 8.

¹⁴SR.13/15, p. 140.

¹⁵SR.13/15, p. 142.

¹⁶SR.13/19, p. 190.

reason why there had been no attempt to spell out the broad interpretation with any more precision was that no matter what wording was used in such an interpretation it would present exactly the same problems that had been encountered in the past.

“Turning to the request of the representative of Cuba for an authoritative interpretation of Article XXII the Chairman pointed out that this Article was one to which the authors of the General Agreement did not deem it necessary to add an interpretative note. The Chairman submitted that the reason for this was that in the wording ‘sympathetic consideration’ in that Article the element of ‘sympathy’ could not be subjected to legal definition; the whole concept of representations pursuant to Article XXII:1 was not a legalistic one but one which had to be charged with an element of ‘sympathy’. ... No Article of the General Agreement, however, and much less one which enjoined ‘sympathetic consideration’ and prescribed consultations, could ensure that the participating parties would reach agreement on a particular difficulty. ...”¹⁷

In discussions at the Fourteenth Session reviewing the consultations that had taken place, the EEC representative stated that “the Six could hardly recognize in advance consequences which would be contrary to their own belief that the Rome Treaty would bring about a general expansion of trade with third countries, unless evidence of concrete damage could be furnished ... The Community holds the view that the consultations which have already been initiated have made it possible to appraise more accurately and more fully the problems which have been raised. The Community, for its part, would be prepared to resume consultations on those products which have already been considered and, still with the desire to reach better mutual consultations, to accept the opening of consultations on additional products”.¹⁸

By a communication dated 3 February 1993 to the representatives of Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela, the representative of the Commission of the EC declined a request from these contracting parties to hold formal consultations under Article XXII:1 on the future EC import regime for bananas, stating that “the meeting of the Council of the European Communities on 17 December 1992 did not in fact result in a formal decision on this regime; the result of the debate was limited to a political orientation about some of the features of the future common market organization for bananas which still need to be formalized in the internal decision-making process of the Community institutions. The present preparatory works cannot therefore be considered as a measure under Articles XXII:1 or XXIII:1 of the General Agreement allowing for formal consultations under one of these provisions.”¹⁹ See also the discussions in the GATT Council during 1992-93 on Article XXII:1 and the proposed EC import regime for bananas.²⁰

2. Paragraph 1

A table of consultations under Article XXII:1 subsequent to adoption of the 1958 Procedures appears at the end of this chapter.

(1) Notifications regarding consultations under Article XXII:1

The 1958 Procedures provide in paragraph 1 that “Any contracting party seeking a consultation under Article XXII shall, at the same time, so inform the Executive Secretary for the information of all contracting parties”. See also the reference to notification in the 1960 Procedures referred to directly above.

The 1989 Decision on “Improvements to the GATT Dispute Settlement Rules and Procedures” provides:

“Requests for consultations under Article XXII:1 or XXIII:1 shall be notified to the Council by the party which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request.”

¹⁷SR.13/19, p. 201.

¹⁸L/1006; see also SR.14/10 p. 129-134.

¹⁹DS38/4.

²⁰C/M/257, C/M/258, C/M/259.

“Mutually agreed solutions to matters formally raised under GATT Articles XXII and XXIII ... must be notified to the Council where any contracting party may raise any point relating thereto”.²¹

Since entry into effect of the 1989 Decision, requests for consultations have been circulated by the Secretariat in the DS/ document series; since entry into force of the WTO Agreement (and thereby the DSU), such requests have been circulated to Members and observers in the WTO, in the WT/DS series.

(2) *Relationship between consultations under Article XXII:1 and consultations under Article XXII:2 or dispute settlement proceedings under Article XXIII:2*

The 1960 Procedures for consultation on residual import restrictions provide in paragraph 9 that “If consultations held under paragraph 1 of Article XXII do not lead to a satisfactory solution, any of the parties to the consultations may request that consultations be carried out by the CONTRACTING PARTIES pursuant to paragraph 2 of Article XXII. Alternatively, a country whose interests are affected may resort to paragraph 2 of Article XXIII, it being understood that a consultation held under paragraph 1 of Article XXII would be considered by the CONTRACTING PARTIES as fulfilling the conditions of paragraph 1 of Article XXIII”.²²

However, the practice of proceeding from consultations under Article XXII:1 to the establishment of a panel under Article XXIII:2 predated the 1960 Decision. For instance, the Panel on “French Assistance to Exports of Wheat and Wheat Flour” was established by the Intersessional Committee at its April-May 1958 meeting after consultations under Article XXII:1 between the two parties to the dispute, Australia and France.²³

The 1989 Decision on “Improvements to the GATT Dispute Settlement Rules and Procedures” provides with regard to Article XXII consultations:

“If the consultations under Article XXII:1 or XXIII:1 fail to settle a dispute within sixty days after the request for consultations, the complaining party may request the establishment of a panel or a working party under Article XXIII:2. The complaining party may request a panel or a working party during the sixty-day period if the parties jointly consider that consultations have failed to settle the dispute”.²⁴

In Council discussion of the recourse to Article XXIII:2 by the EEC concerning “Japan Customs duties, taxes and labelling practices on imported wines and alcoholic beverages”²⁵ the representative of Japan stated that consultations under Article XXII:1 had not been exhausted and it was premature to proceed to Article XXIII:2. Noting that in the dispute concerning “Canada - Administration of the Foreign Investment Review Act”²⁶ the parties had moved directly from Article XXII:1 to Article XXIII:2, he stated that in that case both the United States and Canada had agreed that the requirement in Article XXIII:1 had been fulfilled whereas, in the case at hand, Japan did not agree that the requirement had been met.²⁷ The Legal Adviser to the Director-General “said that in his view it was not necessary that both parties so agree before moving to set up a panel under Article XXIII:2; such a condition would mean that one party could indefinitely block the procedures simply by saying that bilateral consultations had not yet been terminated”.²⁸

See also the discussion of Article XXII:2 below, and the material under Article XXIII:2 on “Recourse to Article XXIII:2 on the basis of consultations under Article XXII:1 or Article XXXVII”.

²¹L/6489, Decision of 12 April 1989, 36S/61, 62, paras. C.3 and B.

²²9S/18, 19-20, para. 9.

²³IC.SR/38, p. 12.

²⁴L/6489, Decision of 12 April 1989, 36S/61, 62, para. C.2.

²⁵C/M/205, p. 4.

²⁶L/5504, adopted on 7 February 1984, 30S/140.

²⁷C/M/205, p. 9.

²⁸*Ibid.*, p. 10.

3. Paragraph 2

(1) *Consultations concerning commodity problems*

See section III below concerning the source of Article XXII:2, in the proposal of Pakistan during the Review Session for a provision for consultations on decline in the off-take of primary commodities exported by developing countries. Resort to the provisions of Article XXII:2 was referred to in connection with discussions on commodity trade which continued after the Review Session. The Resolution on “Particular Difficulties Connected with Trade in Primary Commodities” adopted in the Eleventh Session in 1956 provided, *inter alia*, that the CONTRACTING PARTIES “Resolve ... that it would be appropriate for them to enter into consultations on problems arising out of the trade in primary commodities pursuant to the provisions of paragraph 2 of Article XXII and of paragraph 5 of Article XVIII ...”.²⁹ The Report of the Working Party on “Particular Difficulties Connected with Trade in Primary Commodities”, which drafted that Resolution, notes the ruling made at the Tenth Session that the CONTRACTING PARTIES have the competence to deal, at the request of one or more contracting parties, with difficulties arising in connexion with international trade in primary commodities.³⁰ The Report provides that

“... In addition to this broad competence which would make it possible for any contracting party to submit to the CONTRACTING PARTIES any particular difficulties which it was experiencing in connexion with trade in primary commodities, and which difficulties were in its view such as to impede the attainment of the objectives of the General Agreement, there are specific provisions in the General Agreement which afford an opportunity for contracting parties to secure consideration of special problems arising in this field ... difficulties of this kind would be appropriate matters to bring forward under Article XXII, which, when the revised text comes into effect, will provide not only for bilateral consultations, but also for consultations with the CONTRACTING PARTIES as a whole ...”.³¹

The Report of the Working Party in the Thirteenth Session on “Particular Difficulties Connected with Trade in Primary Commodities” examined actions taken to follow up on the 1956 Resolution, and noted that:

“Paragraph 3 of the basic resolution has not been utilized, perhaps due to a lack of understanding of the potentialities of the General Agreement in facilitating consultations on trade problems of concern to individual contracting parties or the CONTRACTING PARTIES generally. Therefore the Working Party has thought it useful to describe the manner in which contracting parties may have recourse to the facilities of Articles XXII and XXV for dealing with problems in their trade in primary products. Article XXII provides for consultations between contracting parties on any matter affecting the operation of the Agreement. At this session the CONTRACTING PARTIES have adopted procedures whereby these can be broadened into multilateral consultations and it should be noted that there is nothing in this Article which would prevent the participating governments from inviting non-contracting parties to take part. However, there may be situations in which joint action by the CONTRACTING PARTIES under Article XXV would be more appropriate, for example, where a developing situation might lead to commercial policy measures being taken by one or more contracting parties which would be injurious to others unless it is dealt with by co-operative action ... Thus under these two Articles there are procedures, for initiating action and a search for solutions, which are well adapted for dealing with many of the special situations arising in the trade in primary products which could be more appropriately handled by GATT techniques than otherwise.”³²

“Accordingly, the Working Party recommends that contracting parties, when contemplating action on problems arising in commodity trade, should consider the possibility of initiating consultations under Article XXII with a view to arriving at mutually acceptable solutions, thus avoiding the need for unilateral action. ...”.³³

²⁹Resolution of 17 November 1956, 5S/26, 27, para. 3.

³⁰See ruling at SR.10/19, p. 218.

³¹L/592/Rev.1, adopted on 17 November 1956, 5S/87, 88, para. 1.

³²L/930, adopted on 22 November 1958, 7S/42, 44, para. 7.

³³*Ibid.*, 7S/45, para. 8.

The Report of the Working Party in the Fourteenth Session on “Impact of Commodity Problems on International Trade” further noted: “... The General Agreement offers facilities for bilateral and multilateral consultations of which governments may avail themselves when difficulties arise in international commodity trade. ... Contracting parties, whether importing or exporting countries, can avail themselves of the provisions of Article XXII of the General Agreement and initiate consultations under that Article when difficulties arise in connexion with their commodity trade”.³⁴

A Working Party on Dairy Products was established in December 1967 “to conduct, on behalf of the CONTRACTING PARTIES, consultations under Article XXII:2 on urgent problems in international trade in dairy products with a view to arriving at mutually acceptable solutions and to report to the Council”.³⁵ The Working Party resulted in the drawing up of the Arrangement Concerning Certain Dairy Products.³⁶ A Working Party was also established in February 1968 on poultry³⁷ but did not conclude its work.

In 1986, the EEC requested the establishment of a Working Party under Article XXII:2 concerning Japanese measures affecting the world market for copper ores and concentrates.³⁸ The EC representative stated, *inter alia*, that the Community had invoked Article XXII:1 in 1982, and when that approach proved fruitless, Article XXII:2 in 1984. The Community’s request for a working party was based on the Eleventh Session (1956) Resolution on commodity trade referred to above in this section. The Council established a Group of Governmental Experts on this subject without reference to Article XXII:2.³⁹ See also the material on this matter under Article XXIII.

See also the material on consultations under Articles XVIII:5 and XXV:1; see also Articles XXXVI:4 and XXXVIII.

(2) Other consultations held under Article XXII:2

The table at the top of the next page lists other consultations held under Article XXII:2 following consultations held on the same matter under Article XXII:1 or other bilateral consultations.

B. CONSULTATIONS UNDER OTHER PROVISIONS

1. Consultations under other Articles of the General Agreement

Many other GATT provisions require contracting parties to consult in specific instances, e.g.:

Articles II:5; VI:7; VII:1; VIII:2; IX:6; XII:4; XIII:4; XVI:4; XVIII:7, 12, 16, 21, 22; XIX:2; XXIII; XXIV:7; XXV:1; XXVII; XXVIII:1 and 4; XXXVII:2.

For instance, Working Parties have been established by the CONTRACTING PARTIES without reference to Article XXII or XXIII to examine “Suspension of customs liquidation by the United States”⁴⁰, the “French Trade Measures” of 1968⁴¹, various import deposit schemes⁴², import surcharges⁴³, or export subsidies.⁴⁴

See also the material on consultations under Article XXV:1.

³⁴L/1103, adopted on 20 November 1959, 8S/76, 84, para. 35.

³⁵C/M/43.

³⁶L/3295, Report by the Chairman of the Working Party, 17S/59; Arrangement Concerning Certain Dairy Products, 17S/5.

³⁷C/M/45.

³⁸C/W/439, L/5627, L/5654, L/5992.

³⁹C/M/198, p. 4; see Report of Group of Governmental Experts, L/6167, adopted 2 December 1987, 34S/168.

⁴⁰24S/134.

⁴¹L/3047, 16S/57; L/3081, 16S/65; see also C/M/48.

⁴²See, e.g., 17S/144, 18S/210, 21S/121, 23S/84, 24S/129.

⁴³See, e.g., 18S/212, 19S/120.

⁴⁴See, e.g., 28S/80.

Other consultations held under Article XXII:2				
Date of request	Name	Applicant	Respondent	Document references
04-Dec-61	Italian restrictions affecting imports from Israel	Israel	Italy	L/1575, SR.19/8, 10S/130, L/1786, C/M/10, SR.20/8
13-Feb-61	Italian restrictions affecting imports from the United States and certain other contracting parties	United States	Italy	C/M/4, L/1428, L/1468+Add.1-2, 10S/117; L/1478/Add.1-2, L/1547, L/1815, SR.20/8
27-Jul-65	Application of Art. XXIV:5(a) and XXIV:6 to third countries when tariffs reduced in forming customs union with the EEC	United Kingdom	Turkey	SR.22/10 p. 117-121 SR.23/2 L/2465, 14S/59
06-Nov-67	US - Export subsidy on unmanufactured tobacco	Malawi	United States	C/M/42, L/2897, L/2900, L/2902, L/2925+Add.1, SR.24/13, 15S/116
21-Nov-67	Loyalty rebate offered by British Steel corporation to purchasers certifying non-use of imported steel	United States	United Kingdom	SR.24/13, C/M/43, L/2958, L/3271 Spec(67)74-77
19-Jun-69	Spain - Prohibition of imports of codfish from Denmark	Denmark	Spain	L/3221 C/M/55

2. Consultations under Decisions of the CONTRACTING PARTIES

(1) *Consultations on border tax adjustments*

The Report of the Working Party on "Border Tax Adjustments" in 1968 recommended that a consultation procedure be established "whereby, upon request by a contracting party, a multilateral consultation could take place on changes in tax adjustments, whether notified or not. Such consultations would be held within the scope of the relevant GATT provisions. Upon request, contracting parties should be prepared to justify the reasons for adjustment, the methods used, the amount of compensation and to furnish proof thereof".⁴⁵ In adopting that Report, the Council agreed to establish such a consultation procedure.⁴⁶

(2) *Liquidation of strategic stocks*

In the Resolution of 4 March 1955 on "Liquidation of Strategic Stocks" the CONTRACTING PARTIES recognized, *inter alia*, "That any disturbing effects of such liquidations and the risk of injury may be avoided or minimized by consultations between the substantially interested contracting parties" and recommended, *inter alia*:

"That a contracting party, intending to liquidate and giving notice in accordance with paragraph 1, should consult with any contracting party which considers itself substantially interested and requests such consultations, with a view to avoiding or minimizing substantial injury to the economic interests of that contracting party and undue disruption of the markets for the product concerned and should give full and sympathetic consideration to the views expressed by such other interested contracting parties".⁴⁷

In 1981, Peru requested consultations with the United States under Articles XXII:1, XVIII:5 and this Resolution in regard to the liquidation of strategic stocks of silver.⁴⁸

⁴⁵L/3464, adopted on 2 December 1970, 18S/97, 108, para. 43.

⁴⁶C/M/65, p. 4.

⁴⁷3S/51.

⁴⁸C/M/154, SR.38/1.

(3) *Restrictive business practices*

In a Decision on “Arrangements for Consultations on Restrictive Business Practices”⁴⁹ in international trade between contracting parties, the CONTRACTING PARTIES recommend consultations on such practices on a bilateral or multilateral basis as appropriate. The Decision does not refer to Article XXII.

3. Consultations provided for in Protocols of Accession

The Report of the Working Party on the Accession of Poland notes that “The Working Party agreed that it would be desirable that a set of provisions be incorporated in the draft Protocol for the Accession of Poland, designed to safeguard the interests of the parties concerned without hampering the development of a multilateral trading system between the CONTRACTING PARTIES and Poland, corresponding to the provisions of Articles XXII and XXIII but adapted to meet the particular requirements in this case. Paragraph 7 of the draft Protocol was drafted for this purpose”.⁵⁰ Provisions for consultations are also contained in the accession Protocols for Romania⁵¹ and Hungary.⁵²

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

In the US Draft Charter, Article 30, the article on consultation in the commercial policy chapter, included both provisions on consultation and provisions on nullification or impairment. In the London and New York drafts of the Charter these provisions appeared as two separate paragraphs of Article 35, still in the commercial policy chapter. During discussions in Geneva, it was decided to move the provisions on nullification or impairment to Chapter VIII of the Charter, and to expand their scope to cover the entire Charter. The provisions on consultation in the area of commercial policy remained in Article 41.

The text of Article XXII in the original (30 October 1947) text of the General Agreement was identical (*mutatis mutandis*) to Article 41 of the Geneva draft Charter, and provided as follows:

“Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to the operation of customs regulations and formalities, anti-dumping and countervailing duties, quantitative and exchange regulations, subsidies, state-trading operations, sanitary laws and regulations for the protection of human, animal or plant life or health, and generally all matters affecting the operation of this Agreement”.

The corresponding provision in the Havana Charter, Article 41, was essentially identical except for the addition of “internal price regulations” and “transit regulations and practices” to the list of enumerated subjects for consultation. The following note based on the New York Draft (Article 35, paragraph 1) was added to the Havana Charter:

“The provisions for consultation require Members, subject to the exceptions specifically set forth in this Charter, to supply to other Members, upon request, such information as will enable a full and fair Article appraisal of the matters which are the subject of such consultation, including the operation of sanitary laws and regulations for the protection of human, animal or plant life or health, and other matters affecting the application of Chapter IV”.

Prior to the Review Session it was suggested that the selection of certain provisions of the Agreement for special reference was unnecessary, and the Article could be simplified.⁵³ During the Review Session, Pakistan proposed that any developing country affected by a decline in imports by a particular country of primary commodities exported by it, or by measures likely to lead to such a decline, be able to ask for consultations,

⁴⁹Decision of 18 November 1960, 9S/28.

⁵⁰L/2806, adopted on 26 June 1967, 15S/109, III-112, para. 15; for text of paragraph 7 see 15S/49.

⁵¹See paragraph 6 of Accession Protocol (18S/5, 7).

⁵²See paragraph 7 of Accession Protocol (20S/3, 7).

⁵³L/189, Secretariat note on “The Review of the Agreement”, dated 12 April 1954.

stating that “where a grave threat has arisen or is likely to arise to the economy of an under-developed country consequent upon measures taken by the government or quasi-government organizations of another contracting party the former may be able, at the discretion of the CONTRACTING PARTIES, to invoke the procedure of multilateral consultations”.⁵⁴ In response the present text of Article XXII:2 was proposed by a sub-group of Review Working Party IV.⁵⁵ The changes to Article XXII were effected through the Protocol Amending the Preamble and Parts II and III of the General Agreement, and entered into force 7 October 1957.

IV. RELEVANT DOCUMENTS

London

Discussion: EPCT/C.II/38

New York

Discussion: EPCT/C.6/29, 40, 105
 Reports: EPCT/34 p. 30
 Other: EPCT/C.6/W/8, 60, 63, 66, 87
 EPCT/C.6/28/Rev.1, 97/Rev.1

Geneva

Discussion: EPCT/EC/PV.2/22
 EPCT/A/SR.6, 12, 13, 35
 EPCT/TAC/SR/II
 EPCT/TAC/PV/28
 Reports: EPCT/135, 146, 155 + Corr.1, 180,
 186 p. 36, 189, 212,
 214/Rev.1/Add.1
 Other: EPCT/W/64, 168, 172, 175, 224,
 272, 301, 313

Havana

Discussion: E/CONF.2/C.3/SR.17 (p. 4);
 Reports: E/CONF.2/C.3/37

Review Session

Discussion: SR.9/38
 Reports: W.9/180, W.9/198, 3S/244
 Other: L/189, L/291, W.9/62, W.9/134
 Spec/92/55

⁵⁴W.9/134; see also L/291.

⁵⁵W.9/180, “Report by Sub-Group C on the Pakistan Proposal Relating to the Off-take of Primary Commodities”; see also Spec/92/55 and the Report of the Working Party on “Organizational and Functional Questions”, L/327, adopted on 28 February, 5 and 7 March 1955, 3S/231, 244, para. 42.

V. CONSULTATIONS UNDER ARTICLE XXII

A. CONSULTATIONS NOTIFIED UNDER THE 1958 PROCEDURES OR REFERRED TO IN SESSION OR COUNCIL RECORDS

The following table lists consultations notified formally under the 1958 procedures, or referred to in Session or Council discussions. As in many cases consultations have been held without formal notification, this list is necessarily incomplete. The date referred to is (in order of preference) the date of the communication reproduced, or the date of issuance of the document first listed, or the date of the meeting at which a request for consultations was made; where a reference to a consultation only appears in minutes of a subsequent meeting, the date is the date of the consultation or as a last resort, the date of that meeting.

Date	Name	Applicant	Requests for Joinder	Respondent	Document references
09-Jul-58	Effect on Trade in Unmanufactured Tobacco of Rome Treaty Provisions on Proposed Common Tariff and Association of Overseas Territories	Rhodesia and Nyasaland	Brazil, Canada, Cuba, Dominican Republic, Greece, India, Indonesia, Turkey, United States	Six EEC Member States	L/831, IC/SR.41, SR.13/8 p. 37, L/995, SR.14/10, L/1006
14-Jul-58	Effect on Trade in Sugar of Rome Treaty Provisions on Association of Overseas Territories	Dominican Republic	Cuba, Czechoslovakia, United States	Six EEC Member States	L/832, IC/SR.41, SR.13/8 p. 37, SR.14/10, L/1006
28-Jul-58	Effect on Trade in Cocoa of Rome Treaty Provisions on Association of Overseas Territories	United Kingdom	Brazil, Dominican Republic, Ghana, United States, Indonesia	Six EEC Member States	L/838, IC/SR.41, SR.13/8 p. 37, L/994, SR.14/10, L/1006
28-Jul-58	Effect on Trade in Coffee of Rome Treaty Provisions on Association of Overseas Territories	United Kingdom	Brazil, Dominican Republic, Haiti, India, Indonesia, United States	Six EEC Member States	L/838, IC/SR.41, SR.13/15 p. 138, W.13/5, SR.13/8 p. 37, SR.14/10, L/1007, L/1006
28-Jul-58	Effect on Trade in Bananas of Rome Treaty Provisions on Association of Overseas Territories	United Kingdom	Brazil, Dominican Republic, United States	Six EEC Member States	L/838, IC/SR.41, SR.13/8 p. 37, SR.14/10, L/1007, L/1006
15-Aug-58	Effect on Trade in Tea of Rome Treaty Provisions on Association of Overseas Territories	India	Indonesia, Japan, Pakistan, Sri Lanka, United Kingdom	Six EEC Member States	L/841, IC/SR.41, SR.13/8 p. 37, L/996, SR.14/10, L/1006
21-Nov-58	German Import Restrictions (Chairman's proposal to hold consultations, made at 13th Session)	(Chairman's proposal)	Australia, Austria, Canada, Czechoslovakia, Denmark, India, Japan, New Zealand, Sweden, Norway, United Kingdom, United States	Germany	SR.13/208, L/966, MGT/130/58/Rev.1, L/989, W.14/24, SR.14/8 p. 99ff
04-Jun-59	Implications of Provisions of Rome Treaty for Trade in Lead and Zinc	Australia	Austria, Canada, Norway, Sweden, South Africa, United Kingdom	Six EEC Member States	L/1010, SR.14/10, L/1128

Date	Name	Applicant	Requests for Joinder	Respondent	Document references
04-Jun-59	Implications of Provisions of Rome Treaty for Trade in Aluminium (bauxite, alumina and metal)	Australia	Austria, Canada, Ghana, Norway, United Kingdom	Six EEC Member States	L/1010, SR.14/10, L/1129
03-Jun-60	Italian Import Restrictions	United States	Canada, Australia, New Zealand	Italy	L/1222/Add.1, SR.16/8, SR.17/12
15-Jul-60	Italian Import Restrictions	Japan		Italy	L/1222/Add.2, SR.16/8, SR.17/12, L/1325
24-Nov-60	French Import Restrictions	United States	Canada, Australia, New Zealand, Israel	France	L/1392, L/1417, SR.18/4
29-May-61	Italian Import Restrictions	Israel		Italy	L/1495
31-May-61	French Import Restrictions	Uruguay		France	L/1496
13-Nov-63	Canadian Import Restrictions on Turkey	United States	-	Canada	L/1632
19-Apr-63	Austrian Import Restrictions	Netherlands	United States	Austria	L/1998+Add.1
03-Jul-63	United Kingdom Import Restrictions on Grapefruit and Citrus Fruit Products	United States	Jamaica, Trinidad and Tobago, Israel	United Kingdom	L/2030+Add.1+2
01-Aug-63	Austrian Import Restrictions	United States	Australia, Italy	Austria	L/2046+Add.1-10
17-Jan-64	Japan - Tariff Treatment of Sea Water Magnesite	United States		Japan	L/2119
08-Aug-64	Import Restrictions of the Federal Republic of Germany	United States	Canada	Germany	L/2252+Add.1
23-Mar-65	Turkish Request for Renegotiations under Article XXVIII	United Kingdom		Turkey	SR.22/9, p. 113
09-Apr-65	Swiss Veterinary Taxes	Belgium and Netherlands		Switzerland	L/2422
05-Apr-65	Japanese Import Restrictions	Uruguay		Japan	L/2430, L/1662/Rev.1, TN.64/LDC/7, L/2278 Ann.II
21-Jul-66	Norwegian Import Restrictions	United States	Australia	Norway	L/2675+Add.1-2
05-Dec-66	United States - Export subsidy on Unmanufactured Tobacco	Malawi	Canada, India, Turkey	United States	L/2715+Add.1-3, INT(67)50, L/2856, L/2897
11-Jul-72	Netherlands Antilles Tariff Schedule - Preferences granted to EEC Products	United States		Netherlands	L/3726
31-Jan-74	Rules of Origin (EEC agreements with EFTA countries)	United States		EEC and nine member States	L/3992, C/IM/92
31-Jan-74	Rules of Origin (EEC agreements with EFTA countries)	United States		Austria, Finland, Iceland, Norway, Portugal, Sweden, Switzerland	L/3992, C/IM/92

Date	Name	Applicant	Requests for Joinder	Respondent	Document references
16-Aug-74	EEC - Emergency Measures on Bovine Meat	Australia		EEC	L/4069, L/4004 + Addis. 1-7, C/M/99, C/M/102, L/4124
29-Nov-74 19-Nov-76	Japan - Restrictions on Imports of Beef and Veal	Australia		Japan	L/4127, L/4120 + Add. 1, L/4117, C/M/100-102, C/M/109, SR.31/2, L/4452
15-Sep-76	EEC - Export Refunds for Wheat Flour	United States		EEC	L/4399
15-Sep-76	EEC - Export Refunds for Barley Malts	United States		EEC	L/4400, C/M/116
15-Nov-76	United States - Quantitative Limitations on Importation of Certain Meats into the United States	New Zealand		United States	L/4443+Add. 1, C/M/119
02-Dec-76	EEC - Export Measures on Bovine Meat	Australia		EEC	L/4454
26-Jul-77	Japan - Import restrictions on Thrown Silk Yarn	EEC		Japan	C/M/122 p. 8, L/4530, L/4637, 25S/107
31-Jan-79	European Unit of Account for the Common Customs Tariff (use in expressing specific duties in Schedule LXXII)	United States		EEC	L/4774, L/4706
17-May-78	Norway - Restrictions on Imports of Certain Textile Products	Hong Kong		Norway	C/M/125, 27S/119
24-Jul-80	EC - Tariff Preferences to Citrus Products of Certain Countries in the Mediterranean Region	United States		EC	L/5012, L/5037
24-Jul-80	EC - Export Refunds for Wheat Flour	United States		EC	L/5014
29-Aug-80	United States - Tariff Measures on Light Truck Cab Chassis	Japan		United States	L/5019
23-Nov-81	Liquidation of Strategic Stocks (US strategic stocks of silver)	Peru		United States	L/5264, C/M/154
05-Jan-82	Canada - Administration of the Foreign Investment Review Act	United States		Canada	L/5280
29-Jan-82	Measures Affecting the World Market for Copper Ores and Concentrates	EEC		Japan	L/5286, 36S/200
24-Jun-82	Application of Duty-free Tariff Concession for Corn Gluten Feed	EEC		United States	L/5340
05-Jul-82	United States - Sugar Imports (institution of import quota)	Cote d'Ivoire		United States	L/5348
09-Jul-82	United States - Sugar Imports (effects of sugar policy on production and trade)	EEC		United States	L/5349
04-Aug-82	Canada - Differentiated Postal Rates	United States		Canada	L/5359
16-Aug-82	United States - Sugar Imports (institution of import quota)	Brazil		United States	L/5360, C/M/162
11-Oct-82	EEC - Proposal to Ban the Importation of certain Sealskins and Seal Products	Canada		EEC	L/5384

Date	Name	Applicant	Requests for Joinder	Respondent	Document references
19-Nov-84	EEC - Quantitative Restrictions or Measures having Equivalent Effect applied on Imports of Various Products	Chile		EEC	L/5737
19-Nov-84	Portugal - Quantitative Restrictions or Measures having Equivalent Effect applied on Imports of Various Products	Chile		Portugal	L/5737
19-Nov-84	Norway - Quantitative Restrictions or Measures having Equivalent Effect applied on Imports of Various Products	Chile		Norway	L/5737
19-Nov-84	Finland - Quantitative Restrictions or Measures having Equivalent Effect applied on Imports of Various Products	Chile		Finland	L/5737
19-Nov-84	Austria - Quantitative Restrictions or Measures having Equivalent Effect applied on Imports of Various Products	Chile		Austria	L/5737
19-Nov-84	Sweden - Quantitative Restrictions or Measures having Equivalent Effect applied on Imports of Various Products	Chile		Sweden	L/5737
19-Nov-84	Japan - Quantitative Restrictions or Measures having Equivalent Effect applied on Imports of Various Products	Chile		Japan	L/5737
19-Nov-84	New Zealand - Quantitative Restrictions or Measures having Equivalent Effect applied on Imports of Various Products	Chile		New Zealand	L/5737
20-Nov-84	United States - Marking Requirement for Pipes and Tubes in Section 207 of Trade and Tariff Act of 1984	EEC	Canada, Australia, Spain	United States	C/M/183 p. 89-90
18-Jan-85	Followup on DISC - Foreign Sales Corporation Act	EEC		United States	L/5774, C/M/185
22-Jan-85	Brazil - Treatment of Electronic Data Processing Equipment (informatics policy)	United States		Brazil	L/5775, C/M/185, L/5871, C/M/192
11-Jul-85	United States - Trade Measures affecting Nicaragua	United States		Nicaragua	L/5847, L/5803
10-Mar-86	EEC - Restrictions on Certain Imports from New Zealand (French import ban on lamb brains)	New Zealand		EEC	L/5970+Add. 1, C/M/196
22-Jul-86	Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages	EEC	Canada	Japan	L/6031, L/6078, C/M/204-206, L/6216, 34S/83
08-Sep-86	Consultations under Article XXII - Request by New Zealand (Countervailing duty and antidumping orders on exports of low fuming brazing copper rod and wire from New Zealand)	New Zealand		United States	L/6045
08-Oct-86	Bilateral Agreement between the United States and Japan regarding Trade in Semi-conductors	EEC		Japan	L/6057
08-Oct-86	Bilateral Agreement between the United States and Japan regarding Trade in Semi-conductors	EEC		United States	L/6057

Date	Name	Applicant	Requests for Joinder	Respondent	Document references
30-Oct-86	United States - Internal taxes on Petroleum, Petroleum products and Chemical derivatives	EEC	Mexico	United States	L/6080, L/6123, C/M/206, L/6175, 34S/136
07-Nov-86	United States - Tax on Imported Crude Oil and Petroleum Products	Canada		United States	L/6085, L/6121, C/M/206, L/6175, 34S/136
10-Nov-86	United States - Customs User Fee	Canada		United States	L/6086, C/M/206, C/M/207
01-Dec-86	United States - Tax Reform - Transitional Rules (taxation of small passenger aircraft)	EEC		United States	L/6103
25-Feb-87	Italy - Fiscal Duties on Bananas	Colombia	Philippines	EEC	L/6138, C/M/207, C/M/212
11-Nov-87	EEC - Implementation of the Harmonized System	Argentina	Australia	EEC	C/M/215 p. 40
22-Jan-88	United States - Withdrawal of Chile from Generalized System of Preferences	Chile		United States	L/6298, C/M/541, C/M/217, C/M/218, C/M/219, C/M/220
07-Jun-89	United States - Sugar Import Regime	Australia		United States	C/M/222 p. 27-28; see L/6514, 36S/331
03-Dec-92	Subsidy in connection with a Tender submitted for a Hydro-electric Project in Costa Rica	Argentina		Norway	SR. 48/2

B. CONSULTATIONS NOTIFIED UNDER THE 1989 DECISION ON IMPROVEMENTS TO THE GATT DISPUTE SETTLEMENT RULES AND PROCEDURES

Date	Name	Applicant	Requests for Joinder	Respondent	Document references
03-Jul-89	Finland - Restrictions on Imports of Apples and Pears	United States		Finland	DS1/1
01-Sep-89	Measures to be taken under the European Convention on Transfrontier Television	United States		Austria, Luxembourg, Netherlands, Norway, Spain, Sweden, Switzerland, United Kingdom	DS4/1, C/M/236
25-Sep-89	Canada - Restrictions on Imports of Broiler Hatching Eggs/chicks	United States		Canada	DS6/1
11-Oct-89	EEC - Directive on Transfrontier Television	United States		EC	DS4/3
15-Jan-90	Brazil - Tax on Raw Sisal (export tax)	EEC		Brazil	DS11/1
21-Feb-90	Federal Republic of Germany - Restriction of Circulation of Austrian Lornes	Austria		Germany	DS14/1
26-Apr-90	France - Television Broadcasting of Cinematographic and Audiovisual Works	United States		France	DS4/5
16-Oct-90	United States - Investigation of Circumvention of Anti-dumping Order on Colour Television Picture Tubes	Canada		United States	DS19/1
05-Mar-91	United States - Countervailing Duty and Anti-dumping actions on Salmon	Norway		United States	DS24/1

Date	Name	Applicant	Requests for Joinder	Respondent	Document references
18-Mar-91	Japan - Restrictions on Imports of Certain Agricultural Products	United States	Australia, Argentina, Canada, New Zealand, Thailand, Uruguay	Japan	DS25/1, L/6832, DS25/2, L/6910, C/M/247, C/M/248, L/7087
05-Apr-91	Japan - Restrictions on Imports of Certain Agricultural Products	Australia		Japan	DS25/2, DS25/1, L/7087
12-Jun-92 16-Jun-92	EEC - Banana Import Regimes	Colombia, Costa Rica, Guatemala, Nicaragua, Venezuela		EC	DS32/1
21-Aug-92	Japan - Restrictions on Imports of Certain Agricultural Products	New Zealand		Japan	DS25/3, L/7087
28-Jan-93	EEC - Import Regime for Bananas	Colombia, Costa Rica, Guatemala, Nicaragua, Venezuela	Cameroun, Côte d'Ivoire, Jamaica	EC	DS38/1, DS38/4
19-Feb-93	EEC - Import Regime for Bananas	Colombia, Costa Rica, Guatemala, Nicaragua, Venezuela		EC	DS38/5
04-Mar-93	EEC - Restrictions on Imports of Apples	Chile		EC	DS39/1
20-May-93	Poland - Duty Exemptions for Automobiles Originating in the European Communities	India		Poland	DS40/1
18-Aug-93	EEC - French Regulation Concerning the Trade Description of Scallops	Canada		EC	DS43/1
07-Sep-93	EEC - Countervailing Charges on Lemons	Argentina		EC	DS45/1
08-Sep-93	Mexico - Initiation of Countervailing Duty Investigation on Certain Steel Produced in the United States	United States		Mexico	DS46/1
14-Jan-94	United States - Standards for Reformulated and Conventional Gasoline	Venezuela		United States	DS47/1
24-Jan-94	Australia - Import Restrictions on Salmon	Canada		Australia	DS48/1
16-Feb-93	EC - Restrictions on Imports of Canned Tuna and Sardines	Thailand	United States, Philippines	EC	DS49/1-4
5-Apr-94	Argentina - Provisional Anti-Dumping Duties on Three-Phase Electric Motors	Czech Republic		Argentina	DS50/1
21-Apr-94	EC - Prohibition of Imports of Pelt and Manufactured Furs of Wild Animals	Canada		EC	DS51/1
13-Oct-94	Japan - Measures Affecting Imports of Certain Telecommunications Equipment	EC	Sweden	Japan	DS52/1, DS52/2

ARTICLE XXIII

NULLIFICATION OR IMPAIRMENT

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I. TEXT OF ARTICLE XXIII AND DECISIONS INTERPRETING ARTICLE XXIII**A. ARTICLE XXIII****Article XXIII***Nullification or Impairment*

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

- (a) the failure of another contracting party to carry out its obligations under this Agreement, or
- (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
- (c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

B. UNDERSTANDING ON NOTIFICATION, CONSULTATION, DISPUTE SETTLEMENT AND SURVEILLANCE OF 28 NOVEMBER 1979 (26S/210)

1. The CONTRACTING PARTIES reaffirm their adherence to the basic GATT mechanism for the management of disputes based on Articles XXII and XXIII.¹ With a view to improving and refining the GATT mechanism, the CONTRACTING PARTIES agree as follows:

Notification

2. Contracting parties reaffirm their commitment to existing obligations under the General Agreement regarding publication and notification.²

3. Contracting parties moreover undertake, to the maximum extent possible, to notify the CONTRACTING PARTIES of their adoption of trade measures affecting the operation of the General Agreement, it being understood that such notification would of itself be without prejudice to views on the consistency of measures with or their relevance to rights and obligations under the General Agreement. Contracting parties should endeavour to notify such measures in advance of implementation. In other cases, where prior notification has not been possible, such measures should be notified promptly ex post facto. Contracting parties which have reason to believe that such trade measures have been adopted by another contracting party may seek information on such measures bilaterally, from the contracting party concerned.

Consultations

4. Contracting parties reaffirm their resolve to strengthen and improve the effectiveness of consultative procedures employed by contracting parties. In that connexion, they undertake to respond to requests for consultations promptly and to attempt to conclude consultations expeditiously, with a view to reaching mutually satisfactory conclusions. Any requests for consultations should include the reasons therefor.
5. During consultations, contracting parties should give special attention to the particular problems and interests of less- developed contracting parties.
6. Contracting parties should attempt to obtain satisfactory adjustment of the matter in accordance with the provisions of Article XXIII:1 before resorting to Article XXIII:2.

Dispute settlement

7. The CONTRACTING PARTIES agree that the customary practice of the GATT in the field of dispute settlement, described in the Annex, should be continued in the future, with the improvements set out below. They recognize that the efficient functioning of the system depends on their will to abide by the present understanding. The CONTRACTING PARTIES reaffirm that the customary practice includes the procedures for the settlement of disputes between developed and less-developed countries adopted by the CONTRACTING PARTIES in 1966 (BISD, fourteenth supplement, page 18) and that these remain available to less-developed contracting parties wishing to use them.
8. If a dispute is not resolved through consultations the contracting parties concerned may request an appropriate body or individual to use their good offices with a view to the conciliation of the outstanding differences between the parties. If the unresolved dispute is one in which a less-developed contracting party has brought a complaint against a developed contracting party, the less-developed contracting party may request the good offices of the Director-General who, in carrying out his tasks, may consult with the Chairman of the CONTRACTING PARTIES and the Chairman of the Council.
9. It is understood that requests for conciliation and the use of the dispute settlement procedures of Article XXIII:2 should not be intended or considered as contentious acts and that, if disputes arise, all contracting parties will engage in these procedures in good faith in an effort to resolve the disputes. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.
10. It is agreed that if a contracting party invoking Article XXIII:2 requests the establishment of a panel to assist the CONTRACTING PARTIES to deal with the matter, the CONTRACTING PARTIES would decide on its establishment in accordance with standing practice. It is also agreed that the CONTRACTING PARTIES would similarly decide to establish a working party if this were requested by a contracting party invoking the Article. It is further agreed that such requests would be granted only after the contracting party concerned had had an opportunity to study the complaint and respond to it before the CONTRACTING PARTIES.
11. When a panel is set up, the Director-General, after securing the agreement of the contracting parties concerned, should propose the composition of the panel, of three or five members depending on the case, to the CONTRACTING PARTIES for approval. The members of a panel would preferably be governmental. It is understood that citizens of countries whose governments³ are parties to the dispute would not be members of the panel concerned with that dispute. The panel should be constituted as promptly as possible and normally not later than thirty days from the decision by the CONTRACTING PARTIES.
12. The parties to the dispute would respond within a short period of time, i.e., seven working days, to nominations of panel members by the Director-General and would not oppose nominations except for compelling reasons.
13. In order to facilitate the constitution of panels, the Director- General should maintain an informal indicative list of governmental and non-governmental persons qualified in the fields of trade relations, economic development, and other matters covered by the General Agreement, and who could be available for serving on panels. For this purpose, each contracting party would be invited to indicate at the beginning of every year to the Director-General the name of one or two persons who would be available for such work.⁴
14. Panel members would serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments would therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and wide spectrum of experience.⁵
15. Any contracting party having a substantial interest in the matter before a panel, and having notified this to the Council, should have an opportunity to be heard by the panel. Each panel should have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a State it shall inform the government of that State. Any contracting party should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided should not be revealed without formal authorization from the contracting party providing the information.
16. The function of panels is to assist the CONTRACTING PARTIES in discharging their responsibilities under Article XXIII:2. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the General Agreement and, if so requested by the CONTRACTING PARTIES, make such other findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2. In this connexion, panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.
17. Where the parties have failed to develop a mutually satisfactory solution, the panel should submit its findings in a written form. The report of a panel should normally set out the rationale behind any findings and recommendations that it makes. Where a bilateral settlement of

the matter has been found, the report of the panel may be confined to a brief description of the case and to reporting that a solution has been reached.

18. To encourage development of mutually satisfactory solutions between the parties and with a view to obtaining their comments, each panel should first submit the descriptive part of its report to the parties concerned, and should subsequently submit to the parties to the dispute its conclusions, or an outline thereof, a reasonable period of time before they are circulated to the CONTRACTING PARTIES.

19. If a mutually satisfactory solution is developed by the parties to a dispute before a panel, any contracting party with an interest in the matter has a right to enquire about and be given appropriate information about that solution in so far as it relates to trade matters.

20. The time required by panels will vary with the particular case.⁶ However, panels should aim to deliver their findings without undue delay, taking into account the obligation of the CONTRACTING PARTIES to ensure prompt settlement. In cases of urgency the panel would be called upon to deliver its findings within a period normally of three months from the time the panel was established.

21. Reports of panels and working parties should be given prompt consideration by the CONTRACTING PARTIES. The CONTRACTING PARTIES should take appropriate action on reports of panels and working parties within a reasonable period of time. If the case is one brought by a less-developed contracting party, such action should be taken in a specially convened meeting, if necessary. In such cases, in considering what appropriate action might be taken the CONTRACTING PARTIES shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of less-developed contracting parties concerned.

22. The CONTRACTING PARTIES shall keep under surveillance any matter on which they have made recommendations or given rulings. If the CONTRACTING PARTIES' recommendations are not implemented within a reasonable period of time, the contracting party bringing the case may ask the CONTRACTING PARTIES to make suitable efforts with a view to finding an appropriate solution.

23. If the matter is one which has been raised by a less-developed contracting party, the CONTRACTING PARTIES shall consider what further action they might take which would be appropriate to the circumstances.

Surveillance

24. The CONTRACTING PARTIES agree to conduct a regular and systematic review of developments in the trading system. Particular attention would be paid to developments which affect rights and obligations under the GATT, to matters affecting the interests of less-developed contracting parties, to trade measures notified in accordance with this understanding and to measures which have been subject to consultation, conciliation or dispute settlement procedures laid down in this understanding.

Technical assistance

25. The technical assistance service of the GATT secretariat shall, at the request of a less-developed contracting party, assist it in connexion with matters dealt with in this understanding.

Notes:

¹It is noted that Article XXV may, as recognized by the CONTRACTING PARTIES, inter alia, when they adopted the report of the Working Party on particular difficulties connected with trade in primary products (L/930), also afford an appropriate avenue for consultation and dispute settlement in certain circumstances.

²See Secretariat Note, Notifications required from contracting parties (MTN/FR/W/17, dated 1 August 1978).

³In the case customs unions or common markets are parties to a dispute, this provision applies to citizens of all member countries of the customs unions or common markets.

⁴The coverage of travel expenses should be considered within the limits of budgetary possibilities.

⁵A statement is included in the Annex describing the current practice with respect to inclusion on panels of persons from developing countries.

⁶An explanation is included in the Annex that "in most cases the proceedings of the panels have been completed with a reasonable period of time, extending from three to nine months".

ANNEX

Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII:2)

1. Any dispute which has not been settled bilaterally under the relevant provisions of the General Agreement may be referred to the CONTRACTING PARTIES¹ which are obliged, pursuant to Article XXIII:2, to investigate matters submitted to them and make appropriate recommendations or give a ruling on the matter as appropriate. Article XXIII:2 does not indicate whether disputes should be handled by a working party or by a panel.²

2. The CONTRACTING PARTIES adopted in 1966 a decision establishing the procedure to be followed for Article XXIII consultations between developed and less-developed contracting parties (BISD, 14th Supplement, page 18). This procedure provides, inter alia, for the Director-General to employ his good offices with a view to facilitating a solution, for setting up a panel with the task of examining the problem in order to recommend appropriate solutions, and for time-limits for the execution of the different parts of this procedure.

3. The function of a panel has normally been to review the facts of a case and the applicability of GATT provisions and to arrive at an objective assessment of these matters. In this connexion, panels have consulted regularly with the parties to the dispute and have given them

adequate opportunity to develop a mutually satisfactory solution. Panels have taken appropriate account of the particular interests of developing countries. In cases of failure of the parties to reach a mutually satisfactory settlement, panels have normally given assistance to the CONTRACTING PARTIES in making recommendations or in giving rulings as envisaged in Article XXIII:2.

4. Before bringing a case, contracting parties have exercised their judgement as to whether action under Article XXIII:2 would be fruitful. Those cases which have come before the CONTRACTING PARTIES under this provision have, with few exceptions, been brought to a satisfactory conclusion. The aim of the CONTRACTING PARTIES has always been to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the CONTRACTING PARTIES is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the General Agreement. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement. The last resort which Article XXIII provides to the country invoking this procedure is the possibility of suspending the application of concessions or other obligations on a discriminatory basis vis-a-vis the other contracting party, subject to authorization by the CONTRACTING PARTIES of such measures. Such action has only rarely been contemplated and cases taken under Article XXIII:2 have lead to such action in only one case.

5. In practice, contracting parties have had recourse to Article XXIII only when in their view a benefit accruing to them under the General Agreement was being nullified or impaired. In cases where there is an infringement of the obligations assumed under the General Agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. A *prima facie* case of nullification or impairment would ipso facto require consideration of whether the circumstances are serious enough to justify the authorization of suspension of concessions or obligations, if the contracting party bringing the complaint so requests. This means that there is normally a presumption that a breach of the rules has an adverse impact on other contracting parties, and in such cases, it is up to the contracting parties against whom the complaint has been brought to rebut the charge. Paragraph 1(b) permits recourse to Article XXIII if nullification or impairment results from measures taken by other contracting parties whether or not these conflict with the provisions of the General Agreement, and paragraph 1(c) if any other situation exists. If a contracting party bringing an Article XXIII case claims that measures which do not conflict with the provisions of the General Agreement have nullified or impaired benefits accruing to it under the General Agreement, it would be called upon to provide a detailed justification.

6. Concerning the customary elements of the procedures regarding working parties and panels, the following elements have to be noted:

- (i) working parties are instituted by the Council upon the request of one or several contracting parties. The terms of reference of working parties are generally "to examine the matter in the light of the relevant provisions of the General Agreement and to report to the Council". Working parties set up their own working procedures. The practice for working parties has been to hold one or two meetings to examine the matter and a final meeting to discuss conclusions. Working parties are open to participation of any contracting party which has an interest in the matter. Generally working parties consist of a number of delegations varying from about five to twenty according to the importance of the question and the interests involved. The countries who are parties to the dispute are always members of the Working Party and have the same status as other delegations. The report of the Working Party represents the views of all its members and therefore records different views if necessary. Since the tendency is to strive for consensus, there is generally some measure of negotiation and compromise in the formulation of the Working Party's report. The Council adopts the report. The reports of working parties are advisory opinions on the basis of which the CONTRACTING PARTIES may take a final decision.
- (ii) In the case of disputes, the CONTRACTING PARTIES have established panels (which have been called by different names) or working parties in order to assist them in examining questions raised under Article XXIII:2. Since 1952, panels have become the usual procedure. However, the Council has taken such decisions only after the party concerned has had an occasion to study the complaint and prepare its response before the Council. The terms of reference are discussed and approved by the Council. Normally, these terms of reference are "to examine the matter and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or rulings provided for in paragraph 2 of Article XXIII". When a contracting party having recourse to Article XXIII:2 raised questions relating to the suspension of concessions or other obligations, the terms of reference were to examine the matter in accordance with the provisions of Article XXIII:2. Members of the panel are usually selected from permanent delegations or, less frequently, from the national administrations in the capitals amongst delegates who participate in GATT activities on a regular basis. The practice has been to appoint a member or members from developing countries when a dispute is between a developing and a developed country.
- (iii) Members of panels are expected to act impartially without instructions from their governments. In a few cases, in view of the nature and complexity of the matter, the parties concerned have agreed to designate non-government experts. Nominations are proposed to the parties concerned by the GATT secretariat. The composition of panels (three or five members depending on the case) has been agreed upon by the parties concerned and approved by the GATT Council. It is recognized that a broad spectrum of opinion has been beneficial in difficult cases, but that the number of panel members has sometimes delayed the composition of panels, and therefore the process of dispute settlement.
- (iv) Panels set up their own working procedures. The practice for the panels has been to hold two or three formal meetings with the parties concerned. The panel invited the parties to present their views either in writing and/or orally in the presence of each other. The panel can question both parties on any matter which it considers relevant to the dispute. Panels have also heard the views of any contracting party having a substantial interest in the matter, which is not directly party to the dispute, but which has expressed in the Council a desire to present its views. Written memoranda submitted to the panel have been considered confidential, but are made available to the parties to the dispute. Panels often consult with and seek information from any relevant source they deem appropriate and they sometimes consult experts to obtain their technical opinion on certain aspects of the matter. Panels may seek advice or assistance from the secretariat in its capacity as guardian of the General Agreement, especially on historical or procedural aspects. The secretariat provides the secretary and technical services for panels.

- (v) Where the parties have failed to develop a mutually satisfactory solution, the panel has submitted its findings in a written form. Panel reports have normally set out findings of fact, the applicability of relevant provisions, and the basic rationale behind any findings and recommendations that it has made. Where a bilateral settlement of the matter has been found, the report of the panel has been confined to a brief description of the case and to reporting that a solution has been reached.
- (vi) The reports of panels have been drafted in the absence of the parties in the light of the information and the statements made.
- (vii) To encourage development of mutually satisfactory solutions between the parties and with a view to obtaining their comments, each panel has normally first submitted the descriptive part of its report to the parties concerned, and also their conclusions, or an outline thereof, a reasonable period of time before they have been circulated to the CONTRACTING PARTIES.
- (viii) In accordance with their terms of reference established by the CONTRACTING PARTIES panels have expressed their views on whether an infringement of certain rules of the General Agreement arises out of the measure examined. Panels have also, if so requested by the CONTRACTING PARTIES, formulated draft recommendations addressed to the parties. In yet other cases panels were invited to give a technical opinion on some precise aspect of the matter (e.g. on the modalities of a withdrawal or suspension in regard to the volume of trade involved). The opinions expressed by the panel members on the matter are anonymous and the panel deliberations are secret.
- (ix) Although the CONTRACTING PARTIES have never established precise deadlines for the different phases of the procedure, probably because the matters submitted to panels differ as to their complexity and their urgency, in most cases the proceedings of the panels have been completed within a reasonable period of time, extending from three to nine months.

The 1966 decision by the CONTRACTING PARTIES referred to in paragraph 2 above lays down in its paragraph 7 that the Panel shall report within a period of sixty days from the date the matter was referred to it.

Notes

¹ The Council is empowered to act for the CONTRACTING PARTIES, in accordance with normal GATT practice.

² At the Review Session (1955) the proposal to institutionalize the procedures of panels was not adopted by CONTRACTING PARTIES mainly because they preferred to preserve the existing situation and not to establish judicial procedures which might put excessive strain on the GATT.

C. MINISTERIAL DECLARATION OF 29 NOVEMBER 1982, DECISION ON DISPUTE SETTLEMENT (29S/13)

The CONTRACTING PARTIES:

Agree that the Understanding on Notification, Consultation, Dispute Settlement and Surveillance negotiated during the Tokyo Round (hereinafter referred to as the "Understanding") provides the essential framework of procedures for the settlement of disputes among contracting parties and that no major change is required in this framework, but that there is scope for more effective use of the existing mechanism and for specific improvements in procedures to this end;

And agree further that:

- (i) With reference to paragraph 8 of the Understanding, if a dispute is not resolved through consultations, any party to a dispute may, with the agreement of the other party, seek the good offices of the Director-General or of an individual or group of persons nominated by the Director-General. This conciliatory process would be carried out expeditiously, and the Director-General would inform the Council of the outcome of the conciliatory process. Conciliation proceedings, and in particular positions taken by the parties to the dispute during consultations, shall be confidential, and without prejudice to the rights of either party in any further proceedings under Article XXIII:2. It would remain open at any time during any conciliatory process for either party to the dispute to refer the matter to the CONTRACTING PARTIES.
- (ii) In order to ensure more effective compliance with the provisions of paragraphs 11 and 12 of the Understanding, the Director-General shall inform the Council of any case in which it has not been found possible to meet the time-limits for the establishment of a panel.
- (iii) With reference to paragraph 13 of the Understanding, contracting parties will co-operate effectively with the Director-General in making suitably qualified experts available to serve on panels. Where experts are not drawn from Geneva, any expenses, including travel and subsistence allowance, shall be met from the GATT budget.
- (iv) The secretariat of GATT has the responsibility of assisting the panel, especially on the legal, historical and procedural aspects of the matters dealt with.
- (v) The terms of reference of a panel should be formulated so as to permit a clear finding with respect to any contravention of GATT provisions and/or on the question of nullification and impairment of benefits. In terms of paragraph 16 of the Understanding, and after reviewing the facts of the case, the applicability of GATT provisions and the arguments advanced, the panel should come to such a finding. Where a finding establishing a contravention of GATT provisions or nullification or impairment is made, the panel should make such suggestions as appropriate for dealing with the matter as would assist the CONTRACTING PARTIES in making recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate.

- (vi) Panels would aim to deliver their findings without undue delay, as provided in paragraph 20 of the Understanding. If a complete report cannot be made within the period foreseen in that paragraph, panels would be expected to so advise the Council and the report should be submitted as soon as possible thereafter.
- (vii) Reports of panels should be given prompt consideration by the CONTRACTING PARTIES. Where a decision on the findings contained in a report calls for a ruling or a recommendation by the Council, the Council may allow the contracting party concerned a reasonable specified time to indicate what action it proposes to take with a view to a satisfactory settlement of the matter, before making any recommendation or ruling on the basis of the report.
- (viii) The recommendation or ruling made by the CONTRACTING PARTIES shall be aimed at achieving a satisfactory settlement of the matter in accordance with GATT obligations. In furtherance of the provisions of paragraph 22 of the Understanding the Council shall periodically review the action taken pursuant to such recommendations. The contracting party to which such a recommendation has been addressed, shall report within a reasonable specified period on action taken or on its reasons for not implementing the recommendation or ruling by the CONTRACTING PARTIES. The contracting party bringing the case may also ask the CONTRACTING PARTIES to make suitable efforts with a view to finding an appropriate solution as provided in paragraph 22 of the Understanding.
- (ix) The further action taken by the CONTRACTING PARTIES in the above circumstances might include a recommendation for compensatory adjustment with respect to other products or authorization for the suspension of such concessions or other obligations as foreseen in Article XXIII:2, as the CONTRACTING PARTIES may determine to be appropriate in the circumstances.
- (x) The Parties to a dispute would fully participate in the consideration of the matter by the CONTRACTING PARTIES under paragraph (viii) above, including the consideration of any rulings or recommendations the CONTRACTING PARTIES might make pursuant to Article XXIII:2 of the General Agreement, and their views would be fully recorded. They would likewise participate and have their views recorded in the considerations of the further actions provided for under paragraphs (viii) and (ix) above. The CONTRACTING PARTIES reaffirmed that consensus will continue to be the traditional method of resolving disputes; however, they agreed that obstruction in the process of dispute settlement shall be avoided.¹ It is understood that decisions in this process cannot add to or diminish the rights and obligations provided in the General Agreement.

Footnote 1 to paragraph (x) provides: This does not prejudice the provisions on decision making in the General Agreement.

D. DECISION ON DISPUTE SETTLEMENT OF 30 NOVEMBER 1984 (31S/9)

Formation of panels

1. Contracting parties should indicate to the Director-General the names of persons they think qualified to serve as panelists, who are not presently affiliated with national administrations but who have a high degree of knowledge of international trade and experience of the GATT. These names should be used to develop a short roster of non-governmental panelists to be agreed upon by the CONTRACTING PARTIES in consultation with the Director-General. The roster should be as representative as possible of contracting parties.
2. The Director-General should continue the practice of proposing panels composed preferably of governmental representatives but may also draw as necessary on persons on the approved roster. The parties should retain the ability to respond to the Director-General's proposal, but shall not oppose nominations except for compelling reasons.
3. In the event that panel composition cannot be agreed within thirty days after a matter is referred by the CONTRACTING PARTIES, the Director-General shall, at the request of either party and in consultation with the Chairman of the Council, complete the panel by appointing persons from the roster of non-governmental panelists to resolve the deadlock, after consulting both parties.

Completion of panel work

1. Panels should continue to set their own working procedures and, where possible, panels should provide the parties to the dispute at the outset with a proposed calendar for the panel's work.
2. Where written submissions are requested from the parties, panels should set precise deadlines, and parties to a dispute should respect those deadlines.

E. DECISION OF 12 APRIL 1989 ON IMPROVEMENTS TO THE GATT DISPUTE SETTLEMENT RULES AND PROCEDURES (36S/61)

Following the meetings of the Trade Negotiations Committee at Ministerial level in December 1988 and at the level of high officials in April 1989, the CONTRACTING PARTIES to the General Agreement on Tariffs and Trade

Approve the improvements of the GATT dispute settlement rules and procedures set out below and their application on the basis set out in this Decision:

A. General Provisions

1. Contracting parties recognize that the dispute settlement system of GATT serves to preserve the rights and obligations of contracting parties under the General Agreement and to clarify the existing provisions of the General Agreement. It is a central element in providing security and predictability to the multilateral trading system.

2. Contracting parties agree that all solutions to matters formally raised under the GATT dispute settlement system under Articles XXII, XXIII and arbitration awards shall be consistent with the General Agreement and shall not nullify or impair benefits accruing to any contracting party under the General Agreement, nor impede the attainment of any objective of the General Agreement.

3. Contracting parties agree that the existing rules and procedures of the GATT in the field of dispute settlement shall continue. It is further agreed that the improvements set out below, which aim to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, shall be applied on a trial basis from 1 May 1989 to the end of the Uruguay Round in respect of complaints brought during that period under Article XXII or XXIII; it is also agreed to keep the application of these improvements under review during the remainder of the Round and to decide on their adoption before the end of the Round; to continue negotiations with the aim of further improving and strengthening the GATT dispute settlement system taking into account the experience gained in the application of these improvements.

4. All the points set out in this Decision shall be applied without prejudice to any provision on special and differential treatment for developing contracting parties in the existing instruments on dispute settlement including the CONTRACTING PARTIES' Decision of 5 April 1966 (BISD 14S/18).

B. Notification

Mutually agreed solutions to matters formally raised under GATT Articles XXII and XXIII, as well as arbitration awards within GATT, must be notified to the Council where any contracting party may raise any point relating thereto.

C. Consultations

1. If a request is made under Article XXII:1 or XXIII:1, the contracting party to which the request is made shall, unless otherwise mutually agreed, reply to the request within ten days after its receipt and shall enter into consultations in good faith within a period of no more than thirty days from the date of the request, with a view to reaching a mutually satisfactory solution. If the contracting party does not respond within ten days, or does not enter into consultations within a period of no more than thirty days, or a period otherwise mutually agreed, from the date of the request, then the contracting party that requested the holding of consultations may proceed directly to request the establishment of a panel or a working party.

2. If the consultations under Article XXII:1 or XXIII:1 fail to settle a dispute within sixty days after the request for consultations, the complaining party may request the establishment of a panel or a working party under Article XXIII:2. The complaining party may request a panel or a working party during the sixty-day period if the parties jointly consider that consultations have failed to settle the dispute.

3. Requests for consultations under Article XXII:1 or XXIII:1 shall be notified to the Council by the party which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request.

4. In cases of urgency, including those which concern perishable goods en route, parties shall enter into consultations within a period of no more than ten days from the date of the request. If the consultations have failed to settle the dispute within a period of thirty days after the request, the complaining party may request the establishment of a panel or a working party.

D. Good Offices, Conciliation, Mediation

1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree. They may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once terminated, the complaining party can then proceed with a request for the establishment of a panel or a working party under Article XXIII:2. When good offices, conciliation or mediation are entered into within sixty days of a request for consultations, the complaining party must allow a period of sixty days from the date of the request for consultations before requesting the establishment of a panel or working party. The complaining party may request a panel or a working party during the sixty days if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.

2. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel or working party process proceeds.

3. The Director-General may, acting in an *ex officio* capacity, offer his good offices, conciliation or mediation with the view to assisting contracting parties to settle a dispute.

E. *Arbitration*

1. Expeditious arbitration within GATT as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.

2. Resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all contracting parties sufficiently in advance of the actual commencement of the arbitration process.

3. Other contracting parties may become party to an arbitration proceeding upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award.

F. *Panel and Working Party Procedures*

(a) *Establishment of a Panel or a Working Party*

The request for a panel or a working party shall be made in writing. It shall indicate whether consultations were held, and provide a brief summary of the factual and legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel or a working party with other than standard terms of reference, the written request shall include the proposed text of special terms of reference. If the complaining party so requests, a decision to establish a panel or working party shall be taken at the latest at the Council meeting following that at which the request first appeared as an item on the Council's regular agenda, unless at that meeting the Council decides otherwise.*

(b) *Standard Terms of Reference*

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within twenty days from the establishment of the panel:

"To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by (name of contracting party) in document L/... 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".

2. In establishing a panel, the Council may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties subject to the provisions of the preceding paragraph. The terms of reference thus drawn up shall be circulated to all contracting parties. If other than standard terms of reference are agreed upon, any contracting party may raise any point relating thereto in the Council.

(c) *Composition of Panels*

1. Contracting parties shall undertake, as a general rule, to permit their representatives to serve as panel members.

2. Panels shall be composed of well-qualified governmental and/or non-governmental individuals.

3. The roster of non-governmental panelists shall be expanded and improved. To this end, contracting parties may nominate individuals to serve on panels and shall provide relevant information on their nominee's knowledge of international trade and of the GATT.

4. Panels shall be composed of three members unless the parties to the dispute agree, within ten days from the establishment of the panel, to a panel composed of five members.

5. If there is no agreement on the members within twenty days from the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the Council, shall form the panel by appointing the panelists whom he considers most appropriate, after consulting both parties. The Director-General shall inform the contracting parties of the composition of the panel thus formed no later than ten days from the date he receives such a request.

(d) *Procedures for Multiple Complainants*

1. Where more than one contracting party requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all parties concerned. A single panel should be established to examine such complaints whenever feasible.

2. The single panel will organize its examination and present its findings to the Council so that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel will submit separate reports on the dispute concerned. The written submissions by each of the complainants will be made available to the other complainants, and each complainant will have the right to be present when one of the other complainants presents its view to the panel.

3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

(e) *Third Contracting Parties*

1. The interests of the parties to a dispute and those of other contracting parties shall be fully taken into account during the panel process.

2. Any third contracting party having a substantial interest in a matter before a panel, and having notified this to the Council, shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

3. At the request of the third contracting party, the panel may grant the third contracting party access to the written submissions to the panel by those parties to the dispute which have agreed to the disclosure of their respective submission to the third contracting party.

(f) *Time Devoted to Various Phases of a Panel*

1. Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.

2. Panels shall follow the Suggested Working Procedures found in the July 1985 note of the Office of Legal Affairs unless the members of the panel agree otherwise after consulting the parties to the dispute. After consulting the parties, the panel members shall, as soon as practicable and whenever possible within one week after the composition and terms of reference of the panel have been agreed upon, fix the timetable for the panel process at least until its first substantive meeting.

3. In determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions.

4. Each party to the dispute shall deposit its written submissions with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute. The complaining party shall submit its first submission in advance of the responding party's first submission unless the panel decides, in fixing the timetable referred to in the second paragraph of this section and after consultations with the parties to the dispute, that the parties should submit their first submissions simultaneously. When there are sequential arrangements for the deposit of first submissions, the panel shall establish a firm time period for receipt of the responding party's submission. Any subsequent written submissions shall be submitted simultaneously.

5. In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the time the composition and terms of reference of the panel have been agreed upon to the time when the final report is provided to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to provide its report to the parties within three months.

6. When the panel considers that it cannot provide its report within six months, or within three months in cases of urgency, it shall inform the Council in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case should the period from the establishment of the panel to the submission of the report to the contracting parties exceed nine months.

7. In the context of consultations involving a measure taken by a developing contracting party, the parties may agree to extend the periods established in paragraphs 2 and 4 of Section C. If, after the relevant period has elapsed, the parties cannot agree that the consultations have concluded, the Chairman of the Council shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing contracting party, the panel shall accord sufficient time for the developing contracting party to prepare and present its argumentation. The provisions of paragraph 4 of Section G are not affected by any action pursuant to this paragraph.

G. *Adoption of Panel Reports*

1. In order to provide sufficient time for the members of the Council to consider panel reports, the reports shall not be considered for adoption by the Council until thirty days after they have been issued to the contracting parties.

2. Contracting parties having objections to panel reports shall give written reasons to explain their objections for circulation at least ten days prior to the Council meeting at which the panel report will be considered.

3. The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the Council, and their views shall be fully recorded. The practice of adopting panel reports by consensus shall be continued, without prejudice to the GATT provisions on decision-making which remain applicable. However, the delaying of the process of dispute settlement shall be avoided.

4. The period from the request under Article XXII:1 or Article XXIII:1 until the Council takes a decision on the panel report shall not, unless agreed to by the parties, exceed fifteen months. The provisions of this paragraph shall not affect the provisions of paragraph 6 of Section F(f).

H. *Technical Assistance*

1. While the Secretariat assists contracting parties in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing contracting parties. To this end, the Secretariat shall make available a qualified legal expert within the Technical Co-operation Division to any developing contracting party which so requests. This expert shall assist the developing contracting party in a manner ensuring the continued impartiality of the Secretariat.

2. The Secretariat shall conduct special training courses for interested contracting parties concerning GATT dispute settlement procedures and practices so as to enable contracting parties' experts to be better informed in this regard.

I. *Surveillance of Implementation of Recommendations and Rulings*

1. Prompt compliance with recommendations or rulings of the CONTRACTING PARTIES under Article XXIII is essential in order to ensure effective resolution of disputes to the benefit of all contracting parties.

2. The contracting party concerned shall inform the Council of its intentions in respect of implementation of the recommendations or rulings. If it is impracticable to comply immediately with the recommendations or rulings, the contracting party concerned shall have a reasonable period of time in which to do so.

3. The Council shall monitor the implementation of recommendations or rulings adopted under Article XXIII:2. The issue of implementation of the recommendations or rulings may be raised at the Council by any contracting party at any time following their adoption. Unless the Council decides otherwise, the issue of implementation of the recommendations or rulings shall be on the agenda of the Council meeting after six months following their adoption and shall remain on the Council's agenda until the issue is resolved. At least ten days prior to each such Council meeting, the contracting party concerned shall provide the Council with a status report in writing of its progress in the implementation of the panel recommendations or rulings.

4. In cases brought by developing contracting parties, the Council shall consider what further action it might take which would be appropriate to the circumstances, in conformity with paragraphs 21 and 23 of the 1979 Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance (BISD 26S/214).

The footnote to paragraph F(a) provides: References to the Council, made in this paragraph as well as in the following paragraphs, are without prejudice to the competence of the CONTRACTING PARTIES, for which the Council is empowered to act in accordance with normal GATT practice (BISD 26S/215).

F. DECISION OF 22 FEBRUARY 1994 ON EXTENSION OF THE APRIL 1989 DECISION ON IMPROVEMENTS TO THE GATT DISPUTE SETTLEMENT RULES AND PROCEDURES (L/7416)

The CONTRACTING PARTIES,

Recalling their Decision of 12 April 1989 (BISD 36S/61),

Noting that the improvements to the GATT dispute settlement rules and procedures are being applied on a trial basis until the end of the Uruguay Round and that a decision on their adoption should be taken before the end of the Round,

Considering that the continuation of the improved rules and procedures is necessary for the effectiveness of the dispute settlement mechanism,

Decide,

To keep the above-mentioned improvements in effect until the entry into force of the Understanding on Rules and Procedures Governing the Settlement of Disputes contained in Annex 2 of the Agreement Establishing the World Trade Organization (MTN/FA, II).

NOTE: The April 1989 Decision was not extended before the WTO Agreement entered into force on 1 January 1995, and therefore expired as of that date.

G. DECISION OF 5 APRIL 1966 ON PROCEDURES UNDER ARTICLE XXIII (14S/18)

The CONTRACTING PARTIES,

Recognizing that the prompt settlement of situations in which a contracting party considers that any benefits accruing to it directly or indirectly from the General Agreement are being impaired by measures taken by another contracting party, is essential to the effective functioning of the General Agreement and the maintenance of a proper balance between the rights and obligations of all contracting parties;

Recognizing further that the existence of such a situation can cause severe damage to the trade and economic development of the less-developed contracting parties; and

Affirming their resolve to facilitate the solution of such situations while taking fully into account the need for safeguarding both the present and potential trade of less-developed contracting parties affected by such measures;

Decide that:

1. If consultations between a less-developed contracting party and a developed contracting party in regard to any matter falling under paragraph 1 of Article XXIII do not lead to a satisfactory settlement, the less-developed contracting party complaining of the measures may refer the matter which is the subject of consultations to the Director-General so that, acting in an *ex officio* capacity, he may use his good offices with a view to facilitating a solution.
 2. To this effect the contracting parties concerned shall, at the request of the Director-General, promptly furnish all relevant information.
 3. On receipt of this information, the Director-General shall consult with the contracting parties concerned and with such other contracting parties or inter-governmental organizations as he considers appropriate with a view to promoting a mutually acceptable solution.
 4. After a period of two months from the commencement of the consultations referred to in paragraph 3 above, if no mutually satisfactory solution has been reached, the Director-General shall, at the request of one of the contracting parties concerned, bring the matter to the attention of the CONTRACTING PARTIES or the Council, to whom he shall submit a report on the action taken by him, together with all background information.
 5. Upon receipt of the report, the CONTRACTING PARTIES or the Council shall forthwith appoint a panel of experts to examine the matter with a view to recommending appropriate solution. The members of the panel shall act on a personal capacity and shall be appointed in consultation with, and with the approval of, the contracting parties concerned.
 6. In conducting its examination and having before it all the background information, the panel shall take due account of all the circumstances and considerations relating to the application of the measures complained of, and their impact on the trade and economic development of affected contracting parties.
 7. The panel shall, within a period of sixty days from the date the matter was referred to it, submit its findings and recommendations to the CONTRACTING PARTIES or to the Council, for consideration and decision. Where the matter is referred to the Council, it may, in accordance with Rule 8 of the Intersessional Procedures adopted by the CONTRACTING PARTIES at their thirteenth session¹, address its recommendations directly to the interested contracting parties and concurrently report to the CONTRACTING PARTIES.
 8. Within a period of ninety days from the date of the decision of the CONTRACTING PARTIES, or the Council, the contracting party to which a recommendation is directed shall report to the CONTRACTING PARTIES or the Council on the action taken by it in pursuance of the decision.
 9. If on examination of this report it is found that a contracting party to which a recommendation has been directed has not complied in full with the relevant recommendation of the CONTRACTING PARTIES or the Council, and that any benefit accruing directly or indirectly under the General Agreement continues in consequence to be nullified or impaired, and that the circumstances are serious enough to justify such action, the CONTRACTING PARTIES may authorize the affected contracting party or parties to suspend, in regard to the contracting party causing the damage, application of any concession or any other obligation under the General Agreement whose suspension is considered warranted, taking account of the circumstances.
 10. In the event that a recommendation to a developed country by the CONTRACTING PARTIES is not applied within the time-limit prescribed in paragraph 8, the CONTRACTING PARTIES shall consider what measures, further to those undertaken under paragraph 9, should be taken to resolve the matter.
 11. If consultations, held under paragraph 2 of Article XXXVII, relate to restrictions for which there is no authority under any provisions to the General Agreement, any of the parties to the consultations may, in the absence of a satisfactory solution, request that consultations be carried out by the CONTRACTING PARTIES pursuant to paragraph 2 of Article XXIII and in accordance with the procedures set out in the present decision, it being understood that a consultation held under paragraph 2 of Article XXXVII in respect of such restrictions will be considered by the CONTRACTING PARTIES as fulfilling the conditions of paragraph 1 of Article XXIII if the parties to the consultations so agree.
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¹TS/7.

II. INTERPRETATION AND APPLICATION OF ARTICLE XXIII

A. SCOPE AND APPLICATION OF ARTICLE XXIII

The provisions of Article XXIII are essentially the same as those agreed in Geneva in 1947. However, these provisions have been supplemented by a number of decisions and understandings agreed by the CONTRACTING PARTIES, the texts of which are provided above:

- the “Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance” of 28 November 1979 and its annexed “Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement” (referred to below as the “1979 Understanding” and its “Annex on customary practice”), which were agreed in the Tokyo Round.² Paragraph 7 of the 1979 Understanding provides, *inter alia*, “that the customary practice of the GATT in the field of dispute settlement, described in the Annex, should be continued in the future with the improvements set out below”;
- the Decision on “Dispute Settlement Procedures” of 29 November 1982 (“1982 Decision”), adopted at the Thirty-eighth Session which was held at Ministerial level in November 1982;³
- the Decision on “Dispute Settlement Procedures” of 30 November 1984 (“1984 Decision”), adopted at the Fortieth Session;⁴
- the Decision on “Improvements to the GATT Dispute Settlement Rules and Procedures” (“1989 Improvements”), negotiated at the December 1988 Meeting of the Trade Negotiations Committee of the Uruguay Round and adopted on 12 April 1989; and
- the Decision of 5 April 1966 on “Procedures under Article XXIII” (“1966 Procedures”) applying to disputes between a developing contracting party and a developed contracting party;
- The Understanding on Rules and Procedures Governing the Settlement of Disputes (“Dispute Settlement Understanding”), agreed in the Uruguay Round, and included as Annex 2 of the WTO Agreement.

On 22 February 1994 the CONTRACTING PARTIES decided to keep the 1989 Improvements in effect until the entry into force of WTO Agreement. The 1989 Improvements were not extended before the WTO Agreement entered into force on 1 January 1995, and have expired.

This chapter cites decisions, examples and precedents with regard to dispute settlement practice under the General Agreement and the Tokyo Round Agreements, but does not discuss the Dispute Settlement Understanding.

1. Scope of Article XXIII

See also the material below in Section B under “Scope of panel proceeding”.

(1) Matters not within the competence of the GATT

The Report of the Panel on “Canada - Administration of the Foreign Investment Review Act” notes that in discussion of the request by the United States for a panel in this case, “At the Council meeting, a number of delegations expressed doubts whether the dispute between the United States and Canada was one for which the GATT had competence since it involved investment legislation, a subject not covered by the GATT. ... The representative of the United States said that his government was not calling into question the Canadian investment legislation as such but was complaining about the two specific trade-related issues mentioned in the terms of reference. The representative of Canada said that ... the terms of reference ensured that the examination would touch only on trade matters within the purview of GATT. The Chairman suggested, and the Council so decided,

²L/4907, adopted on 28 November 1979, 26S/210.

³L/5424, adopted on 29 November 1982, 29S/9, 13-16.

⁴L/5752, adopted on 30 November 1984, 31S/9-10.

that the terms of reference remain as they stood, and that the reservations and statements made be placed on the record and that it be presumed that the panel would be limited in its activities and findings to within the four corners of GATT”.⁵ The Panel findings note that “In view of the fact that the General Agreement does not prevent Canada from exercising its sovereign right to regulate foreign direct investments, the Panel examined the purchase and export undertakings by investors subject to the Foreign Investment Review Act of Canada solely in the light of Canada’s trade obligations under the General Agreement”.⁶

See also the material below at page 730 on the related but separate issue of interpretation of the standard provision in terms of reference concerning panel examination of matters “in the light of the relevant GATT provisions”.

(2) *Disputes involving countries or territories which are not contracting parties*

A Secretariat Note describing GATT practice relating to *de facto* application of the General Agreement notes as follows:

“The CONTRACTING PARTIES do not assist in the resolution of disputes on the interpretation or application of the General Agreement that might arise between contracting parties and countries applying the General Agreement on a *de facto* basis. Article XXIII:2 is not applied to such disputes (cf. VAL/M/8, page 2, for a legal opinion on this issue by the Secretariat).⁷”

The Minutes referred to, of the November 1983 meeting of the Committee on Customs Valuation, note:

“Responding to a query regarding the significance of the reference to GATT Article XXIII in Article 20.11 of the Code, the Director of the Office of Legal Affairs said that this Article stipulated that Parties should use the dispute settlement procedures under the Agreement before availing themselves of any rights which they had under the GATT. It was thus recognized in the provision that there might not be invocable rights under the GATT; this would apply in the case of a dispute involving a country which, like Botswana, was neither a GATT contracting party nor had provisionally acceded to the GATT”.⁸

At its March 1992 meeting, the Council agreed to the request of Yugoslavia for establishment of a panel on “EEC - Trade Measures for Non-economic Reasons”.⁹ At the April 1992 Council meeting, in discussion of the notification of the transformation of the Socialist Federal Republic of Yugoslavia into the Federal Republic of Yugoslavia consisting of the Republics of Serbia and Montenegro, the EC representative said that until the question of succession to Yugoslavia’s contracting party status had been resolved, the Panel process which had been initiated between the former SFRY and the EC no longer had any foundation and could not proceed.¹⁰ See also the material on the status of Yugoslavia under Articles XXV and XXXII.

On the other hand, disputes have been brought by contracting parties on behalf of territories for which they had international responsibility at the time, and in respect of which they had agreed to apply provisionally the General Agreement under the Protocol of Provisional Application: for instance, the disputes on “Norway - Restrictions on Imports of Certain Textile Products” and “EEC - Quantitative Restrictions against Imports of Certain Products from Hong Kong”, which were brought by the United Kingdom on behalf of Hong Kong, and the dispute on “United States - Import Restrictions on Tuna” which was brought by the Netherlands on behalf of the Netherlands Antilles.¹¹

See also the material at page 719 on bilateral agreements and the material under Article XXV on competence of the CONTRACTING PARTIES.

⁵L/5504, adopted on 7 February 1984, 30S/140, 141, para. 1.4, referring to C/M/162, p. 25-26.

⁶*Ibid.*, 30S/157, para. 5.1.

⁷C/130, p. 4.

⁸VAL/M/8, p. 2, para. 8.

⁹DS27/2; C/M/255, p. 14-18.

¹⁰C/M/256, p. 32.

¹¹L/4959, adopted on 18 June 1980, 27S/119; L/5511, adopted on 12 July 1983, 30S/129; and DS33/1, respectively.

(3) *Discretionary legislation*

The 1957 Report on “The European Economic Community” notes, concerning the EEC Treaty provisions relating to quantitative restrictions, that “the Sub-Group noted that these provisions were not mandatory and imposed on the Members of the Community no obligation to take action which would be inconsistent with the General Agreement. On the other hand because of the very general scope and competence conferred on the institutions of the Community, it could be within their powers to take measures which could be inconsistent with the GATT whatever the interpretation given to the provisions of Article XXIV. The Six pointed out that many contracting parties had permissive legislation of a general character which, if implemented in full, would enable them to impose restrictions in a manner contrary to Article XI. These countries were not, however, required to consult with the CONTRACTING PARTIES about their possible intentions as regards the implementation of such legislation”.¹²

The 1987 Panel Report on “United States - Taxes on Petroleum and Certain Imported Substances” examined excise taxes on imported petroleum and certain imported chemical substances (“Superfund taxes”), which had been enacted as a revenue source for the US “Superfund” hazardous-waste cleanup program. The tax on certain imported substances, enacted in October 1986, provided that it would not enter into effect until 1 January 1989, and regulations implementing it had not been drafted or put into effect. The Panel Report examined, with respect to the tax on certain imported substances, a requirement that importers supply sufficient information regarding the chemical inputs of taxable substances to enable the tax authorities to determine the amount of tax to be imposed; otherwise a penalty tax would be imposed in the amount of five percent *ad valorem*, or a different rate to be prescribed by the U.S. Secretary of the Treasury which would equal the amount that would be imposed if the substance were produced using the predominant method of production. The Panel noted concerning the penalty rate:

“... the Superfund Act permits the Secretary of the Treasury to prescribe by regulation, in lieu of the 5 per cent rate, a rate which would equal the amount that would be imposed if the substance were produced using the predominant method of production. ... These regulations have not yet been issued. Thus, whether they will eliminate the need to impose the penalty tax and whether they will establish complete equivalence between domestic and imported products, as required by Article III:2, first sentence, remain open questions. From the perspective of the overall objectives of the General Agreement it is regrettable that the Superfund Act explicitly directs the United States tax authorities to impose a tax inconsistent with the national treatment principle but, since the Superfund Act also gives them the possibility to avoid the need to impose that tax by issuing regulations, the existence of the penalty rate provisions as such does not constitute a violation of the United States obligations under the General Agreement. The Panel noted with satisfaction the statement of the United States that, given the tax authorities’ regulatory authority under the Act, ‘in all probability the 5 per cent penalty rate would never be applied’ ...”.¹³

In the 1990 Panel Report on “EEC - Regulation on Imports of Parts and Components” the Panel examined an argument of Japan concerning the anti-circumvention provision in the EEC anti-dumping legislation:

“Japan considers not only the measures taken under the anti-circumvention provision but also the provision itself to be violating the EEC’s obligations under the General Agreement. Japan therefore asked the Panel to recommend to the CONTRACTING PARTIES that they request the EEC not only to revoke the measures taken under the provision but also to withdraw the provision itself. The Panel therefore examined whether the mere existence of the anti-circumvention provision is inconsistent with the General Agreement. The Panel noted that the anti-circumvention provision does not mandate the imposition of duties or other measures by the EEC Commission and Council; it merely authorizes the Commission and the Council to take certain actions. Under the provisions of the General Agreement which Japan claims to have been violated by the EEC contracting parties are to avoid certain measures; but these provisions do not establish the obligation to avoid legislation under which the executive authorities may possibly impose such measures

“In the light of the above the Panel found that the mere existence of the anti-circumvention provision in the EEC’s anti-dumping Regulation is not inconsistent with the EEC’s obligations under the General Agreement. Although it would, from the perspective of the overall objectives of the General

¹²L/778, adopted on 29 November 1957, 6S/70, 80, para.10.

¹³L/6175, adopted on 17 June 1987, 34S/136, 163-164, para. 5.2.9.

Agreement, be desirable if the EEC were to withdraw the anti-circumvention provision, the EEC would meet its obligations under the General Agreement if it were to cease to apply the provision in respect of contracting parties".¹⁴

The 1990 Panel Report on "Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes" examined, *inter alia*, whether excise taxes which could be levied by Thai authorities on foreign cigarettes, as well as the exemption from Thai business and municipal taxes accorded in respect of cigarettes made from domestic leaf, were consistent with Article III. While the ceiling tax rates permitted under law were higher for imported than for domestic cigarettes, and the tax rate applied until 11 July 1990 varied in proportion to foreign tobacco content, the Thai Ministry of Finance had issued a regulation on 11 July 1990 to provide a uniform excise tax rate for all cigarettes. On 18 August 1990 Thailand modified its regulations to exempt all cigarettes from business and municipal taxes.

"... The United States argued that it was not sufficient under Article III for the rates effectively levied to be the same; the maximum rates that could be levied under the legislation also had to be non-discriminatory. The Panel noted that previous panels had found that legislation mandatorily requiring the executive authority to impose internal taxes discriminating against imported products was inconsistent with Article III:2, whether or not an occasion for its actual application had as yet arisen; legislation merely giving the executive the possibility to act inconsistently with Article III:2 could not, by itself, constitute a violation of that provision.¹⁵ The Panel agreed with the above reasoning and found that the possibility that the Tobacco Act might be applied contrary to Article III:2 was not sufficient to make it inconsistent with the General Agreement.¹⁶

"... The Panel observed that the new Thai measure, by eliminating business and municipal taxes on cigarettes, removed the internal taxes imposed on imported cigarettes in excess of those applied to domestic cigarettes. The Panel noted that, as in the case of the excise tax, the Tobacco Act continued to enable the executive authorities to levy the discriminatory taxes. However, the Panel, recalling its findings on the issue of excise taxes, found that the possibility that the Tobacco Act might be applied contrary to Article III:2 was, by itself, not sufficient to make it inconsistent with the General Agreement."¹⁷

The Panel concluded that "The current regulations relating to the excise, business and municipal taxes on cigarettes are consistent with Thailand's obligations under Article III of the General Agreement".¹⁸

The 1991 Panel Report on "United States - Restrictions on Imports of Tuna", which has not been adopted, examined *inter alia* the application in connection with the US Marine Mammal Protection Act (MMPA) of Section 8 of the Fishermen's Protective Act, which provided discretionary authority for the President to order a prohibition of imports of fish products "for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade".

"The Panel recalled that Mexico had also argued that the *possible* extension of import prohibitions to all fish products of Mexico under Section 101(a)(2)(D) of the MMPA and Section 8 of the Fishermen's Protective Act (the Pelly Amendment) was inconsistent with Article XI. The Panel noted that the Pelly Amendment authorised such an embargo, but gave the United States authorities discretion to refrain from taking any trade measures at all. Such an embargo was not now in effect, and might not be imposed by the United States authorities. In the Panel's view, therefore, the question presented to it was whether a statutory provision that authorises but does not require a measure inconsistent with the General Agreement constituted in itself a measure in conflict with the General Agreement.

"The Panel recalled that it had been recognised by the CONTRACTING PARTIES in previous cases that legislation mandatorily requiring the executive authority of a contracting party to act inconsistently with the

¹⁴L/6657, adopted on 16 May 1990, 37S/132, 198-199, para. 5.25-5.26.

¹⁵The footnote to this paragraph refers to the Panel Reports on "EEC - Regulation on Imports of Parts and Components", L/6657, adopted on 16 May 1990, 37S/132, at para. 5.25; and "United States - Taxes on Petroleum and Certain Imported Substances", L/6175, adopted on 17 June 1987, 34S/160, 164.

¹⁶DS10/R, adopted on 7 November 1990, 37S/200, 227, para. 84.

¹⁷*Ibid.*, 37S/227 para. 86.

¹⁸*Ibid.*, 37S/228 para. 88.

General Agreement may be found to be inconsistent with that contracting party's obligations under the General Agreement, whether or not an occasion for its actual application has yet arisen, but on the other hand, legislation merely giving those executive authorities the power to act inconsistently with the General Agreement is not, in itself, inconsistent with the General Agreement.¹⁹ Accordingly, the Panel found that, because the Pelly Amendment did not require trade measures to be taken, this provision as such was not inconsistent with the General Agreement.²⁰

See also in this connection the unadopted 1992 panel report on "United States - Restrictions on Imports of Tuna".²¹

In the 1994 Panel Report on "United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco",

"The Panel first noted that Article VIII:1(a) prohibits the imposition of fees imposed on or in connection with importation which are in excess of the cost of services rendered. In view of the fact that USDA had as yet not amended its inspection fee structure in line with the statutory amendment of Section 1106(c), the main question that arose for the Panel's analysis was whether this section of the 1993 Budget Act mandated action inconsistent with Article VIII or whether it merely gave the U.S. Government the discretion to act inconsistently with Article VIII. In this regard, the Panel recalled that panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge."²²

...

"The Panel considered that if USDA had the discretion to lower its fees for inspection of domestic tobacco to a level *comparable* to the cost of services rendered for inspection of imported tobacco or to otherwise determine that the fees for inspecting imported and domestic tobacco were *comparable*, such action would permit the U.S. Government to avoid inconsistency with Article VIII:1(a).

...

"Considering these various arguments and the evidence of record, the Panel noted that there was no clear interpretation on the meaning of the term 'comparable' as used in the 1993 legislative amendment. It appeared to the Panel that the term 'comparable', including the ordinary meaning thereof, was susceptible of a range of meanings. The Panel considered that this range of meanings could encompass the interpretation advanced by the United States in this proceeding, an interpretation which would potentially enable USDA to comply with the obligation of Article VIII:1(a) not to impose fees in excess of the cost of services rendered, while at the same time meeting the comparability requirement of Section 1106(c) of the 1993 Budget Act. This being the case, and given that the United States had as yet neither changed the fee structure nor promulgated rules implementing Section 1106(c), the Panel found that it was not demonstrated that Section 1106(c) could not be applied in a manner ensuring that the fees charged for inspecting imported tobacco were not in excess of the cost of services rendered".²³

¹⁹The footnote to this sentence refers to the Panel Reports on "United States - Taxes on Petroleum and Certain Imported Substances", L/6175, adopted 17 June 1987, 34S/136, 160, 163-4, paras. 5.2.2, 5.2.9-10; and "EEC - Regulation on Imports of Parts and Components", L/6657, adopted 16 May 1990, 37S/132, paras. 5.25-5.26.

²⁰DS21/R (unadopted), dated 3 September 1991, 39S/155, 196-197, paras. 5.20-5.21; see also parallel finding at 39S/202, para. 5.37.

²¹DS29/R, dated 16 June 1994, para. 5.6.

²²The footnote to this paragraph states: See, e.g., report of the panel on United States - Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/136, 160; report of the panel on EEC - Regulation on Import of Parts and Components, adopted on 16 May 1990, BISD 37S/132, 198-199; report of the panel on Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, adopted on 7 November 1990, BISD 37S/200, 227-228; report of the panel on United States - Measures Affecting Alcoholic and Malt Beverages, adopted on 19 June 1992, BISD 39S/206, 281-282, 289-290; report of the panel on United States - Denial of MFN Treatment as to Non-Rubber Footwear from Brazil, adopted on 19 June 1992, BISD 39S/128, 152.

²³DS44/R, adopted on 4 October 1994, para. 118, 121, 123.

See also the discussion of non-binding “administrative guidance” by the government under the authority of discretionary legislation in the 1988 Panel Report on “Japan - Trade in Semi-conductors”,²⁴ and the conclusion in the Report on “Japan - Restrictions on Imports of Certain Agricultural Products” that “administrative guidance” utilized for the purposes of supply management is a “governmental measure” operating to restrict supply of agricultural products for the purposes of Article XI:2(c).²⁵ See also related material under Articles III and XI.

(4) Measures not yet in effect

The Panel on “United States - Definition of Industry Concerning Wine and Grape Products” examined a dispute concerning 1984 legislation which amended the definition of industry for the purposes of antidumping and countervailing duty investigations of wine and grape products. The Panel was established in February 1985. In September 1985, a preliminary countervailing duty investigation of certain wine imports was instituted in response to a petition by grape growers. On 28 October 1985, the US International Trade Commission (USITC) found that there was no reasonable indication of material injury, threat of material injury or material retardation of establishment, to the US industry as defined in this legislation; the investigation was terminated and no countervailing duty was levied. In November 1985 this determination was appealed in US domestic courts; if the appeal had been successful a court decision could have required resumption of the investigation. The Panel findings note as follows:

“The first question which the Panel considered in the course of its work was the request made by the US delegation that the Panel suspend the proceedings until such time, if any, as a countervailing-duty investigation under the law at issue were resumed. The Panel noted that the decision by the Committee to establish the Panel was taken at a time (i.e. on 15 February 1985) when neither such an investigation had been initiated nor even a complaint had been lodged. The Panel noted that it had been called upon, in its terms of reference, to review the facts of the matter referred to the Committee by the EEC in document SCM/54, and that the issue raised in this document was the conformity of the US law in question (i.e. Section 612(a)(1) of the Trade and Tariff Act of 1984) as such with the provisions of the Code, as required by its Article 19:5(a). The Panel had thus no option but to proceed with its work, as provided for in its terms of reference, irrespective of whether any concrete countervailing duty investigation was under way or whether any countervailing duties based on the above-noted provision were being or had been levied. The Panel was aware of the understanding of the Committee Chairman that it would, in its work, take into account any actual implementation of the legislation in question by the competent authorities of the United States ... The Panel noted in this connection that the USITC in its decision of 28 October 1985 had in fact applied this legislation by stating that in that particular case the US industry was composed of the wineries producing the like product and the grape-growers whose grapes were used in the like product. The Panel therefore proceeded to the examination of the conformity of the law in question with the provisions of the Code”.²⁶

When this Panel Report was adopted on 28 April 1992, the United States representative noted that “in accepting this Panel report, the United States reserved its position of opposition to the Panel’s view that it was ripe for the Panel to consider a matter that did not involve an actual initiation of an action, but rather an abstract question of whether a proceeding, if initiated, would have been consistent with the Subsidies Code”.²⁷

The 1987 Panel Report on “United States - Taxes on Petroleum and Certain Imported Substances” examined excise taxes on imported petroleum and certain imported chemical substances (“Superfund taxes”), which had been enacted as a revenue source for the US “Superfund” hazardous-waste cleanup program. The tax on certain imported substances, enacted in October 1986, provided that it would not enter into effect until 1 January 1989, and regulations implementing it had not been drafted or put into effect.

“The Panel noted that the United States objected to an examination of this tax because it did not go into effect before 1 January 1989, and - having no immediate effect on trade and therefore not causing

²⁴L/6309, adopted on 4 May 1988, 35S/116, 157-158, para. 117. See further under Article XI:1 in this Index.

²⁵L/6253, adopted on 22 March 1988, 35S/163, 242, para. 5.4.1.4.

²⁶SCM/71, adopted on 28 April 1992, 39S/436, 445, para. 4.1.

²⁷SCM/M/59, p. 31.

nullification or impairment - fell outside the framework of Article XXIII. The Panel examined this point and concluded the following.

“... The general prohibition of quantitative restrictions under Article XI ... and the national treatment obligation of Article III ... have essentially the same rationale, namely to protect expectations of the contracting parties as to the competitive relationship between their products and those of the other contracting parties. Both articles are not only to protect current trade but also to create the predictability needed to plan future trade. That objective could not be attained if contracting parties could not challenge existing legislation mandating actions at variance with the General Agreement until the administrative acts implementing it had actually been applied to their trade. Just as the very existence of a regulation providing for a quota, without it restricting particular imports, has been recognized to constitute a violation of Article XI:1, the very existence of mandatory legislation providing for an internal tax, without it being applied to a particular imported product, should be regarded as falling within the scope of Article III:2, first sentence. The Panel noted that the tax on certain imported substances had been enacted, that the legislation was mandatory and that the tax authorities had to apply it after the end of next year and hence within a time frame within which the trade and investment decisions that could be influenced by the tax are taken. The Panel therefore concluded that Canada and the EEC were entitled to an investigation of their claim that this tax did not meet the criteria of Article III:2, first sentence.”²⁸

In June 1992, Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela requested consultations with the EC under Article XXII:1 concerning, *inter alia*, a proposal for a unified import regime for bananas adopted by the EC Commission. The EC responded that “the future common import regime for bananas is presently under preparation ... The present preparatory work can therefore not be considered as a measure under Articles XXII:1 or XXIII:1 of the General Agreement allowing for formal consultations under one of these provisions”.²⁹

See also the discussion below at page 733 of “measures as applied versus measures as such”.

(5) Measures no longer in effect

The Panel on “EEC - Measures on Animal Feed Proteins” was established on 17 September 1976 to examine EEC measures providing for import deposits and purchasing requirements affecting non-fat dry milk and certain animal feed proteins. These measures came into force on 19 March 1976 for imported products and were terminated on 25 October 1976. The Council was informed of the panel composition on 2 March 1977. The Panel Report included a complete examination of the measures and was adopted on 14 March 1978.³⁰

The 1982 Panel Report on “United States - Prohibition of Imports of Tuna and Tuna Products from Canada” examined an embargo imposed by the United States on 31 August 1979. The embargo was lifted effective 4 September 1980, during the Panel’s work. The Report notes as follows:

“... the Panel noted that according to prevailing GATT practice when a bilateral settlement to a dispute had been found, panels had usually confined their reports to a brief description of the case indicating that a solution had been reached.³¹ However, it also noted that in the past, panels had on occasion presented a complete report even if the measure giving rise to the dispute had been disinvoked.³² It furthermore noted that the representative of Canada did not accept that the results obtained bilaterally constituted a satisfactory solution or settlement in terms of paragraph 17 of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, and that he argued that the damage caused by the action which gave rise to the dispute had not been satisfactorily repaired, and that the threat of the United States taking action under Section 205 of the Fishery Conservation and Management Act of 1976

²⁸L/6175, adopted on 17 June 1987, 34S/136, 160, paras. 5.2.1-5.2.2.

²⁹DS32/1 (request), DS32/2 (response).

³⁰L/4599, adopted on 14 March 1978, 25S/49.

³¹The footnote to this sentence refers to the Panel Reports on “Japan - Measures on Imports of Thrown Silk Yarn”, 25S/107; “Japanese Measures on Imports of Leather”, 26S/320; “Japanese Restraints on Imports of Manufactured Tobacco from the United States”, L/5140, 28S/100; “EC - United Kingdom Application of EEC Directives to Imports of Poultry from the United States”, L/5155, 28S/90; “Panel on United States Countervailing Duties”, L/5192, 28S/113.

³²The footnote to this sentence refers to L/4599, the Panel Report on “EEC - Measures on Animal Feed Proteins”, adopted on 14 March 1978, 25S/49.

continued to exist. He therefore requested the Panel to present a substantial report on the case. The Panel noted that the Canadian Embassy, in a diplomatic note to the Department of State of the United States ... indicated that the arrangements concerning fisheries for albacore tuna off the Pacific coasts of Canada and the United States were without prejudice to action brought before the GATT regarding import prohibition on tuna and tuna products. The Panel also noted that the representative of the United States, although expressing serious doubts about the usefulness of establishing a comprehensive report when a conciliation on the dispute had been achieved, nevertheless declared himself willing and ready to provide his full cooperation if the Panel wanted to establish a comprehensive report. The Panel subsequently felt that in this particular case it had to consider itself what type of report it should present to the Council and decided to proceed with its work and establish a complete report".³³

The 1980 Panel Report on "EEC - Restrictions on Imports of Apples from Chile"³⁴ concerned restrictions imposed by the EEC from April through August 1979. The Panel was established on 25 July 1979 in principle; on 6 November 1979 the Council agreed to terms of reference referring to "restrictions which were applied by the EEC on imports of apples from Chile" and the Council was informed of the Panel members on 29 January 1980.

The 1989 Panel Report on "EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile"³⁵ concerned restrictions imposed by the EEC from April through August 1988. The Panel was established on 4 May 1988 and its first meeting was held in October 1988. See below at page 682 concerning Chile's request in this connection for a recommendation of compensation against the EEC.

See also the material below starting at page 738 on changes in the subject matter, and the material starting at page 743 on treatment of the proceedings and the panel report in the event of a settlement.

(6) Acts of private parties

In 1958 the CONTRACTING PARTIES decided to appoint a group of experts "to study and make recommendations with regard to whether, to what extent if at all, and how the CONTRACTING PARTIES should undertake to deal with restrictive business practices in international trade."³⁶ The 1960 Report of the Group of Experts on "Restrictive Business Practices - Arrangements for Consultations" notes that

"... Members agreed that the CONTRACTING PARTIES should now be regarded as an appropriate and competent body to initiate action in this field.

"... the Group agreed to recommend that the CONTRACTING PARTIES should encourage direct consultations between contracting parties with a view to the elimination of the harmful effects of particular restrictive practices".³⁷

The Group was divided on the nature of further measures to be recommended and on the applicability of Article XXIII.

"The majority felt that, as experts on restrictive business practices rather than on the legal aspects of GATT, the Group were not competent to judge whether restrictive business practices were a matter that could be deemed to fall under any specific provisions of GATT - for example, whether the provisions of Article XXIII would be applicable. However, the majority were convinced that, regardless of the question whether Article XXIII could legally be applied, they should recommend to the CONTRACTING PARTIES that they take no action under this Article. Such action would involve the grave risk of retaliatory measures under the provisions of paragraph 2 of that Article, which would be taken on the basis of judgments which

³³L/5198, adopted on 22 February 1982, 29S/91, 106, para. 4.3.

³⁴L/5047, adopted on 10 November 1980, 27S/98.

³⁵L/6491, adopted on 22 June 1989, 36S/93.

³⁶Resolution of 5 November 1958 on "Restrictive Business Practices - Appointment of Group of Experts", 7S/29.

³⁷L/1015, adopted on 2 June 1960, 9S/170, 171, paras. 4-5.

would have to be made without adequate factual information about the restrictive business practice in question ...”³⁸

“... The minority hold the view that [when consultations fail to lead to voluntary settlements] the provisions of paragraph 2 of Article XXIII are applicable. According to the first part of this paragraph the CONTRACTING PARTIES shall, when matters are referred to them, make appropriate recommendations to the contracting parties concerned. While referring to these provisions, the minority advise against the use by the CONTRACTING PARTIES of the authority conferred upon them under the second part of paragraph 2.”³⁹

The Report of the Group of Experts also notes the disagreement within the Group regarding the minority proposal that where bilateral consultations on eliminating harmful effects of particular restrictive business practices failed to reach a mutually satisfactory conclusion, the dispute be referred to a standing group of five experts appointed by the CONTRACTING PARTIES, which would examine the matter, consult with the parties and submit a report to the secretariat on the outcome. The majority stated that

“... The complexities of the subject, and the impossibility of obtaining accurate and complete information on private commercial activities in international trade and of enforcing decisions without adequate powers of investigation and control, precluded the possibility of an effective control agreement which was not based upon [adoption by countries of powers to act against international restrictive business practices, or a supra-national body with broad powers of investigation and control]. Therefore, it was at this stage impracticable to set up any procedures for investigating or passing judgment on individual cases within the framework of GATT. ...

“... Even if sufficient information is available in some cases there are no internationally agreed standards or guidelines upon which judgment could be based. No such standards or guidelines are contained either in the Resolution of the CONTRACTING PARTIES, which is the basis of the work of the present Group, or in the definition of restrictive practices which is proposed by the minority, since neither provides an answer to the question, in what circumstances specific business practices in international trade should be deemed harmful. In making their judgments, experts would therefore have to rely on their personal views ... The majority did not consider that any useful purpose would be served by the intervention of experts in the consultations, and, moreover, could not agree that in present circumstances governments should be obliged to accept such intervention”.

On 18 November 1960 the CONTRACTING PARTIES adopted a Decision on Arrangements for Consultations on Restrictive Business Practices, which did not include provision for participation by a group of experts and which did not refer to Article XXIII.⁴⁰

In the 1984 Panel Report on “Canada - Administration of the Foreign Investment Review Act”, the Panel examined, *inter alia*, written undertakings submitted by foreign investors to the Canadian government concerning the conduct of the business that an investor was proposing to acquire or establish.

“The panel carefully examined the Canadian view that the purchase undertakings should be considered as private contractual obligations of particular foreign investors vis-à-vis the Canadian government. The Panel recognized that investors might have an economic advantage in assuming purchase undertakings, taking into account the other conditions under which the investment was permitted. The Panel felt, however, that even if this was so, private contractual obligations entered into by investors should not adversely affect the rights which contracting parties, including contracting parties not involved in the dispute, possess under Article III:4 of the General Agreement and which they can exercise on behalf of their exporters. This applies in particular to the rights deriving from the national treatment principle, which - as stated in Article III:1 - is aimed at preventing the use of internal measures ‘so as to afford protection to domestic production’.”⁴¹

³⁸*Ibid.*, 9S/172, para. 8.

³⁹*Ibid.*, 9S/177, para. 18.

⁴⁰9S/28.

⁴¹L/5504, adopted on 7 February 1984, 30S/140, 159, para. 5.6.

During discussion in the Council in 1986 concerning the EEC request for a working party under Article XXII:2 on “Japan - Measures Affecting the World Market for Copper Ores and Concentrates”, the representative of Japan stated that “the difficulties which [the EEC] claimed to have encountered resulted from commercial transactions or from legitimate tariff protection. Neither of these two reasons warranted the invocation of GATT’s dispute settlement mechanism ... The sale prices of refined copper and the purchase prices of copper concentrates were decided on a strictly commercial basis in business negotiations between private, independent parties. Such negotiations, whatever their consequences, were alien to GATT, which was an intergovernmental legal framework”.⁴² The 1988 Good Offices Report of the Personal Representative of the Director-General on the dispute between the EC and Japan concerning certain pricing and trading practices for copper in Japan notes that

“... The EC has maintained that their copper smelting and refining industry has suffered from serious difficulties in obtaining adequate supplies of copper concentrates on acceptable terms. These difficulties were seen as stemming from market distortions resulting from the Japanese smelters often offering higher prices for concentrates than what the EC smelters believe ‘normal market conditions’ justify, thus enabling them to obtain inequitably large shares of concentrates. The EC smelters and refiners have alleged that the high internal price of refined copper in Japan, which made it possible for Japanese smelters to offer such high prices for concentrates, is a result of ‘questionable practices’, including high Japanese tariffs on imports of refined copper, concealed import restrictions, possibly hidden subsidies, and a price cartel operated by the Japanese producers. The Japanese authorities have insisted that the Japanese import duties are consistent with their GATT obligations, that there are no hidden restrictions on imports, that there is no producers’ cartel in Japan, and that the purchasing terms for copper concentrate are a purely commercial matter and so are completely outside the purview of the GATT.

“From the evidence submitted I reach the following conclusions:

“... Japan has not violated any of its GATT obligations. Nor was any evidence presented of the existence of a producers’ cartel in Japan. Although certain kinds of government assistance (research funds, aid for stockpiling, unemployment aids etc.) have been extended in both Japan and the EEC, these do not appear to be of the sorts or amounts that have had any significant impact on the competitive position of the industry in either Japan or the EEC.”⁴³

The Personal Representative also noted that a major element in creating the situation was the Japanese tariff on cathodes and wire bar, and rendered the advisory opinion that the parties resolve the dispute by entering into reciprocal and mutually advantageous negotiations with a view to reduction or elimination of this tariff on an m.f.n. basis, in the context of the Uruguay Round.⁴⁴

In the panel proceeding on “Japan - Trade in Semi-conductors”, “Japan contended that there were no governmental measures limiting the right of Japanese producers and exporters to export semi-conductors at any price they wished ... Exports were limited by private enterprises in their own self-interest and such private action was outside the scope of Article XI:1.”⁴⁵ The Panel found that “... an administrative structure had been created by the Government of Japan which operated to exert maximum possible pressure on the private sector to cease exporting at prices below company-specific costs ... the Panel considered that the complex of measures exhibited the rationale as well as the essential elements of a formal system of export control”.⁴⁶

See also the discussion of whether measures were “governmental” measures under Article XI:2(c) in the 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” and the 1989 Panel Reports on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile” and “EEC - Restrictions on Imports of Apples - Complaint by the United States”.⁴⁷ See also the 1960 Panel Report on “Review Pursuant to

⁴²C/M/198, p. 5-6.

⁴³L/6456, Note by the Director-General dated 31 January 1989, including Report dated 16 December 1988, 36S/199, 200-201, paras. 1 and 4.

⁴⁴*Ibid.*, 36S/201-202, para. 5.

⁴⁵L/6309, adopted on 4 May 1988, 35S/116, 153, para. 102.

⁴⁶*Ibid.*, 35S/157-158, para. 117. See further under Article XI.

⁴⁷L/6491 and L/6513, both adopted on 22 June 1989, 36S/93 and 36S/135, at 36S/126-127 and 36S/161-162, paras. 12.8-12.9 and 5.8-

Article XVI:5” which, examining the question of whether subsidies financed by a non-governmental levy were notifiable under Article XVI, expressed the view that “The GATT does not concern itself with such action by private persons acting independently of their governments except insofar as it allows importing countries to take action under other provisions of the Agreement. ... the question ... depends upon the source of the funds and the extent of government action, if any, in their collection. Therefore, rather than attempt to formulate a precisely worded recommendation designed to cover all contingencies, the Panel feels that the CONTRACTING PARTIES should ask governments to notify all levy/subsidy schemes affecting imports or exports which are dependent for their enforcement on some form of government action”.⁴⁸

See also the material below on “benefits under the General Agreement” and the material on “any other situation” starting at page 668.

(7) *Applicability of Article XXIII procedures to requests for rulings*

During the Second Session, in discussion of a request by Pakistan for a ruling on the applicability of Article I to rebates of internal taxes in connection with exports, the Chairman stated that the Article XXIII requirements of written representations and consultations did not apply when a delegate was asking only for a ruling on a general point of law and was not submitting the concrete dispute itself.⁴⁹

2. Paragraph 1

(1) *“any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired”*

The 1962 Panel Report on “Uruguayan Recourse to Article XXIII” notes that

“... The Panel thought it essential to have a clear idea as to what would constitute a nullification or impairment. In its view impairment and nullification in the sense of Article XXIII does not arise merely because of the existence of any measures; the nullification or impairment must relate to benefits accruing to the contracting party ‘under the General Agreement’”.⁵⁰

See also the material below at page 730 on the interpretation of the phrase “the relevant GATT provisions” used in terms of reference for panels.

(a) *“obligations under this Agreement” and positions taken in trade negotiations*

In the panel proceeding on “Japan - Restrictions on Imports of Certain Agricultural Products” the terms of reference indicated that “in examining the matter, the Panel may take into account all pertinent elements”. The Panel thus considered the Council minutes as well as Japan’s arguments regarding the practices of other countries, the status of the multilateral negotiations and the special characteristics of Japanese agriculture.

“The Panel ... noted that a modification of Article XI:2 has been proposed in the Uruguay Round and that in the Ministerial Declaration of 1986 participants in the Uruguay Round had undertaken the commitment to phase out or bring into conformity all trade restrictive or distorting measures inconsistent with the provisions of the General Agreement or instruments negotiated within the framework of GATT. The Panel noted that it was generally understood that neither this commitment nor the possible modification of provisions of the General Agreement in the course of the negotiations curtailed the rights and obligations of contracting parties under Article XXIII of the General Agreement.

“The Panel recalled that the purpose of GATT panels is to assist the CONTRACTING PARTIES in taking a decision under Article XXIII:2 and that according to the Ministerial Declaration of 1982, ‘it is understood that decisions [in the dispute settlement process] cannot add or diminish the rights or obligations provided in the General Agreement’. What was pertinent, therefore, in a panel’s conclusions were findings regarding

5.9 respectively.

⁴⁸L/1160, adopted on 24 May 1960, BISD 9S/188, 192, para. 12.

⁴⁹GATT/CP.2/SR.11, p. 4.

⁵⁰L/1923, adopted on 16 November 1962, 11S/95, 99, para. 14.

the conformity of the measures with the General Agreement, and their effects on the benefits accruing from the General Agreement. These benefits arose, in part, from the obligations assumed by Japan under the General Agreement. Consequently, the Panel found that Japan's actions could be judged only against its obligations under the General Agreement and not against the practices of others, nor did the Panel consider it appropriate to prejudge the outcome of the negotiations."⁵¹

The 1989 Panel report on "EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile" notes that in this proceeding, Chile argued that the EEC restrictions in question were inconsistent with the standstill commitment in the Punta del Este Declaration.

"The Panel regarded the Standstill Commitment of the Punta del Este Declaration as outside its mandate. The Punta del Este Declaration contained commitments in the context of a plan for continuing negotiations whose outcome was yet to be decided. The Punta del Este Standstill commitments had their own special forum - the Surveillance Body established by the Committee on Trade Negotiations - to which any complaint concerning them should be taken. These commitments could therefore not be considered to be obligations within the meaning of Article XXIII:1(a)."⁵²

(2) "or that the attainment of any objective of the Agreement is being impeded"

Although the text of Article XXIII:1 dates from the 30 October 1947 text of the General Agreement, and was largely identical to Article 89 of the Geneva Draft Charter, Article 89 referred to "Members" of the ITO, benefits under the Charter, and attainment of the objectives in Article 1 of the Charter.

References to "the objectives of this Agreement" appear in Articles XV:7(a), XVI:2, XVI:5, XVIII:1, XXIII:1, XVIII:2, XXV:1, XXVIIIbis:1, XXXVI:1(a), XXXVII:2(b)(iii), and the Notes *Ad* Articles XXIV:11 and XXXVI:1. The Preamble to the General Agreement also refers to "these objectives". At the 1954-55 Review Session, it was agreed to incorporate the Preamble, with some additions, into the text of the General Agreement as a new Article I in Part I entitled "Objectives". For the text of this proposed Article I, see the material on the Preamble at pages 21-22. However, the instrument which would have effected this amendment was the Protocol Amending Part I and Articles XXIX and XXX, which did not enter into force, due to lack of the requisite unanimous approval, and was abandoned; as a result the amended Article I did not go into effect.⁵³

The 1979 Panel Report on "European Communities - Refunds on Exports of Sugar" dealt, *inter alia*, with the claim by Australia that the EC system of sugar export subsidies "had impeded the attainment of the objectives of the General Agreement."⁵⁴ The Panel did not consider this question since "no detailed submission had been made as to exactly ... which objective of the General Agreement had been impeded."⁵⁵

In a complaint against Japan in 1983, the European Community, basing its request on Article XXIII:1(c), requested establishment of a working party under Article XXIII:2, on the basis that "benefits of successive GATT negotiations with Japan have not been realized owing to a series of factors peculiar to the Japanese economy which have resulted in a lower level of imports, especially of manufactured products, as compared with other industrial countries. ... The European Community is of the view that the present situation constitutes a nullification or impairment by Japan, of the benefits otherwise accruing to the European Community under the GATT, and an impediment to the attainment of GATT's objectives. In particular the general GATT objective of 'reciprocal and mutually advantageous arrangements' has not been achieved."⁵⁶ In discussion of this complaint in the Council, one delegation commented that "the EEC had not based its case on particular provisions of the General Agreement but instead referred to one of its objectives. This was unprecedented ... problems and precedents could arise if such loose terms for a working party were accepted. He therefore urged extreme caution, and reiterated that while not opposing the setting up of a working party he would first like to know from

⁵¹L/6253, adopted on 22 March 1988, 35S/163, 241, paras. 5.4.1.2-5.4.1.3.

⁵²L/6491, adopted on 22 June 1989, 36S/93, 134, para. 12.33.

⁵³See 15S/65, decision to abandon the Protocol; see the Note *Ad* Article XXXVI:1.

⁵⁴L/4833, adopted on 6 November 1979, 26S/290, 291, para. 2.1 (e).

⁵⁵*Ibid.*, 26S/319, para. V(i).

⁵⁶L/5479.

the EEC what specific measures and policies it was asking to be examined".⁵⁷ The complaint was ultimately not pursued.

In a complaint concerning "EEC - Operation of Beef and Veal Régime" in 1984, Australia claimed that "the operation of the Community's beef and veal régime had nullified and impaired Australia's benefits under the General Agreement and had also impeded the attainment of the objectives of the GATT as envisaged in Article XXIII:1(b)".⁵⁸ The complaint was not pursued.

(3) Paragraph 1(a): "as the result of the failure of another contracting party to carry out its obligations under this Agreement"

(a) *Prima facie* nullification or impairment

The 1962 Panel Report on "Uruguayan Recourse to Article XXIII" notes that

"... In cases where there is a clear infringement of the provisions of the General Agreement, or in other words, where measures are applied in conflict with the provisions of GATT and are not permitted under the terms of the relevant protocol under which the GATT is applied by the contracting party, the action would, *prima facie*, constitute a case of nullification or impairment and would *ipso facto* require consideration of whether the circumstances are serious enough to justify the authorization of suspension of concessions or obligations".⁵⁹

This statement concerning "prima facie nullification or impairment", or the following statement from the 1979 Understanding, has been referred to in many subsequent panel reports as established GATT practice.⁶⁰ The Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement annexed to the 1979 Understanding provides as follows:

"In practice, contracting parties have had recourse to Article XXIII only when in their view a benefit accruing to them under the General Agreement was being nullified or impaired. In cases where there is an infringement of the obligations assumed under the General Agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. A *prima facie* case of nullification or impairment would *ipso facto* require consideration of whether the circumstances are serious enough to justify the authorization of suspension of concessions or obligations, if the contracting party bringing the complaint so requests. This means that there is normally a presumption that a breach of the rules has an adverse impact on other contracting parties, and in such cases, it is up to the contracting parties against whom the complaint has been brought to rebut the charge".⁶¹

(b) *Relevance of trade effects*

The 1984 "Panel on Japanese Measures on Imports of Leather" found that restrictions on imports of leather constituted a *prima facie* case of nullification or impairment:

"The Panel noted that its terms of reference explicitly required it 'to make findings on the question of nullification or impairment'. It noted that since a *prima facie* case had been established, according to established GATT practice it was up to Japan to rebut the presumption that nullification or impairment had actually occurred.

⁵⁷C/M/167, p. 9-10.

⁵⁸C/M/183, p. 68, L/5715.

⁵⁹L/1923, adopted on 16 November 1962, 11S/95, 99-100, para. 15.

⁶⁰See, e.g., Panel Reports on "EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables", 25S/106, para. 4.20; "EEC - Restrictions on Imports of Apples from Chile", L/5047, adopted on 10 November 1980, 27S/98, 117, para. 4.24; "Japanese Measures on Imports of Leather", L/5623, adopted on 15/16 May 1984, 31S/94, 111, para. 47; "Japan - Trade in Semi-Conductors", L/6309, adopted on 4 May 1988, 35S/116, 161, para. 130.

⁶¹26S/216, para.5.

“Against this background the Panel considered Japan’s argument that the existence of the quotas themselves did not necessarily mean that nullification or impairment of benefits accruing to the United States had actually been caused, but that this depended solely upon whether or not the allocation system and its implementation functioned so as to hinder United States’ trade. ...

“... the Panel could not escape the conclusion that the import restrictions were maintained in order to restrict imports ...

“In any event, the Panel wished to stress that the existence of a quantitative restriction should be presumed to cause nullification or impairment not only because of any effect it had had on the volume of trade but also for other reasons e.g., it would lead to increased transaction costs and would create uncertainties which could affect investment plans.

“The Panel therefore found that the arguments advanced by Japan were not sufficient to rebut the presumption that the quantitative restrictions on imports of leather had nullified or impaired benefits accruing to the United States under Article XI of the General Agreement”.⁶²

The 1987 Panel Report on “United States - Taxes on Petroleum and Certain Imported Substances” examined (*inter alia*) an excise tax levied on imported petroleum at a higher rate than on the like domestic product, which the Panel found was inconsistent with US obligations under Article III:2, first sentence. The major contention of the United States was that the tax differential was so small that its trade effects were minimal or nil and that the tax differential did not nullify or impair benefits accruing to the applicant parties Canada, Mexico and the EEC under the General Agreement. The Panel considered that “The question raised by the case before the Panel is whether the presumption that a measure inconsistent with the General Agreement causes a nullification or impairment of benefits accruing under that Agreement is an absolute or a rebuttable presumption and, if rebuttable, whether a demonstration that a measure inconsistent with Article III:2, first sentence, has no or insignificant effects on trade is a sufficient rebuttal”.⁶³ The Panel Report notes as follows:

“... the practice of the CONTRACTING PARTIES is to make recommendations or rulings on measures found to be inconsistent with the General Agreement independent of the impact of such measures

[Citing paragraph 5 of the Annex to the 1979 Understanding:] “Thus, the 1979 Understanding does not refer to the adverse impact of a measure, and the possibility of a rebuttal, in connection with the power of the CONTRACTING PARTIES to make recommendations or give rulings on measures inconsistent with the General Agreement; it does so only in connection with the authorization of compensatory action. This, in the view of the Panel, supports the conclusion that the impact of a measure inconsistent with the General Agreement is not relevant for a determination of nullification or impairment by the CONTRACTING PARTIES.

“The Panel examined how the CONTRACTING PARTIES have reacted in previous cases to claims that a measure inconsistent with the General Agreement had no adverse impact and therefore did not nullify or impair benefits accruing under the General Agreement to the contracting party that had brought the complaint. The Panel noted such claims had been made in a number of cases but that there was no case in the history of the GATT in which a contracting party had successfully rebutted the presumption that a measure infringing obligations causes nullification and impairment ... ”.⁶⁴

⁶²L/5623, adopted on 15/16 May 1984, 31S/94, 112-113, paras. 47-48, 53, 55-56.

⁶³L/6175, adopted on 17 June 1987, 34S/136, 155, para. 5.1.3.

⁶⁴*Ibid.*, 34S/156-157, paras. 5.1.4-5.1.6.

After reviewing some other cases,⁶⁵

“The Panel concluded from its review of the above and other cases that, while the CONTRACTING PARTIES had not explicitly decided whether the presumption that illegal measures cause nullification or impairment could be rebutted, the presumption had in practice operated as an irrefutable presumption”.⁶⁶

(4) Paragraph 1(b): “as the result of the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement”

(a) Definition of “non-violation nullification or impairment”: “reasonable expectations” and “upsetting the competitive relationship”

The first case in which “non-violation nullification or impairment”⁶⁷ was examined in the GATT was the complaint on “Cuban Import Restrictions on Textiles”, where the US delegate stated that “whether or not it is in conflict with the letter of these provisions, there can be no question, in the view of my Government, that this measure is a clear nullification of the benefits which the General Agreement seeks to provide.”⁶⁸ However, the first report containing a finding concerning Article XXIII:1(b) was the 1950 Report of the Working Party on “The Australian Subsidy on Ammonium Sulphate”. The Working Party first found that the measure taken by the Australian government, in withdrawing a wartime subsidy on sodium nitrate fertilizer while maintaining a subsidy on ammonium sulphate fertilizer, was not inconsistent with Australia’s obligations under the General Agreement.

“The working party next considered whether the injury that the Government of Chile said it had suffered represented a nullification or impairment ... It was agreed that such impairment would exist if the action of the Australian Government which resulted in upsetting the competitive relationship between sodium nitrate and ammonium sulphate could not reasonably have been anticipated by the Chilean Government, taking into consideration all pertinent circumstances and the provisions of the General Agreement, at the time it negotiated for the duty-free binding on sodium nitrate. The working party concluded that the Government of Chile had reason to assume, during these negotiations, that the war-time fertilizer subsidy would not be removed from sodium nitrate before it was removed from ammonium sulphate. In reaching this conclusion, the working party was influenced in particular by the combination of the circumstances that:

“(a) The two types of fertilizer were closely related;

“(b) Both had been subsidized and distributed through the same agency and sold at the same price;

“(c) Neither had been subsidized before the war, and the war-time system of subsidization and distribution had been introduced in respect of both at the same time and under the same war powers of the Australian Government;

“(d) This system was still maintained in respect of both fertilizers at the time of the 1947 tariff negotiations.

“For these reasons, the working party also concluded that the Australian action should be considered as relating to a benefit accruing to Chile under the Agreement, and that it was therefore subject to the provisions of Article XXIII. ... The inequality created and the treatment Chile could have expected at the time of the negotiation, after taking into consideration all pertinent circumstances, including the circumstances mentioned above, and the provisions of the General Agreement, were important elements in the working party’s conclusions.

⁶⁵Panel Reports on “Italian Discrimination against Imported Agricultural Machinery”, at 7S/66-67; “Canada - Administration of the Foreign Investment Review Act, at 30S/167; “Panel on Japanese Measures on Imports of Leather”, at 31S/113.

⁶⁶34S/157,158, para.5.1.7.

⁶⁷While the term “non-violation nullification or impairment” does not appear in the negotiating history or early GATT usage, it appears to have been added to the GATT vocabulary through the writings of GATT legal scholars. It is used here to refer to nullification or impairment under Article XXIII:1 in the absence of a “violation”, that is, under Article XXIII:1(b) or (c).

⁶⁸GATT/CP.2/W/13 at p. 1.

“The situation in this case is different from that which would have arisen from the granting of a new subsidy on one of the two competing products. In such a case, given the freedom under the General Agreement of the Australian Government to impose subsidies and to select the products on which a subsidy would be granted, it would be more difficult to say that the Chilean Government had reasonably relied on the continuation of the same treatment for the two products. In the present case, however, the Australian Government, in granting a subsidy on account of the war-time fertilizer shortage and continuing it in the post-war period, had grouped the two fertilizers together and treated them uniformly. In such circumstances it would seem that the Chilean Government could reasonably assume that the subsidy would remain applicable to both fertilizers so long as there remained a local nitrogenous fertilizer shortage.”⁶⁹

The 1952 Panel Report on “Treatment by Germany of Imports of Sardines” which examined a complaint by Norway that the new German tariff schedule treated imports of sprats and herrings differently from sardines, did not find a breach of Articles I or XIII; however,

“The Panel ... agreed that ... impairment [of a benefit under Article XXIII] would exist if the action of the German Government, which resulted in upsetting the competitive relationship between preparations of *clupea pilchardus* and preparations of the other varieties of the *clupeoid* family could not reasonably have been anticipated by the Norwegian Government at the time it negotiated for tariff reductions on preparations of *clupea sprattus* and *clupea harengus*. The Panel concluded that the Government of Norway had reason to assume, during these negotiations that preparations of the type of *clupeae* in which they were interested would not be less favourably treated than other preparations of the same family and that this situation would not be modified by unilateral action of the German Government.”⁷⁰

See also the similar case examined in 1955 on “German Import Duties on Starch and Potato Flour”.⁷¹

During the 1954-55 Review Session, the Review Working Party on “Other Barriers to Trade” considered a number of proposals for strengthening the provisions of the General Agreement on subsidies, including proposals regarding the negotiability of subsidies and the relationship between subsidies and concessions. The Report of the Working Party notes, *inter alia*:

“So far as domestic subsidies are concerned, it was agreed that a contracting party which has negotiated a concession under Article II may be assumed, for the purpose of Article XXIII, to have a reasonable expectation, failing evidence to the contrary, that the value of the concession will not be nullified or impaired by the contracting party which granted the concession by the subsequent introduction or increase of a domestic subsidy on the product concerned.”⁷²

The 1961 Report of the Panel on “Subsidies”, citing this paragraph, provides:

“In this connexion it was noted that the expression ‘reasonable expectation’ was qualified by the words ‘failing evidence to the contrary’. By this the Panel understands that the presumption is that unless such pertinent facts were available at the time the tariff concession was negotiated, it was then reasonably to be expected that the concession would not be nullified or impaired by the introduction or increase of a domestic subsidy.”⁷³

In the 1985 Panel Report on “EEC - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes”, which has not been adopted, the Panel found as follows on the basis of the panel reports referred to directly above:

⁶⁹GATT/CP.4/39, adopted on 3 April 1950, II/188, 193-194, para. 12.

⁷⁰G/26, adopted on 31 October 1952, 1S/53, 58, para. 16.

⁷¹W.9/178, noted by the CONTRACTING PARTIES on 16 February 1955, 3S/77.

⁷²L/334 and Addendum, adopted on 3 March 1955, 3S/222, 224, para. 13. The 1961 Report of the Panel on “Subsidies” notes that the words “or increase” appear in the English text of the Review Working Party report, but not in the French text; their insertion was approved at the meeting when the report was adopted in 1955: see SR.9/41 p. 5.

⁷³L/1442 & Add.1-2, adopted on 21 November 1961, 10S/201, 209, para. 28.

“The Panel recalled its earlier finding ... that in past GATT practice it had been established that the upsetting of the competitive position of an imported product as a result of a subsequent domestic measure, which could not have reasonably been anticipated by the party bringing the complaint at the time of negotiation of a tariff concession on the imported product, would constitute nullification or impairment of the tariff concessions. ...

“The Panel considered whether the aid systems for each product upset the competitive relationship between EEC products and those imported from the United States. With regard to canned peaches, canned pears, and canned fruit mixtures the Panel *concluded* that the minimum price granted to growers of fresh peaches and pears did not adversely affect the competitive relationship between EEC and imported canned peaches, pears or fruit cocktail. With regard to the production aids granted on canned peaches, canned pears and canned fruit mixtures the Panel *concluded* that:

- “since the production aids made up any differences between the prices of Community products and those of products from non-member countries, foreign product could never improve its competitiveness in the EEC;
- “whenever EEC fresh fruit prices and processing costs for peaches and pears were higher than those in non-EEC countries, EEC processors of peaches and pears were compensated for the differences in fresh fruit prices and processing costs. To this extent, the EEC production aids more than merely compensated EEC processors for the costs resulting from the granting of a minimum price to growers. The Panel noted that, since their introduction, the production aids had always exceeded that amount necessary to compensate for any increased costs resulting from the minimum grower prices for fresh fruit;
- “since the production aid is calculated as the difference between the computed EEC price and the duty-free price of imported product, the bound rates of tariff duty had become an absolute margin of protection for EEC products cancelling any cost and price advantages of foreign competitors.

“The Panel *concluded*, therefore, that the production aids granted to processors upset the competitive relationship between EEC and imported canned peaches, canned pears and canned fruit cocktail.”⁷⁴

The 1990 Panel Report on “EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins” examined, *inter alia*, the argument of the United States that EC production subsidies paid since 1966 nullified or impaired the value of duty-free tariff bindings for oilseeds and oilcakes.

“... The Panel examined whether it was reasonable for the United States to expect that the Community would not introduce subsidy schemes systematically counteracting the price effect of the tariff concessions. ... The essential argument of the Community in this respect was that it is not legitimate to expect the absence of production subsidies even after the grant of a tariff concession because Articles III:8(b) and XVI:1 explicitly recognize the right of contracting parties to grant production subsidies. This right would be effectively eliminated if its exercise were assumed to impair tariff concessions.

“The Panel ... found the following: ... At issue in the case before it are product-specific subsidies that protect producers completely from the movement of prices for imports and thereby prevent tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds. The Panel considered that the main value of a tariff concession is that it provides an assurance of better market access through improved price competition. Contracting parties negotiate tariff concessions primarily to obtain that advantage. They must therefore be assumed to base their tariff negotiations on the expectation that the price effect of the tariff concessions will not be systematically offset. If no right of redress were given to them in such a case they would be reluctant to make tariff concessions and the General Agreement would no longer be useful as a legal framework for incorporating the results of trade negotiations. The Panel does not share the view of the Community that the recognition of the legitimacy of such expectations would amount to a re-writing of the rules of the General Agreement. The contracting parties have decided that a finding of

⁷⁴L/5778, paras. 55, 80.

impairment does not authorize them to request the impairing contracting party to remove a measure not inconsistent with the General Agreement; such a finding merely allows the contracting party frustrated in its expectation to request, in accordance with Article XXIII:2, an authorization to suspend the application of concessions or other obligations under the General Agreement. The recognition of the legitimacy of an expectation thus essentially means the recognition of the legitimacy of such a request. The recognition of the legitimacy of an expectation relating to the use of production subsidies therefore in no way prevents a contracting party from using production subsidies consistently with the General Agreement; it merely delineates the scope of the protection of a negotiated balance of concessions. For these reasons the Panel found that the United States may be assumed not to have anticipated the introduction of subsidies which protect Community producers of oilseeds completely from the movement of prices for imports and thereby prevent tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds, and which have as one consequence that all domestically-produced oilseeds are disposed of in the internal market notwithstanding the availability of imports.”⁷⁵

The 1992 Report of the Members of the Original Oilseeds Panel on “Follow-up on the Panel Report ‘EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins’” notes in this connection:

“There was ... nothing in the reasoning of the original Panel that indicated that the impairment of tariff concessions through a production subsidy could only take place through a subsidy which *completely* protected producers from the price movements of imports. Applying this finding to the present situation, the Panel considered that the assurance of better market access through improved price competition would be meaningless if the effect of the general movement of prices on the production level of the product subject to the concession were to be systematically counteracted. The Panel considered that the original Panel’s finding with respect to impairment had not been based on the specific method of delivering production subsidies, but rather on the Community’s systematic denial, through substantially offsetting the effect of the general movement of import prices on the allocation of resources to production, of the benefits reasonably to be expected from the reciprocal exchange of tariff concessions. ...

“... The Panel considered that, in these circumstances, the new system of regionalized, direct, yield-based per hectare payments, effectively offsets the general movement of import prices and renders the level of Community production substantially insensitive to the general movement of world market prices, and thereby continues to impair the benefits the United States could reasonably expect to accrue to it under the tariff concessions in question.

“The Panel noted in this context that under the system of Maximum Guaranteed Areas the level of Community production of oilseeds that had been achieved as a result of the impairment of the tariff concessions would be maintained or at least not discouraged. The Panel also noted that the Community had aligned the support for oilseeds under the new system with the support or returns for producers of alternative crops protected by variable levies which completely insulate Community producers from world market prices; the Panel noted that this alignment as such would appear to be difficult to reconcile with the reasonable expectations of the United States at the time the zero tariff bindings were negotiated.”⁷⁶

(b) Relevance of concessions

All panel reports which have dealt with claims of non-violation nullification or impairment, except for one, have concerned nullification or impairment of tariff concessions. The exception is the 1985 Panel Report on “EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region”, cited below.

The 1990 Panel Report on “EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins” discussed the relationship between a non-violation complaint based on

⁷⁵L/6627, adopted on 25 January 1990, 37S/86, 128-129, paras. 147-148.

⁷⁶DS28/R, dated 31 March 1992, 39S/91, 116-117, paras. 81, 83-84.

Article XXIII:1(b) and tariff concessions, and “the purpose of the provisions of Article XXIII relating to the impairment of benefits accruing under the General Agreement”.

“... The Panel noted that these provisions, as conceived by the drafters and applied by the contracting parties, serve mainly to protect the balance of tariff concessions. The idea underlying them is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement.”⁷⁷

The 1990 Panel Report on “United States - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariffs Concessions” notes that the EEC had claimed that restrictions on imports of sugar-containing products under the 1955 waiver in question nullified or impaired benefits accruing to the EEC under the General Agreement and that the United States therefore owed compensation to the EEC. The Panel found, *inter alia*:

“According to the 1979 Understanding on dispute settlement, a contracting party bringing a complaint under Article XXIII:1(b) is ‘called upon to provide a detailed justification’ ... The Panel noted that Article XXIII:1(b), as conceived by the drafters and applied by the CONTRACTING PARTIES, serves mainly to protect the balance of tariff concessions ... The party bringing a complaint under that provision would therefore normally be expected to explain in detail that benefits accruing to it under a tariff concession have been nullified or impaired. ...”.⁷⁸

See also the references to tariff concessions in the two Panel Reports on “Treatment by Germany of Imports of Sardines”⁷⁹ and “German Import Duties on Starch and Potato Flour”.⁸⁰

(c) *Non-violation nullification or impairment not relating to concessions*

The only instance in which a panel has found that a “benefit accruing ... under this Agreement” other than a concession was nullified or impaired under Article XXIII:1(b) is the 1985 Panel Report on “EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region”, which has not been adopted. In this case, the United States challenged the conformity with Article I:1 of tariff preferences on certain citrus products extended under agreements between the EC and certain Mediterranean countries. The examinations of these agreements conducted under Article XXIV had not resulted in adoption of any conclusions under Article XXIV:7. The US had not made a specific claim of non-violation nullification or impairment in consultations or in its request for a panel, and stated its claim under Article XXIII:1(b) in response to a question by the Panel.⁸¹ The Panel found that, given the undetermined legal status of the preferences with respect to Article XXIV, there could not be said to be a clear case of infringement which would constitute *prima facie* nullification or impairment under Article XXIII:1(a) (see at page 707 below). It then examined the application of Article XXIII:1(b). The Panel found that

“Given that the tariffs on some of the products covered by the complaint of the United States were not bound, that the preferences were already being granted by the EC to certain Mediterranean countries on certain fresh citrus before the negotiation of concessions by the Community of the Nine in 1973, and that it could be expected that these preferences would be deepened and extended thereafter, *prima facie* nullification or impairment of benefits accruing under Article II in the sense of Article XXIII:1(b) could not be concluded on the basis of past precedents ...”.⁸²

⁷⁷L/6627, adopted on 25 January 1990, 37S/86, 126-127, para. 144.

⁷⁸L/6631, adopted on 7 November 1990, 37S/228, 261, para. 5.21 (referring also to EPCT/A/PV/6, page 5; II/188; 1S/53; 10S/209).

⁷⁹G/26, adopted on 31 October 1952, 1S/53.

⁸⁰W.9/178, noted by the CONTRACTING PARTIES on 16 February 1955, 3S/77.

⁸¹L/5776, dated 7 February 1985 (unadopted), para. 3.33.

⁸²*Ibid.*, para. 5.1(f).

However, the Panel then went on as follows:

“... the Panel considered that although complaints brought previously under Article XXIII:1(b) had related to benefits arising from Article II, it believed that this did not signify that Article XXIII:1(b) was limited only to those benefits. The drafting history of Article XXIII confirmed that this Article, including paragraph 1(b) thereof, protected any benefit under the General Agreement ...⁸³ This would include then the benefits accruing to the United States under Article I:1 which applied to bound and unbound tariff items alike ...

“The Panel noted that the basic purpose of Article XXIII:1(b) was to provide for offsetting or compensatory adjustment in situations in which the balance of rights and obligations of the contracting parties had been disturbed.⁸⁴ One of the fundamental benefits accruing to the contracting parties under the General Agreement, therefore, was the right to such adjustment in situations in which the balance of their rights and obligations had been upset to their disadvantage. ...”⁸⁵

The Panel reached the conclusion that “in this particular situation the balance of obligations underlying Articles I and XXIV of the General Agreement had been upset to the disadvantage of the contracting parties not party to these agreements and that the United States was therefore entitled to offsetting or compensatory adjustment to the extent that the grant of the preferences had caused substantial adverse effects to its actual trade or its trade opportunities”.⁸⁶ In Council discussion of this Panel Report the EC representative stated: “Regarding Article XXIII:1(b) non-violation nullification and impairment, this provision had been applied only to cases in which tariff bindings were at stake; it would be a dangerous precedent to extend its application to situations in which no such commitment had been infringed”.⁸⁷

In the 1990 Panel Report referred to directly above on “United States - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions”, the Panel found that the tariff on the imports in question was not subject to a concession, noting that

“... The EEC has not claimed that benefits accruing to it under a tariff concession made by the United States in accordance with Article II have been nullified or impaired as a result of measures taken under the Waiver. The main justification for its claim of nullification or impairment that the EEC presented to the Panel was that the restrictions, in spite of the Waiver, have remained inconsistent with the General Agreement. The Panel recognized that Article XXIII:1(b) does not exclude claims of nullification or impairment based on provisions of the General Agreement other than Article II. However, the Panel noted that Article XXIII:1(b) applies whether or not the measure at issue conflicts with the General Agreement and that, therefore, the question of whether a measure inconsistent with Article XI:1 remains inconsistent with the General Agreement even if covered by a waiver cannot, by itself, determine whether it nullifies or impairs benefits accruing under the General Agreement within the meaning of that provision. A complaint under Article XXIII:1(b) must therefore be supported by a justification that goes beyond a mere characterization of the measure at issue as inconsistent with the General Agreement”.⁸⁸

The Panel found that such a justification had not been supplied.

(d) *“Reasonable expectations” in relation to measures formally approved by the CONTRACTING PARTIES*

During the Review Session of 1954-55, the Review Working Party on Quantitative Restrictions, in the process of redrafting Article XVIII, examined the extent to which claims could be brought under Article XXIII concerning measures under Article XVIII:C with respect to which the concurrence of the CONTRACTING PARTIES

⁸³A footnote to this sentence refers to page 7 of EPCT/A/PV/12.

⁸⁴A footnote to this sentence refers to page 5 of EPCT/A/PV/6.

⁸⁵*Ibid.*, paras. 4-36-4.37.

⁸⁶*Ibid.*, para. 4.37.

⁸⁷C/M/186, p. 17.

⁸⁸L/6631, adopted on 7 November 1990, 37S/228, 261-262, para. 5.21.

had been obtained. After examining the case referred to above regarding ammonium sulphate, the Working Party agreed on the following conclusions:

“... the question was raised whether and to what extent the concurrence by the CONTRACTING PARTIES in a measure proposed under Article XVIII would affect the right of a contracting party to resort to Article XXIII. The Working Party agreed on the following interpretation which would apply to paragraph 21 of Article XVIII, but would not in any way prejudice the interpretation of Article XXIII in other cases; although it is understood that the concurrence of the CONTRACTING PARTIES in a measure under paragraphs 16, 19 or 22, or the fact that the CONTRACTING PARTIES, as envisaged in paragraph 15 did not request a contracting party to consult, would not deprive a contracting party affected by the measure in question of its right to lodge a complaint under Article XXIII, the CONTRACTING PARTIES, in assessing the extent of the impairment of benefits, would have to take into consideration all the facts of the case and, in particular, the terms under which the benefit was obtained, including the provisions embodied in Article XVIII. It is therefore recognized that the CONTRACTING PARTIES would not be in a position to allow a contracting party to resort to the withdrawal of concessions or suspension of obligations under paragraph 2 of Article XXIII, unless the effects of the measure concurred in proved to be substantially different from what could reasonably have been foreseen at the time the measure was considered by the CONTRACTING PARTIES”.⁸⁹

See also the material below on the relationship between Article XXIII and Article XXV:5.

(e) *Date of relevant concession in relation to the measures at issue*

The 1985 Panel Report on “EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region”, which has not been adopted, examined the application of Article XXIII:1(b) in relation to the EEC’s application of tariff preferences on citrus products from certain Mediterranean countries. See paragraphs 4.27-4.34 of the Panel Report concerning the Panel’s examination of the date of the tariff concessions, the effect of events which were public knowledge as of that date, and the “reasonable expectations” of the United States at the time it negotiated the concessions in question.⁹⁰

The 1985 Panel Report on “EEC - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes”, which has not been adopted, includes the following findings.

“The Panel first considered the question of whether and to what extent the United States could claim ‘any benefit accruing to it directly or indirectly under this Agreement’ (Article XXIII:1) in respect of the tariff concessions invoked ... [The Panel noted that the EEC had not contested] the US submission that the EEC tariff bindings on canned peaches, canned pears, fruit mixtures and dried grapes had been given ‘as part of a balance of concessions’. The Panel also noted that, pursuant to Article I and II of the General Agreement, tariff concessions, and the benefits deriving therefrom, have to be accorded on a most favoured nation basis independent of the existence of initial negotiating rights in respect of the tariff concessions concerned. The Panel found, therefore, that the tariff bindings granted by the EEC in 1974/79 on the four product categories concerned had created for the United States ‘benefits accruing to it directly or indirectly under this Agreement’ in terms of Article XXIII:1 of the General Agreement ...”.⁹¹

“... nullification or impairment of the tariff concessions would exist if the introduction or increase of the EEC production aids could not have been reasonably anticipated by the United States at the time of the negotiations for the tariff concessions on those products and the aid systems had upset the competitive position of imported canned peaches, canned pears, canned fruit cocktail and dried grapes on the EC market.

“The Panel observed ... that the EC production aids for canned peaches had been introduced prior to the conclusion of the Geneva (1979) Tariff Protocol on 30 June 1979. In the Panel’s view, therefore, the United States should have been aware of the existence of this subsidy and have taken due account of it in the negotiation of the tariff concessions for canned peaches in 1978/79. Since peaches are a principal

⁸⁹L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 188, para. 63; see also W.9/129 (discussing non-violation nullification or impairment relative to the draft text of Article XVIII:C).

⁹⁰L/5776 (unadopted), dated 7 February 1986.

⁹¹L/5778 (unadopted) dated 20 February 1985, para. 49.

component of canned fruit cocktail, the Panel found that the United States should also have been aware of any possible effects of these production aids on the economic benefit of the tariff concessions for fruit mixtures negotiated in 1978/79. As regards the EC tariff concessions of 1979 for canned pears, the Panel noted that the production aids had been introduced subsequent to the conclusion of the Geneva (1979) Tariff Protocol and that neither party to the dispute had contended that the EEC Regulation No. 1639/79 of 24 July 1979 could have reasonably been foreseen by the United States at the time it negotiated these tariff concessions.”⁹²

The 1990 Panel Report on “EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins” also discussed the date of the relevant concession.

“The Panel noted that the tariff concessions for oilseeds were originally made in 1962 following negotiations with the United States and other contracting parties in the Dillon Round and under Article XXIV:6 after the Community had established a common external tariff. The United States bases its case on expectations it claims to have had in 1962 when the concessions for oilseeds were first incorporated into the Community Schedule. The Community argues that the United States can base its claim only on expectations it could reasonably have had when the Schedule of Concessions currently in force was negotiated, namely in 1986 when the production subsidies had already been introduced.

“The first issue the Panel examined in this context was therefore whether the benefits accruing to the United States under the tariff concessions on oilseeds presently in force include the protection of expectations that prevailed in 1962 when the tariff concessions on oilseeds were originally incorporated in the Schedule of Concessions of the Community. The Panel, noting that there is no explicit rule nor a precedent to guide it in this matter, considered the issue in the light of the purpose of the provisions of Article XXIII relating to the impairment of benefits accruing under the General Agreement. The Panel noted that these provisions, as conceived by the drafters and applied by the CONTRACTING PARTIES, serve mainly to protect the balance of tariff concessions.”⁹³...

“The Panel concluded from the above that the answer to the question of whether the expectations of 1962 continue to be protected depends on whether the concessions on oilseeds resulting from the subsequent renegotiations under Article XXIV:6 were part of a new balance of concessions or whether the reinstitution of the concessions at the same rate after the successive enlargements of the Community meant that the balance of concessions originally negotiated in 1962 was to be continued. The Panel noted that the result of the initial Article XXIV:6 negotiations of the Community in 1962 was the creation of a Schedule of Concessions for its common external tariff that had replaced the tariffs of the six founding member States. In these negotiations, the trading partners of the Community compared the benefits accruing to them under the previous tariff concessions of the individual member States with the benefits accruing to them under the common external tariff in the whole territory of the Community. The result of the Article XXIV:6 negotiations following the successive enlargements of the Community was not the creation of a new common external tariff but the extension of the existing tariff concessions of the Community to the new member States.”⁹⁴ On the occasion of these negotiations pre-existing concessions of the Community were renegotiated as well but such modifications remained exceptional. Except where such modifications were specifically renegotiated, the partners of the Community could confine themselves to comparing the benefits accruing to them under the previous tariff concessions of the new member States with the benefits accruing to them as a result of the application of the Community's tariff concessions by the new member States. They had no reason to proceed to a global reassessment of the value of all the Community's concessions in the whole of the Community's territory.

⁹²*Ibid.*, paras. 51-52.

⁹³The footnote to this sentence refers to EPCT/A/PV/6, page 5 and Panel Reports on “The Australian Subsidy on Ammonium Sulphate”, adopted on 3 April 1950 (II/188, 194-5); “Treatment by Germany of Imports of Sardines”, adopted on 31 October 1952 (IS/53, 58-59); “Operation of the Provisions of Article XVI”, adopted on 21 November 1961 (10S/201, 209).

⁹⁴The footnote to this sentence refers to “Article XXIV:6 Negotiations: Communication from the Commission of the European Communities”, L/3807 dated 11 January 1973; “Negotiations Under the Provisions of Article XXIV:6: Communication from the Commission of the European Communities”, TAR/16 dated 20 May 1961; “Enlargement of the European Economic Community: Accession of Portugal and Spain”, L/5936, Add.2 and Third Geneva (1987) Protocol, Schedule LXXX.

“In these circumstances, the partners of the Community in the successive renegotiations under Article XXIV:6 could legitimately assume, in the absence of any indications to the contrary, that the offer to continue a tariff commitment by the Community was an offer not to change the balance of concessions previously attained. The Panel noted that nothing in the material submitted to it indicated that the Community had made it clear to its negotiating partners that the withdrawal and reinstitution of the tariff concessions for oilseeds as part of the withdrawal of the whole of the Community Schedule meant that the Community was seeking a new balance of concessions with respect to these items. There is in particular no evidence that the Community, in the context of these negotiations, offered to compensate its negotiating partners for any impairment of the tariff concessions through production subsidies or that it accepted compensatory tariff withdrawals by its negotiating partners to take into account any such impairment. The balance of concessions negotiated in 1962 in respect of oilseeds was thus not altered in the successive Article XXIV:6 negotiations. The Panel therefore found that the benefits accruing to the United States under the oilseed tariff concessions resulting from the Article XXIV:6 negotiations of 1986/87 include the protection of reasonable expectations the United States had when these concessions were initially negotiated in 1962.”⁹⁵

(f) *Relevance of initial negotiating rights with regard to concessions*

Concerning the concept of “initial negotiating rights,” see Article XXVIII.

The 1985 Panel Report on “EEC - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes”, which has not been adopted, includes the following findings.

“The Panel ... considered whether there was any legal basis in the General Agreement for limiting the rights of contracting parties to bring a ‘nonviolation complaint’ under Article XXIII to contracting parties having initial negotiating rights. The Panel found no legal justification in either Article XXIII or past GATT practice for limiting the right of contracting parties to challenge under Article XXIII an alleged nullification or impairment of tariff concessions which have to be applied on a most-favoured-nation basis. The Panel noted that neither past Panel proceedings concerning ‘nonviolation complaints’ in respect of tariff concessions ... nor the parties to this dispute had suggested any such limitation of the rights of contracting parties under Article XXIII. The Panel also noted that the United States had in fact claimed to have initial negotiating rights or substantial interests in the tariff concessions invoked.”⁹⁶

(g) *Relevance of statistics on trade flows*

The 1952 Panel Report on “Treatment by Germany of Imports of Sardines” notes that “the Panel did not feel that an analysis of the recent trade statistics would lead to definite conclusions as regards the existence of any causal relationship between the measures taken by the German Government and the reduction in the volume of Norwegian exports of fish products to Germany. Nor did the Panel feel that it was necessary for a finding of nullification or impairment under Article XXIII first to establish statistical evidence of damage”.⁹⁷

The 1985 Panel Report on “EEC - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes”, which has not been adopted, includes the finding that

“The Panel was of the view that it was not necessary to establish statistical evidence of damage in order to make a finding of nullification and impairment under Article XXIII. It noted that this view had also been adopted in the Panel report on Treatment by Germany of Imports of Sardines Benefits accruing from bound tariff concessions under Article II also encompass future trading opportunities. Consequently, complaints by contracting parties regarding nullification and impairment should be admissible even if there was not yet statistical evidence of trade damage ...”.⁹⁸

⁹⁵L/6627, adopted on 25 January 1990, 37S/86, 126-127, paras. 143-146.

⁹⁶L/5778 (unadopted) dated 20 February 1985, para. 50, referring to cases at II/188, 1S/53, 11S/95 (cases on Australian fertilizer subsidies, German treatment of imports of sardines, and Uruguayan recourse to Article XXIII).

⁹⁷G/26, adopted on 31 October 1952, 1S/53, 56, para. 9.

⁹⁸L/5778 (unadopted), dated 20 February 1985, para. 77.

In the 1990 Panel Report on “European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins” the Panel noted that

“... one [past Article XXIII:1(b)] case ... specifically rejected the relevance of statistics on trade flows for a finding on nullification and impairment.⁹⁹ It is of course true that, in the tariff negotiations in the framework of GATT, contracting parties seek tariff concessions in the hope of expanding their exports, but the commitments they exchange in such negotiations are commitments on conditions of competition for trade, not on volumes of trade”.¹⁰⁰

See also the Panel Report, which has not been adopted, on “United States - Trade Measures Affecting Nicaragua”.¹⁰¹

(h) *Relevance of other agreements*

In the panel proceeding on “EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins” the EEC argued that as between the parties that signed it, the Agreement on Interpretation and Application of Articles VI, XVI and XXIII created an expectation as to the criteria that would be used to judge a complaint of non-violation nullification or impairment of tariff concessions. The Panel Report adopted in 1990 provides:

“The Panel was established to make findings ‘in the light of the relevant GATT provisions’; it therefore does not have the mandate to propose interpretations of the provisions of the Subsidies Code which the Community invokes to justify its position. However, the following may be noted in this respect. The Subsidies Code states in Article 8:4 that a nullification or impairment may arise through ‘the effects of the subsidy in displacing or impeding imports of like products into the market of the subsidizing country’. The Community takes the position that its production subsidies for oilseeds were followed by a rise in imports of oilseeds; they therefore neither displaced nor impeded imports and consequently did not cause nullification or impairment. The Community’s position implies that Article 8:4 redefines the benefit accruing under a tariff concession as being no longer the protection of expectations on conditions of competition but the protection of expectations on the level of trade volumes even though the CONTRACTING PARTIES have consistently decided otherwise. It is to be recalled that the CONTRACTING PARTIES considered in 1960 that ‘it is fair to assume that a subsidy which provides an incentive to increased production will, in the absence of offsetting measures, e.g., a consumption subsidy, either increase exports or reduce imports’.¹⁰² The implication of the Community’s position is that, under the Subsidies Code, this assumption could no longer be made. The Panel noted that the purpose of the Subsidies Code is, according to its preamble, ‘to apply fully and interpret’ provisions of the General Agreement. In the view of the Panel this speaks in favour of interpreting Article 8:4 in conformity with the decisions of the CONTRACTING PARTIES rather than, as the Community suggests, revising these decisions in the light of a particular interpretation of a Code accepted by a portion of the contracting parties”.¹⁰³

(i) *Procedural requirements*

The 1962 Panel Report on “Uruguayan Recourse to Article XXIII” notes:

“While it is not precluded that a *prima facie* case of nullification or impairment could arise even if there is no infringement of GATT provisions, it would be in such cases incumbent on the country invoking Article XXIII to demonstrate the grounds and reasons for its invocation. Detailed submissions on the part of that contracting party on these points were therefore essential for a judgement to be made under this Article”.¹⁰⁴

⁹⁹The footnote to this sentence refers to the Panel Report on “Treatment by Germany of Imports of Sardines”, adopted on 31 October 1952, 1S/53, 56.

¹⁰⁰L/6627, adopted on 25 January 1990, 37S/86, 130, para. 150.

¹⁰¹L/6053 (unadopted), dated 13 October 1985.

¹⁰²The footnote to this sentence refers to “Review Pursuant to Article XVI:5”, report adopted on 24 May 1960, 9S/188, 191.

¹⁰³L/6627, adopted on 25 January 1990, 37S/86, 131-132, para. 154.

¹⁰⁴L/1923, adopted on 16 November 1962, 11S/95, 100, para. 15.

Paragraph 5 of the 1979 Understanding Annex on customary practice provides that "... If a contracting party bringing an Article XXIII case claims that measures which do not conflict with the provisions of the General Agreement have nullified or impaired benefits accruing to it under the General Agreement, it would be called upon to provide a detailed justification".

The 1988 Panel Report on "Japan - Trade in Semi-Conductors" referred to this paragraph in examining a subsidiary claim of non-violation nullification and impairment:

"The Panel had not found that the measures relating to the access to the Japanese market were inconsistent with the provisions of the General Agreement ... The Panel considered that the evidence submitted by the EEC relating to access to the Japanese market did not permit it to identify any measure by the Japanese Government that put EEC exporters of semi-conductors at a competitive disadvantage vis-à-vis those of the United States and that might therefore nullify or impair benefits accruing to the EEC under the General Agreement and impede the attainment of objectives of the General Agreement within the meaning of Article XXIII".¹⁰⁵

The 1990 Panel Report on "United States - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions" notes that the EEC had claimed that restrictions on imports of sugar-containing products were inconsistent with Article XI even whether or not they met the terms of the waiver in question, that this waiver simply suspended the obligation to implement provisions of the General Agreement, that these restrictions nullified or impaired benefits accruing to the EEC under the General Agreement, and that the EEC was entitled to compensation from the US pending the withdrawal of these restrictions.

"... The Panel ... concluded that the fact that the restrictions found to be inconsistent with Article XI:1 conform to the terms of the Waiver does not prevent the EEC from bringing a complaint under Article XXIII:1(b) of the General Agreement but it is up to the EEC to demonstrate that a nullification or impairment of benefits accruing to it under the General Agreement has resulted from these restrictions.

"According to the 1979 Understanding on dispute settlement, a contracting party bringing a complaint under Article XXIII:1(b) is 'called upon to provide a detailed justification'... The Panel noted that Article XXIII:1(b), as conceived by the drafters and applied by the CONTRACTING PARTIES, serves mainly to protect the balance of tariff concessions ... The party bringing a complaint under that provision would therefore normally be expected to explain in detail that benefits accruing to it under a tariff concession have been nullified or impaired. ... the Panel noted that Article XXIII:1(b) applies whether or not the measure at issue conflicts with the General Agreement and that, therefore, the question of whether a measure inconsistent with Article XI:1 remains inconsistent with the General Agreement even if covered by a waiver cannot, by itself, determine whether it nullifies or impairs benefits accruing under the General Agreement within the meaning of that provision. A complaint under Article XXIII:1(b) must therefore be supported by a justification that goes beyond a mere characterization of the measure at issue as inconsistent with the General Agreement

"For the reasons indicated in the preceding paragraphs, the Panel did not examine the case before it in the light of Article XXIII:1(b). The Panel would however like to stress that nothing in this report is meant to preclude the EEC from bringing a complaint under that provision with the required detailed justification."¹⁰⁶

(j) *Procedural relationship between findings of "violation" and findings regarding "non-violation nullification or impairment"*

Although in a number of cases the submissions of applicant parties to panels have included arguments in the alternative concerning both violation of the provisions of the General Agreement and non-violation nullification or impairment, panels which have made a finding that a *prima facie* case of nullification or impairment exists under Article XXIII:1(a) have generally declined to make a ruling on non-violation nullification or impairment under

¹⁰⁵ L/6309, adopted on 4 May 1988, 35S/116, 161, para. 131.

¹⁰⁶ L/6631, adopted on 7 November 1990, 37S/228, 261-262, paras. 5.20-5.23 (referring also to EPCT/A/PV/6, page 5; II/188; 1S/53; 10S/209).

Article XXIII:1(b). The 1990 Panel on “EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins”, which found the measures examined were inconsistent with Article III:4, provides in this respect:

“... The Panel ... examined whether its finding that the payments to the processors are inconsistent with the General Agreement might make an examination of the question of the nullification or impairment of the tariff concessions unnecessary. The Panel noted that this would be the case if compliance by the Community with the finding on Article III:4 would necessarily remove the basis of the United States claim of nullification or impairment. The Panel noted that the subsidies the Community presently grants to producers of oilseeds result from the maintenance of producer prices at levels generally exceeding the price of competing imports through payments to processors conditional upon the purchase or transformation of domestic oilseeds. The finding of the Panel under Article III:4 does not relate to the benefits accruing to the Community producers under the Community subsidy schemes but only to the benefits accruing to processors. The Panel further noted that the Community could comply with the Panel’s finding on Article III and still make available in the Community market oilseeds produced with the benefit of producer prices maintained at levels exceeding the price of competing imports. Compliance with the finding on Article III thus could, but would not necessarily, eliminate the basis of the United States complaint that the benefits accruing to the Community producers of oilseeds impair the Community’s tariff concessions for oilseeds. The Panel therefore decided that it had to examine that complaint as well”.¹⁰⁷

(5) Paragraph 1(c): “as the result of the existence of any other situation”

(a) Situations involving macroeconomic or employment factors

During the negotiation of the General Agreement in the Tariff Agreement Committee at the Geneva session of the Preparatory Committee, in discussion of whether to include in the General Agreement the second chapter of the Charter on “Employment and Economic Activity”, it was stated that “if a situation should arise in which considerations came up under Chapter [II of the Charter] which were not dealt with under the exceptions already provided for in Articles [XI through XV] a party could invoke” the Agreement “specifically under Article [XXIII]”. Reference was also made to chapter III on “Economic Development and Reconstruction” in the course of the discussion.¹⁰⁸

It was also stated in discussions at Geneva of Article 89 of the Geneva Draft Charter (corresponding to Article XXIII:1) that it gave a country a right “to seek a modification of the undertakings it has given if, by the action of others, conditions are created in which it can no longer carry out those undertakings. In other words, if there is a world-wide collapse of demand; if a shortage of a particular currency places us all in balance-of-payment difficulties; if we become subject again to wide-spread fluctuations in the prices of primary products with devastating effects upon individual economies ...”.¹⁰⁹ Describing these discussions, the delegate of Australia later stated that at the Preparatory Committee, Australia “had proposed very positive obligations regarding employment. However, [Australia] had been persuaded to accept obligations relating to employment of a less positive character in return for provisions in Article 89 which would enable a Member to obtain without difficulty a review of its obligations under the Charter should the obligations regarding employment not serve to prevent such situations as the collapse of levels of employment and effective demand leading to worldwide depression”.¹¹⁰

Referring to Article 93 of the Havana Charter (corresponding to Article XXIII:1), a Havana Sub-Committee stated: “The Committee was of the opinion that, in case of widespread unemployment or a serious decline in demand in the territory of another Member, a Member might properly have recourse to Article 93, if the measures adopted by the other Member under the provisions of Article 3 [of the Charter, on employment] had not produced the effects which they were designed to achieve and thus did not result in such benefits as might reasonably be anticipated”.¹¹¹

¹⁰⁷L/6627, adopted on 25 January 1990, 37S/86, 126, para. 142.

¹⁰⁸EPCT/TAC/PV/13, p. 41. See also the material on Article XII:3(d) in the chapter on Article XII.

¹⁰⁹EPCT/A/PV/5, p. 14.

¹¹⁰E/CONF.2/C.6/W.19, p. 1.

¹¹¹Havana Reports, p. 155.

During the Review Session of 1954-55 the Review Working Party on Quantitative Restrictions considered proposals to authorize joint action to prevent disequilibrium in world trade and payments from occurring through macroeconomic pressures, or to meet a situation of general scarcity of a particular currency resulting from an important country running a persistent payments surplus. It was agreed that adequate provision already existed in various provisions of the General Agreement.

“For example, if any contracting party considered that the pressure on its international reserves was resulting from the situation in some individual country, it could raise the question under Article XXIII with a view either to consultations directly with such other contracting parties as it might consider to be particularly concerned, or to reference to the CONTRACTING PARTIES, in order to obtain recommendations from them or, if need be, release from specific obligations in accordance with the terms of that Article.”¹¹²

Also during the Review Session, the Review Working Party on “Organizational and Functional Questions” considered a proposal to include in the General Agreement an article on full employment, including provision for initiating consultations in urgent cases to prevent the international spread of a decline in employment, production or demand.

“After discussion it was the opinion of the Working Party that, in view of the present provisions of the Agreement and of changes contained in amendments agreed upon during the Review Session, it was not necessary to include this new Article and that in fact its inclusion might cause some confusion in the application of other Articles of the Agreement. ...

“It was thought that the kind of action [proposed] was already provided for in existing or proposed new Articles of the Agreement. It was clear, for example, that Article XXIII contemplates that any country which considers that a situation had arisen which impeded the attainment of any objective of the Agreement, including, of course, all those enumerated in the new Article I, may refer the matter to the CONTRACTING PARTIES, which then would be obliged promptly to investigate the matter and to make appropriate recommendations. It was also clear that in such a case the CONTRACTING PARTIES would be free to enter into consultations with other interested international bodies which would be in a position to make a contribution to the problem presented.”¹¹³

This Report also repeated the point included in the report on “Quantitative Restrictions” concerning resort to Article XXIII in the event of pressure on a country’s reserves from deflationary influences abroad.¹¹⁴

(b) *Situations involving other factors*

In 1951, Haiti placed on the Sixth Session agenda an application under Article XXIII:1(c) regarding the withdrawal by the United States under Article XXVII of concessions on straw and sisal matting, which had been initially negotiated with China. The application was withdrawn in the light of agreement to consult on the items concerned.¹¹⁵

The February 1953 “Report on the Accession of Japan” by the *Ad Hoc* Committee on Agenda and Intersessional Business expressed the view that “violent disruption of trading conditions ... if remedial action consistent with the General Agreement would lead to a general raising of tariff levels and other barriers to world trade, would create a situation impeding the attainment of objectives of the Agreement. This would therefore be a situation falling under part (c) of paragraph 1 of Article XXIII. It was considered that, in the event of such a situation arising, contracting parties whose interests were seriously affected would avail themselves of the facilities of Article XXII, but that if consultations under that Article should prove unsuccessful they could thereafter refer the matter to the CONTRACTING PARTIES under paragraph 2 of Article XXIII” and the CONTRACTING PARTIES could authorize release from obligations on a discriminatory basis.¹¹⁶ The Report of the Working Party on “Arrangements

¹¹²L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 175 para. 22. See also the material in this work on Article XII:5 and Article XIV.

¹¹³L/329, adopted on 28 February, 5 and 7 March 1955, 3S/231, 241, paras. 28-29.

¹¹⁴*Ibid.*, 3S/241-242, para. 30.

¹¹⁵GATT/CP/115/Add.2 (application by Haiti); GATT/CP.6/SR.9 (discussion); GATT/CP.6/42 (withdrawal).

¹¹⁶L/76, dated 13 February 1953, para. 8.

for Japanese Participation” adopted in November 1953 at the Eighth Session, which drew up the Declaration on Commercial Relations between Certain Contracting Parties and Japan,¹¹⁷ noted that “most of the representatives of countries intending to accept the Declaration do not regard the approval of an interpretation of Article XXIII on the lines of that contained in the Report of the *Ad Hoc* Committee as necessary or desirable.” Other delegations disagreed.¹¹⁸

The statement made by Uruguay at the Nineteenth Session in November 1961 concerning the Uruguayan recourse to Article XXIII noted the view of Uruguay that “our case meets not just one, but all the requirements of Article XXIII:1, since it concerns not only the non-fulfilment of obligations, but also the application of other measures, which, taken together, constitute a state of affairs so generalized that it may well fall within the concept provided for in section (c) of that paragraph”.¹¹⁹

In June 1968, the government of France gave notice that it had instituted temporary import ceilings on certain products including automobiles, and had instituted subsidies for production and exports of products of France, in the wake of the events of spring 1968.¹²⁰ In Council discussion of these trade measures on 4 July 1968, the representative of France stated that “The French Government did not ... consider that it was necessary to invoke Articles XII and XIX of the General Agreement to justify the measures it was taking. Article XXIII of the General Agreement recognized that situations might arise that might be such as to impair the benefits that each contracting party was entitled to expect from its participation in the Agreement, and it authorized the protection of those benefits. The French Government was of the opinion that, taking into account the exceptional characteristics of the crisis with which it was faced, the benefits that it was entitled to expect from its participation in the General Agreement would have been seriously impaired unless it had taken interim protective measures”. The representative of the UK stated that “... a dangerous precedent could be set in the GATT if [this argument] were accepted outright. If the French action could not be fitted into any of the provisions of the GATT, the first presumption must be that they were in conflict with these provisions”.¹²¹

In 1974, when Article XXIV:6 negotiations between Canada and the European Communities did not produce a mutually satisfactory result, Canada referred the matter to the CONTRACTING PARTIES pursuant to paragraph 1(c) and 2 of Article XXIII and requested that a panel of experts be appointed to investigate whether the new Schedules LXXII and LXXIIbis maintained a general level of reciprocal and mutually advantageous concessions between Canada and the European Communities, not less favourable to trade than that provided for in Schedules XL, XLbis, XIX, XXII and LXI.¹²² The representative of the European Communities recalled “that the negotiations that had led to this new Schedule covered practically the whole of the customs tariffs in question and a difficult assessment of both a quantitative and qualitative character was therefore called for. The Community could not accept the proposal. The conciliation procedures of the GATT had hitherto mostly been used in cases of violations of the General Agreement; in the present case, a number of factors made this procedure inappropriate. Such an exercise would involve highly sophisticated assessments in complex trade fields where the criteria for reaching judgements were exceedingly imprecise ...”.¹²³ At the following Council meeting, the Chairman “concluded that it was the wish of the Council, with the exception of the European Communities, to establish such a panel and that he should, in due course, discuss the question of the panel in consultation with the parties most concerned”.¹²⁴ The panel was established but was not convened as the two parties reached a bilateral agreement in March 1975.¹²⁵

In a complaint against Japan in 1983, the European Community requested establishment of a working party under Article XXIII:2, on the basis that “benefits of successive GATT negotiations with Japan have not been realized owing to a series of factors peculiar to the Japanese economy which have resulted in a lower level of

¹¹⁷Declaration of 24 October 1953, 2S/31.

¹¹⁸G/55/Rev.1, adopted on 23 October 1953, 2S/117, 119, para. 9. See also the material on early discussions of safeguards in the chapter on Article XIX.

¹¹⁹L/1679, statement of the representative of Uruguay of 8 December 1961 on “Recourse to Article XXIII by Uruguay.”

¹²⁰See notification in L/3035+Add.1.

¹²¹C/M/48, p. 4 (French statement), 7 (UK statement); see also L/3047 and L/3081, first and second reports of the Working Party on “French Trade Measures”, 16S/57ff.

¹²²C/M/101, p. 7.

¹²³C/M/101, p. 8.

¹²⁴C/M/102, p. 4.

¹²⁵See material under Article XXVIII:3 in this Index.

imports, especially of manufactured products, as compared with other industrial countries. ... The European Community is of the view that the present situation constitutes a nullification or impairment by Japan, of the benefits otherwise accruing to the European Community under the GATT, and an impediment to the attainment of GATT's objectives. In particular the general GATT objective of 'reciprocal and mutually advantageous arrangements' has not been achieved".¹²⁶ The complaint was ultimately not pursued.

(6) “any contracting party ... may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned”

(a) Notification of consultation requests; requirements concerning requests

Paragraph C.3 of the 1989 Improvements provides: “Requests for consultations under Article ... XXIII:1 shall be notified to the Council by the party which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request”.

Since entry into effect of the 1989 Improvements, all consultation requests notified in writing have been circulated in the DS/ series with a separate number assigned to each dispute. However, in a few instances requests for consultations have been announced in the Council, and are referred to in the Council minutes.¹²⁷

(b) Consultation requests by more than one contracting party

In a “Joint Representation under Article XXIII:1” submitted in 1982, ten contracting parties requested joint consultations with the Member States of the European Communities on the European Communities’ sugar régime and pointed out “that, although a joint request for Article XXIII consultations may be unusual, it is nevertheless perfectly legal under the GATT”.¹²⁸ The European Communities replied, *inter alia*, that “according to the practices followed under the General Agreement, a consultation under Article XXIII is of a bilateral character” and that “the Community is prepared forthwith to enter into a set of ten bilateral consultations which would be held jointly. The Community underlines that the fact of acceding to your request on this basis in no way implies that it would be disposed to accept joint action at any later stage under paragraph 2 of the same Article”.¹²⁹

At the October 1993 Council meeting it was announced that consultations had been held under Article XXIII:1 by the United States jointly with Brazil, Argentina, Canada, Chile, Colombia, El Salvador, Guatemala, Thailand, Venezuela and Zimbabwe, concerning US legislation on the use of imported tobacco.¹³⁰

See also the material below at page 728 on procedures in disputes where there are more than one applicant contracting party.

(7) “Any contracting party thus approached shall give sympathetic consideration”

Paragraph C.1 of the 1989 Improvements provides: “If a request is made under Article ... XXIII:1, the contracting party to which the request is made shall, unless otherwise mutually agreed, reply to the request within ten days after its receipt and shall enter into consultations in good faith within a period of no more than thirty days from the date of the request, with a view to reaching a mutually satisfactory solution”. Paragraph C.4 provides: “In cases of urgency, including those which concern perishable goods en route, parties shall enter into consultations within a period of no more than ten days from the date of the request ... ”.

¹²⁶L/5479; see also Council discussion of this complaint at C/M/167, p. 9-10.

¹²⁷See, e.g., announcement by Mexico at the May 1993 Council meeting of request for Article XXIII:1 consultations with Venezuela concerning anti-dumping measures on cement from Mexico, C/M/263, p. 37. Documents circulated in connection with disputes under the WTO appear in the WT/DS series.

¹²⁸L/5309 and Add. 1-5; Add. 3, 5.

¹²⁹*Ibid.*, Add. 4.

¹³⁰C/M/267, p. 10, referring to consultation requests at DS44/1, 2 and 4. A panel was established at the Forty-Ninth Session in January 1994 in response to the panel requests by Brazil, Canada, Chile, Colombia, El Salvador, Guatemala, Thailand and Zimbabwe (DS44/5 and 6). SR.49/1, p. 10-11.

3. Paragraph 2

(1) *“If no satisfactory adjustment is effected”*

(a) *Prerequisite of consultations*

The 1962 Panel Report on “Uruguayan Recourse to Article XXIII” notes that “Paragraph 2 of Article XXIII provides that the CONTRACTING PARTIES shall promptly investigate any matter referred to them under that paragraph. From the context it is obvious, however, that before a ‘matter’ can be so referred to the CONTRACTING PARTIES it must have been the subject of representations or proposals made pursuant to paragraph 1 of the Article which have not resulted in a ‘satisfactory adjustment’ (unless the difficulty is of the type referred to in paragraph 1(c) of the Article).”¹³¹ The Report of the same Panel on its work when it was reconvened in 1964 notes that the Panel “had been constituted ‘to examine cases referred to it by Uruguay, in accordance with the provisions of paragraph 2 of Article XXIII’ and that the procedures of Article XXIII:2 were, in general, not to be resorted to until possibilities of effecting ‘satisfactory adjustment’ through direct consultation (under Article XXII:1 or XXIII:1) had been exhausted Hence, a contracting party could not be obliged to appear before the Panel unless and until the CONTRACTING PARTIES had referred the case to it on the advice of the contracting party invoking the provisions that no ‘satisfactory solution’ had been effected through direct representation or consultation.”¹³²

Paragraph 6 of the 1979 Understanding provides that “Contracting parties should attempt to obtain satisfactory adjustment of the matter in accordance with the provisions of Article XXIII:1 before resorting to Article XXIII:2”.

In a communication dated 11 July 1985, Nicaragua requested the United States to hold bilateral consultations under Article XXII:1 concerning the United States’ prohibition imposed 7 May 1985 on all trade with Nicaragua. The United States did not agree to those consultations, stating that the measures could not be isolated from the broader security situation and that bilateral consultations would be useless. At the July 1985 Council meeting, Nicaragua then requested a panel, supported by a number of delegations. The United States opposed the establishment of a panel stating that there was no function for a panel to perform in this case and that “a panel had no power to address the validity of, or motivation for, invocation of Article XXI:(b)(iii).”¹³³ At the following Council meeting, the Chairman reported that the United States would not oppose establishment of a panel provided that it was understood that the Panel could not examine or judge the validity of or motivation for the invocation of Article XXI:(b)(iii) by the United States in this matter. The Council agreed to establish a panel with terms of reference reflecting that understanding.¹³⁴

In July 1988, New Zealand requested the establishment of a panel on Korean restrictions on imports of beef, stating that Korea had not responded to a request for consultations under Article XXIII:1 made three months earlier and the issue could not wait until the next Council meeting in September as the Council had established panels to consider the complaints of the United States and Australia concerning the same measures and New Zealand sought the establishment of a panel to ensure equitable treatment relative to them. The representative of New Zealand, supported by a number of other delegations, “reiterated that a careful reading of Article XXIII:2 made it clear that consultations under Article XXIII:1 were not a necessary prerequisite for the establishment of a panel ... The only test was that the CONTRACTING PARTIES collectively agree that no satisfactory adjustment had been effected between the parties concerned within a reasonable time.”¹³⁵ However, action on New Zealand’s request was deferred and the panel was established at the September Council meeting; its members were the same as the Panels in the US and Australian complaints (see below at page 728).

¹³¹L/1923, adopted on 16 November 1962, 11S/95, 98, para. 10. A footnote to this passage provides: “However, at least in respect of quantitative import restrictions applied inconsistently with the General Agreement, it has been agreed by the CONTRACTING PARTIES that the holding of a consultation under paragraph 1 of Article XXII would fulfil the conditions of paragraph 1 of Article XXIII (see BISD, Ninth Supplement, pages 19-20).”

¹³²L/2278 (dated September 1964), adopted on 3 March 1965, 13S/45, 47-48, para. 11.

¹³³L/5847 (Nicaraguan request), C/M/191, p. 41 (US statement), L/5803 (US notification of measures).

¹³⁴C/M/192, p. 6.

¹³⁵C/M/223, p. 6-10.

At the February 1989 Council meeting, the EC asked the Council to establish a panel under Article XXIII:2 concerning a US Presidential Proclamation of 24 December 1987 providing for increased rates of duty on certain EC products in response to an EC directive on hormones. In response to US objections that this would be procedurally premature, the EC representative stated that “there was no requirement in the General Agreement that formal consultations under Articles XXII or XXIII must be held prior to the establishment of a panel; Paragraph 6 of the 1979 Understanding said only that ‘contracting parties should attempt to obtain a satisfactory adjustment of a matter in accordance with the provisions of Article XXIII:1 before moving to Article XXIII:2’ or requesting a Council ruling or recommendation”.¹³⁶ Article XXIII:1 consultations were held at a later date.

Paragraph C.1 of the 1989 Improvements provides that “... If the contracting party does not respond within ten days, or does not enter into consultations within a period of no more than thirty days, or a period otherwise mutually agreed, from the date of the request, then the contracting party that requested the holding of consultations may proceed directly to request the establishment of a panel or a working party”.

On 23 December 1991, Yugoslavia requested consultations with the European Community under Article XXIII:1 concerning EEC trade measures taken for non-economic reasons against Yugoslavia.¹³⁷ In a communication dated 6 February 1992, Yugoslavia requested the establishment of a panel under Article XXIII:2 and paragraphs C.1 and F(a) of the 1989 Improvements, stating that the EC had not replied to the request and had not entered into consultations with a view to reaching a mutually satisfactory solution.¹³⁸ A panel was established at the March 1992 Council meeting.¹³⁹

See also the material on “Establishment of working parties and panels” starting at page 721, and on “Matters not raised in consultations, panel request and/or terms of reference” starting at page 734.

(b) Failure to reach a satisfactory adjustment

In Council discussion of recourse to Article XXIII:2 by the EEC concerning “Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages” the representative of Japan stated that consultations under Article XXII:1 had not been exhausted and it was premature to proceed to Article XXIII:2. In response to a request by the representative of the European Communities for the Secretariat’s opinion on Japan’s statement that the two parties to a dispute should agree that the conditions of Article XXIII:1 had been fulfilled before moving to application of Article XXIII:2, the Legal Adviser to the Director-General “said that in his view it was not necessary that both parties so agree before moving to set up a panel under Article XXIII:2; such a condition would mean that one party could indefinitely block the procedures simply by saying that bilateral consultations had not yet been terminated”.¹⁴⁰

Paragraph C.2 of the 1989 Improvements provides in this regard: “If the consultations under Article XXII:1 or XXIII:1 fail to settle a dispute within sixty days after the request for consultations, the complaining party may request the establishment of a panel or a working party under Article XXIII:2. The complaining party may request a panel or a working party during the sixty-day period if the parties jointly consider that consultations have failed to settle the dispute”. Paragraph C.4 provides: “In cases of urgency, including those which concern perishable goods en route ... If the consultations have failed to settle the dispute within a period of thirty days after the request, the complaining party may request the establishment of a panel or a working party”.

(c) Recourse to Article XXIII:2 on the basis of consultations under Article XXII:1 or Article XXXVII

As noted in Section III below, the Charter provisions corresponding to Article XXII (on consultations in respect of commercial policy measures) were located in the commercial policy chapter, Chapter IV, and the nullification and impairment provisions corresponding to Article XXIII applied to the entire Charter and were located in Chapter VIII. The Havana Reports record the following notification to other Committees of the Havana Conference by the Sixth Committee, which considered Chapter VIII:

¹³⁶C/M/228, p. 30.

¹³⁷DS27/1.

¹³⁸DS27/2.

¹³⁹C/M/255, p. 18.

¹⁴⁰C/M/205, p. 10.

"The Sixth Committee has discussed the question of the relationship between Chapter VIII and other parts of the Charter. In the light of its discussion the Committee wishes to make known to other Committees of the Conference ... the view of the Committee that if consultation or investigation has taken place under the provisions of another article, the Organization may regard such consultation or investigation as fulfilling, either in whole or in part, any similar procedural requirement in Chapter VIII."¹⁴¹

The practice of proceeding from consultations under Article XXII:1 to the establishment of a panel under Article XXIII:2 was an established one as of the 1950s. For instance, the Panel on "French Assistance to Exports of Wheat and Wheat Flour" was established by the Intersessional Committee at its April-May 1958 meeting after consultations under Article XXII:1 between the parties to the dispute, Australia and France.¹⁴² Other examples of disputes where Article XXIII:2 proceedings were preceded by consultations under Article XXII:1 include the 1962 "Uruguayan Recourse to Article XXIII"¹⁴³, the dispute brought by the United States in 1982 on "Canada - Administration of the Foreign Investment Review Act"¹⁴⁴, the dispute brought by the EC in 1987 on "Japan - Trade in Semi-conductors"¹⁴⁵, and the complaint brought by Australia in 1988 on "United States - Restrictions on Imports of Sugar".¹⁴⁶

The procedures agreed in 1960 for consultations on residual import restrictions provide in paragraph 9 that "If consultations held under paragraph 1 of Article XXII do not lead to a satisfactory solution, any of the parties to the consultations may request that consultations be carried out by the CONTRACTING PARTIES pursuant to paragraph 2 of Article XXII. Alternatively, a country whose interests are affected may resort to paragraph 2 of Article XXIII, it being understood that a consultation held under paragraph 1 of Article XXII would be considered by the CONTRACTING PARTIES as fulfilling the conditions of paragraph 1 of Article XXIII".¹⁴⁷

Paragraph 11 of the 1966 Procedures provides: "If consultations held under paragraph 2 of Article XXXVII, relate to restrictions for which there is no authority under any provisions for the General Agreement, any of the parties to the consultations may, in the absence of a satisfactory solution, request that consultations be carried out by the CONTRACTING PARTIES pursuant to paragraph 2 of Article XXIII and in accordance with the procedures set out in the present decision, it being understood that a consultation held under paragraph 2 of Article XXXVII in respect of such restrictions will be considered by the CONTRACTING PARTIES as fulfilling the conditions of paragraph 1 of Article XXIII if the parties to the consultations so agree". No consultations have ever been held under Article XXXVII.

See also the chapter on Article XXII.

(2) "the matter may be referred"

(a) "the matter"

The Report of the Sixth Committee of the Havana Conference, which considered the Charter provisions on nullification or impairment, notes that "The Committee agreed that the word 'matter' as used in Article 93 [XXIII] ... refers to nullification or impairment of a benefit and not to the action, failure, measure or situation referred to in sub-paragraphs 1(a), (b) or (c)".¹⁴⁸

The 1994 Panel Report on "United States - Imposition of Anti-Dumping duties on Imports of Fresh and Chilled Atlantic Salmon from Norway" refers to the dispute settlement procedure under the Agreement on Implementation of Article VI as "a three-step process of settlement of a dispute between Parties concerning a

¹⁴¹E/CONF.2/C.6/63, Havana Reports, p. 159.

¹⁴²IC.SR/38, p. 12.

¹⁴³Consultations with France and Italy; see 11S/96 and Uruguayan panel request at L/1647.

¹⁴⁴L/5504, Panel Report adopted on 7 February 1980, 36S/140, para. 1.1.

¹⁴⁵L/6309, adopted on 4 May 1988, 35S/116.

¹⁴⁶L/6514, Panel Report adopted on 22 June 1989, 36S/331, para. 1.

¹⁴⁷"Procedures for dealing with new import restrictions applied for balance-of-payments reasons and residual import restrictions", 9S/18, 19-20, para. 9.

¹⁴⁸Havana Reports, p. 155.

single ‘matter’ and the individual claims of which a matter is composed, in which panel examination of a matter would be preceded by consultations concerning that same matter and conciliation concerning that same matter”.¹⁴⁹

One “matter” does not include counter-complaints in regard to distinct matters. Paragraph 9 of the 1979 Understanding provides as follows: “It is ... understood that complaints and counter-complaints in regard to distinct matters should not be linked”.¹⁵⁰

(b) Requests for the establishment of a panel

The 1989 Improvements provide in paragraph F(a) as follows:

“The request for a panel or a working party shall be made in writing. It shall indicate whether consultations were held, and provide a brief summary of the factual and legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel or a working party with other than standard terms of reference, the written request shall include the proposed text of special terms of reference. ...”.

(3) “The CONTRACTING PARTIES shall promptly investigate”

See the material in section D (pages 721-763) on panel procedures used to carry out the investigation by the CONTRACTING PARTIES.

At the November 1990 Council meeting, the Director-General noted that “the composition of two panels established in 1985 and 1987 was still not decided; these complaints should be either pursued or withdrawn. In the light of such instance, he wondered if a complaint should not be deemed to be withdrawn if it was not actively pursued for, say, more than one year”.¹⁵¹

(4) “the CONTRACTING PARTIES ... shall make appropriate recommendations ... or give a ruling”

The 1962 Panel Report on the “Uruguayan Recourse to Article XXIII” notes as follows:

“Paragraph 2 of Article XXIII provides, apart from promptly investigating any matter so referred to them, for two kinds of action by the CONTRACTING PARTIES, namely:

“(i) they shall make appropriate recommendations or give a ruling on the matter;

“(ii) they may authorize the suspension of concessions or obligations.

“The action stated under (i) is obligatory and must be taken in all cases where there can be an ‘appropriate’ recommendation or ruling. The action under (ii) is to be taken at the discretion of the CONTRACTING PARTIES in defined circumstances.

“The paragraph states that the CONTRACTING PARTIES ‘shall make appropriate recommendations to the contracting parties which they consider to be concerned or give a ruling on the matter, as appropriate’. Whilst a ‘ruling’ is called for only when there is a point of contention on fact or law, ‘recommendations’ should always be appropriate whenever, in the view of the CONTRACTING PARTIES, they would lead to a satisfactory adjustment of the matter”.¹⁵²

¹⁴⁹ADP/82, adopted on 27 April 1994, para. 332.

¹⁵⁰26S/212, para. 9.

¹⁵¹C/M/246, p. 23.

¹⁵²L/1923, adopted on 16 November 1962, 11S/95, 99, paras. 11-12.

Paragraphs 16 and 17 of the 1979 Understanding provide:

“The function of panels is to assist the CONTRACTING PARTIES in discharging their responsibilities under Article XXIII:2. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the General Agreement and, if so requested by the CONTRACTING PARTIES, make such other findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2 ...

“Where the parties have failed to develop a mutually satisfactory solution, the panel should submit its findings in a written form. The report of a panel should normally set out the rationale behind any findings and recommendations that it makes”.

Paragraph 3 of the 1979 Understanding Annex on customary practice provides: “.... In cases of failure of the parties to reach a mutually satisfactory settlement, panels have normally given assistance to the CONTRACTING PARTIES in making recommendations or in giving rulings as envisaged in Article XXIII:2”. Paragraphs 6(v) and 6(viii) of this Annex also provide:

“Where the parties have failed to develop a mutually satisfactory solution, the panel has submitted its findings in a written form. Panel reports have normally set out findings of fact, the applicability of relevant provisions, and the basic rationale behind any findings and recommendations that it has made”

“In accordance with their terms of reference established by the CONTRACTING PARTIES panels have expressed their views on whether an infringement of certain rules of the General Agreement arises out of the measure examined. Panels have also, if so requested by the CONTRACTING PARTIES, formulated draft recommendations addressed to the parties ...”.

Paragraphs (v) and (viii) of the 1982 Ministerial Decision provide:

“(v) The terms of reference of a panel should be formulated so as to permit a clear finding with respect to any contravention of GATT provisions and/or on the question of nullification and impairment of benefits. In terms of paragraph 16 of the Understanding, and after reviewing the facts of the case, the applicability of GATT provisions and the arguments advanced, the panel should come to such a finding. Where a finding establishing a contravention of GATT provisions or nullification or impairment is made, the panel should make such suggestions as appropriate for dealing with the matter as would assist the CONTRACTING PARTIES in making recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate.

“(viii) The recommendation or ruling made by the CONTRACTING PARTIES shall be aimed at achieving a satisfactory settlement of the matter in accordance with GATT obligations ...”.

See also the material on “Panel reports” at page 755.

a) *Objective of recommendations or rulings*

The Report of the Review Session Working Party on “Organizational and Functional Questions” noted that

“... any implication ... that the provision of appropriate compensation, on the one hand, and the removal of a measure inconsistent with the Agreement, on the other hand, are fully equivalent and satisfactory alternatives would not accord with the intent and spirit of the Article ... the first objective, if the CONTRACTING PARTIES decided, in the event of a complaint under Article XXIII, that certain measures were inconsistent with provisions of the Agreement, should be to secure the withdrawal of the measures. In such a case, the alternative of providing compensation for damage suffered should be resorted to only if the

immediate withdrawal of the measures was impracticable and only as a temporary measure pending the withdrawal of the measures which were inconsistent with the Agreement".¹⁵³

This view was referred to by the Panel on "French Import Restrictions", in suggesting in its 1962 Report "that the CONTRACTING PARTIES could appropriately recommend to the French Government the withdrawal of restrictions inconsistent with Article XI," and in suggesting "that the CONTRACTING PARTIES recommend to the United States Government that it refrain, for a reasonable period, from exercising its right, under the procedures of paragraph 2 of Article XXIII, to propose suspension of the application of equivalent obligations or concessions".¹⁵⁴

The 1962 Panel Report on "Uruguayan Recourse to Article XXIII" provides that

"Where a measure affecting imports is maintained clearly in contradiction with the provisions of the General Agreement (and is not covered by the 'existing legislation' clause of a Protocol), the Panel has in all cases recommended that the measure in question be removed".¹⁵⁵

Paragraph 4 of the 1979 Understanding Annex on customary practice provides:

"... The aim of the CONTRACTING PARTIES has always been to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the CONTRACTING PARTIES is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the General Agreement. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement. The last resort which Article XXIII provides to the country invoking this procedure is the possibility of suspending the application of concessions or other obligations on a discriminatory basis vis-à-vis the other contracting party, subject to authorization by the CONTRACTING PARTIES of such measures. Such action has only rarely been contemplated and cases taken under Article XXIII:2 have led to such action in only one case".

See also paragraph (ix) of the 1982 Ministerial Declaration.

(b) *Recommendations with regard to "violation" complaints under Article XXIII:1(a)*

See paragraph 4 of the 1979 Understanding Annex on customary practice, directly above. In most instances where a panel has found that a measure was inconsistent with the General Agreement it has recommended that it be "brought into conformity with the General Agreement".

One panel report adopted by the CONTRACTING PARTIES has found that a measure was inconsistent with the General Agreement, and at the same time suggested that the CONTRACTING PARTIES grant a waiver. The 1971 Panel Report on "Jamaica - Margins of Preference" held that

"... The provision of Article I:4 establishing 10 April 1947 as the base date for permissible margins of preference was ... applicable to Jamaica.

"The Panel agreed, however, that it was important to find a solution which, on the one hand, would not lead to a strained interpretation of the General Agreement and which would leave the General Agreement intact, but which, on the other hand, would take into account the uniqueness of the Jamaican case ...

"The Panel therefore suggests that in the light of the exceptional circumstances the CONTRACTING PARTIES consider taking a decision in accordance with the provisions of paragraph 5 of Article XXV to change with

¹⁵³L/327, adopted on 28 February, 5 and 7 March 1955, 3S/231, 251, para. 64.

¹⁵⁴L/1921, adopted on 14 November 1962, 11S/94, 95, paras. 6 and 7.

¹⁵⁵L/1923, adopted on 16 November 1962, 11S/95, 101, para. 20.

respect to Jamaica the base date referred to in paragraph 4 of Article 1 from 10 August 1947 to 1 August 1962".¹⁵⁶

The Panel drew up a draft waiver decision. The waiver was agreed on 2 March 1971.

In three cases which have been adopted (two under Article XXIII and one under the Agreement on Interpretation and Application of Articles VI, XVI and XXIII), the recommendations of a panel have included a recommendation of specific actions to be taken. The 1985 Panel Report on "New Zealand - Imports of Electrical Transformers from Finland" found that "the imposition of anti-dumping duties on these imports was not consistent with the provision of Article VI:6(a) of the General Agreement" and concluded that "The Panel proposes to the Council that it addresses to New Zealand a recommendation to revoke the anti-dumping determination and to reimburse the anti-dumping duty paid".¹⁵⁷ The 1991 Panel Report on "United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada" concluded that "the United States countervailing duties on fresh, chilled and frozen pork from Canada are being levied inconsistently with Article VI:3 of the General Agreement because the United States' determination that the production of pork had benefited from subsidies was not made in accordance with the requirements of that provision" and recommended "that the CONTRACTING PARTIES request the United States to either reimburse the countervailing duties corresponding to the amount of the subsidies granted to producers of swine or to make a subsidy determination which meets the requirements of Article VI:3 and reimburse the duties to the extent that they exceed an amount equal to the subsidy so determined to have been granted to the production of pork". The 1993 Panel Report on "United States - Measures Affecting Imports of Softwood Lumber from Canada" discusses this subject as follows:

"... The Panel further noted that panels, having found a measure to be inconsistent with a signatory's obligation, generally recommended that the signatory be requested to bring its measure into conformity with the Agreement. The Panel considered that such a recommendation was especially appropriate in those cases where there were several options available to a signatory to bring itself into conformity with the Agreement. The Panel considered however that such multiple options were not available to the United States in the present case and that the only option open to the United States was, with respect to imports of softwood lumber from Canada, to terminate the bonding requirement, release any bonds, refund any cash deposits and terminate the suspension of liquidation of entries made during the period of application of the inconsistent interim measures imposed in October 1991 under the authority of Section 304 of the Trade Act of 1974.

"Moreover, the Panel noted that the CONTRACTING PARTIES of GATT had adopted two panel reports which had recommended the reimbursement of duties found to have been imposed in a manner inconsistent with GATT obligations, the first involving anti-dumping duties and the second involving countervailing duties. The Panel considered that such a recommendation was also appropriate in this case.

"The Panel therefore recommends to the Committee that it request the United States, with respect to imports of softwood lumber from Canada, to terminate the bonding requirement, release any bonds, refund any cash deposits and terminate the suspension of liquidation of entries made during the period of application of the inconsistent interim measures imposed in October 1991 under the authority of Section 304 of the Trade Act of 1974."¹⁵⁸

The appropriateness of such recommendations has been discussed on a number of occasions in the Committee on Anti-Dumping Practices and the Committee on Subsidies and Countervailing Measures.¹⁵⁹

In some cases where a measure was no longer in effect at the time of the panel report, the panel has found the measure to be inconsistent with the General Agreement and has not recommended that the measure be brought into conformity with the General Agreement; for instance, the 1978 Panel Report on "EEC - Measures on Animal Feed Proteins"¹⁶⁰, the 1980 Panel Report on "EEC Restrictions on Imports of Apples from Chile"¹⁶¹,

¹⁵⁶L/3485, Panel Report adopted on 2 February 1971, 18S/183, 187, para. 13-15; L/3503, waiver decision of 2 March 1971, 18S/33.

¹⁵⁷L/5814, adopted on 18 July 1985, 32S/55, 70, paras. 4.9 (finding), 4.11 (recommendation).

¹⁵⁸SCM/162, adopted on 26 October 1993, paras. 413-415.

¹⁵⁹See minutes of discussions in ADP/M/30, ADP/M/32, ADP/M/35, ADP/M/37, ADP/M/39, ADP/M/40, SCM/M/65.

¹⁶⁰L/4599, adopted on 14 March 1978, 25S/49.

the 1982 Panel Report on “United States - Prohibition of Imports of Tuna and Tuna Products from Canada”¹⁶², the 1989 Panel Reports on the complaints of Chile and the United States with respect to “EEC - Restrictions on Imports of Dessert Apples”¹⁶³ and the 1992 Panel Report on “United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear”.¹⁶⁴ See also above at page 649 concerning “Measures no longer in effect”.

The Panel Report under the Agreement on Government Procurement on “Norway - Procurement of Toll Collection Equipment for the City of Trondheim” discusses GATT practice with respect to recommendations in panel reports.

“The Panel ... turned its attention to the recommendations that the United States had requested it to make. In regard to the United States’ request that the Panel recommend that Norway take the necessary measures to bring its practices into compliance with the Agreement with regard to the Trondheim procurement, the Panel noted that all the acts of non-compliance alleged by the United States were acts that had taken place in the past. The only way mentioned during the Panel’s proceedings that Norway could bring the Trondheim procurement into line with its obligations under the Agreement would be by annulling the contract and recommencing the procurement process. The Panel did not consider it appropriate to make such a recommendation. Recommendations of this nature had not been within customary practice in dispute settlement under the GATT system and the drafters of the Agreement on Government Procurement had not made specific provision that such recommendations be within the task assigned to panels under standard terms of reference. Moreover, the Panel considered that in the case under examination such a recommendation might be disproportionate, involving waste of resources and possible damage to the interests of third parties.

“The United States had further requested the Panel to recommend that Norway negotiate a mutually satisfactory solution with the United States that took into account the lost opportunities in the procurement of United States’ companies, including Amtech. Finally, the United States had requested the Panel to recommend that, in the event that the proposed negotiation did not yield a mutually satisfactory result, the Committee be prepared to authorise the United States to withdraw benefits under the Agreement from Norway with respect to opportunities to bid of equal value to the Trondheim contract. Norway had argued that, even if the Panel were to find that the procurement had been conducted inconsistently with the Agreement, such requests should be rejected because they were outside the scope of the complaint referred to the Panel and outside the tasks assigned to dispute settlement panels under the Agreement.

“In examining these requests, the Panel first noted that, as instructed in its terms of reference, it had given Norway and the United States full opportunity to develop a mutually satisfactory solution. The Panel also noted that nothing prevented the two governments from negotiating at any time a mutually satisfactory solution that took into account the lost opportunities of United States’ suppliers, provided such solution was consistent with their obligations under this and other GATT agreements. The issue was whether the Panel should recommend this and further recommend that the Committee be prepared to authorise the withdrawal of benefits under the Agreement from Norway if such a solution were not negotiated.

“The Panel noted that the United States had indicated that it was not asking the Panel to recommend the negotiation of compensation for past losses. However, if this was not the case, it was not evident to the Panel what it was being asked to recommend that Norway negotiate with the United States. Clearly the ‘lost opportunities’ referred to were past opportunities and the remedial action that might be negotiated taking into account these lost opportunities would have to be in the future and therefore in all probability compensatory. The request concerning withdrawal of benefits also confirmed to the Panel that the practical effect of the recommendations sought by the United States would be to invite Norway to offer compensation, in one form or another, to the United States for past losses. Given that the United States had indicated that this was not what it was seeking, the Panel had some difficulty in responding to this request, despite having made efforts to explore its implications with the parties.

¹⁶¹L/5047, adopted on 10 November 1980, 27S/98.

¹⁶²L/5198, adopted on 22 February 1982, 29S/91.

¹⁶³L/6491 and L/6513, both adopted on 22 June 1989, 36S/93 and 36S/135.

¹⁶⁴DS18/R, adopted on 19 June 1992, 39S/128, 154, paras. 7.1-7.2 (noting in para. 7.1 that “The Panel noted that Brazil requested a general ruling on the matter in dispute, but did not request the Panel to make a specific recommendation to the CONTRACTING PARTIES”).

“Moreover, the Panel observed that, under the GATT, it was customary for panels to make findings regarding conformity with the General Agreement and to recommend that any measures found inconsistent with the General Agreement be terminated or brought into conformity from the time that the recommendation was adopted. The provision of compensation had been resorted to only if the immediate withdrawal of the measure was impracticable and as a temporary measure pending the withdrawal of the measures which were inconsistent with the General Agreement ... Questions relating to compensation or withdrawal of benefits had been dealt with in a stage of the dispute settlement procedure subsequent to the adoption of panel reports.

“The Panel then considered whether there were reasons that would justify dispute settlement panels under the Agreement on Government Procurement differing from the above practice under the General Agreement. In this respect, the Panel noted the argument of the United States that, because benefits accruing under the Agreement were primarily in respect of events (the opportunity to bid), rather than in respect of trade flows, and because government procurement by its very nature left considerable latitude for entities to act inconsistently with obligations under the Agreement in respect of those events even without rules or procedures inconsistent with those required by the Agreement, standard panel recommendations requiring an offending Party to bring its rules and practices into conformity would, in many cases, not by themselves constitute a sufficient remedy and would not provide a sufficient deterrent effect.

“In considering this argument, the Panel was of the view that situations of the type described by the United States were not unique to government procurement. Considerable trade damage could be caused in other areas by an administrative decision without there necessarily being any GATT inconsistent legislation, for example in the areas of discretionary licensing, technical regulations, sanitary and phytosanitary measures and subsidies. Moreover, there had been cases where a temporary measure contested before the GATT had been lifted before a Panel had been able to report.

“The Panel also believed that, in cases concerning a particular past action, a panel finding of non-compliance would be of significance for the successful party: where the interpretation of the Agreement was in dispute, panel findings, once adopted by the Committee, would constitute guidance for future implementation of the Agreement by Parties.

“Moreover, the Panel was not aware of any basis in the Agreement on Government Procurement for panels to adopt with regard to the issues under consideration a practice different from that customary under the General Agreement, at least in the absence of special terms of reference from the Committee.

“In the light of the above, the Panel did not consider that it would be appropriate for it to recommend that Norway negotiate a mutually satisfactory solution with the United States that took into account the lost opportunities of United States companies in the procurement or that, in the event that such a negotiation did not yield a mutually satisfactory result, the Committee be prepared to authorise the United States to withdraw benefits under the Agreement from Norway with respect to opportunities to bid of equal value to the Trondheim contract. The Panel had recognised, however, that nothing prevented the United States from pursuing these matters further in the Committee or from seeking to negotiate with Norway a mutually satisfactory solution provided that it was consistent with the provisions of this and other GATT agreements.”¹⁶⁵

See also the discussion of panel recommendations of compensation in the 1989 Panel Report on the complaint of Chile with respect to “EEC - Restrictions on Imports of Dessert Apples”, cited on page 682, and the Secretariat Notes on this subject cited on page 683.

(c) *Recommendations with respect to “non-violation” complaints under Article XXIII:1(b)*

During discussions on the Charter dispute settlement provisions at the Geneva session of the Preparatory Committee, it was stated that, in case of recommendations affecting otherwise lawful conduct, member states “are under no specific and contractual obligations to accept those Recommendations”.¹⁶⁶

¹⁶⁵GPR/DS.2/R, adopted on 13 May 1992, paras. 4.17-4.26.

¹⁶⁶EPCT/A/PV/5, p. 16.

The 1950 Report of the Working Party on “The Australian Subsidy on Ammonium Sulphate” notes as follows:

“In making this recommendation the working party wishes to draw attention to one point of particular importance. There is in their view nothing in Article XXIII which would empower the CONTRACTING PARTIES to require a contracting party to withdraw or reduce a consumption subsidy such as that applied by the Government of Australia to ammonium sulphate, and the recommendation made by the working party should not be taken to imply the contrary. The ultimate power of the CONTRACTING PARTIES under Article XXIII is that of authorizing an affected contracting party to suspend the application of appropriate obligations or concessions under the General Agreement. The sole reason why the adjustment of subsidies to remove any competitive inequality between the two products arising from subsidization is recommended is that, in this particular case, it happens that such action appears to afford the best prospect of an adjustment of the matter satisfactory to both parties”.¹⁶⁷

The 1952 Panel Report on “Treatment by Germany of Imports of Sardines”, concerning the treatment of certain imports relative to tariff concessions negotiated by Norway in the Torquay Round, provides that “... the Panel suggests to the CONTRACTING PARTIES that it would be appropriate for the CONTRACTING PARTIES to make a recommendation to Germany and Norway in accordance with the first sentence of paragraph 2 of Article XXIII. This recommendation should aim at restoring, as far as practicable, the competitive relationship which existed at the time when the Norwegian Government negotiated at Torquay and which that Government could reasonably expect to be continued”.¹⁶⁸ The Recommendation of 31 October 1952 on the “Complaint by Norway concerning the Treatment by Germany of Imports of preparations of Clupea Sprattus and Clupea Harengus” provides:

“*Having Investigated* in accordance with Article XXIII the complaint of Norway concerning the treatment by Germany of imports of preparations of Clupea sprattus and Clupea harengus,

...

“*Having Concluded* that the evidence produced was not such as to warrant a finding that the measures taken by the German Government regarding the treatment of preparations of Clupea pilchardus were inconsistent with the provisions of Article I paragraph 1 and Article XIII paragraph 1 of the General Agreement, and

“*Having Found*, however, that as a result of these measures the value of the tariff concession obtained by Norway has been impaired,

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“*Recommend* that the Government of the Federal Republic of Germany consider ways and means to remove the competitive inequality between the preparations of Clupea pilchardus and those of other varieties of the Clupeoid family which may, in practice, exist as a result of the changes introduced in 1951 and 1952 in the treatment of preparations of Clupea pilchardus as regards the imposition of import duties and taxes and as regards the relaxation of quantitative restrictions on imports, and consult with the Government of Norway with respect to the results of their consideration, and that the two parties report to the CONTRACTING PARTIES not later than the opening day of the Eighth Session”.¹⁶⁹

The report of the reconvened Panel on “Uruguayan Recourse to Article XXIII” on its examination in 1964 notes in respect of the previous report by the same Panel, adopted on 16 November 1962:

“In dealing with the first group of Uruguayan applications under Article XXIII:2 in 1962, the Panel had been unable to find nullification or impairment under the General Agreement in respect of a large number of items. In many of such cases the contracting party concerned was nevertheless urged to remove the

¹⁶⁷ GATT/CP.4/39, adopted on 3 April 1950, II/188, 195, para. 16.

¹⁶⁸ G/26, adopted on 31 October 1952, 1S/53, 59, para. 18.

¹⁶⁹ 1S/30-31.

measure in question or any adverse effect which it might have on Uruguayan exports. The Panel was now informed by certain contracting parties that they had been able to take action in this direction".¹⁷⁰

The 1982 Report of the "Panel on Vitamins" concluded that "The Panel considers that the United States has not infringed its commitment under the General Agreement or under the ASP Chemical Products Understanding of 2 March 1979".¹⁷¹ The Panel also concluded that the "European Economic Community ... had in the opinion of the Panel no reason to assume that the tariff treatment of feed-grade quality vitamins would be modified in such a way that imports into the United States would decrease to the extent experienced"¹⁷², and that "the Panel feels that in the light of the particular circumstances, the Council could invite the United States to advance the implementation of the Tokyo Round concession rate on feed-grade Vitamin B12 to such an extent that imported vitamins could again attain their traditional competitive position in the United States market".¹⁷³

The 1989 Panel Report on the complaint of Chile with respect to "EEC - Restrictions on Imports of Dessert Apples" notes a claim of Chile regarding compensation related to non-violation nullification or impairment. Recalling the EEC's tariff concessions on apples, Chile argued that the restrictions in question, even if consistent with the EEC's GATT obligations, distorted the competitive relationship which would otherwise have prevailed between Chilean suppliers and other suppliers on the Community market. Chile argued that compensation was appropriate since of the other possible recommendations - withdrawal of the restrictions or retaliatory withdrawal of concessions - one was meaningless as the measures had lapsed on 31 August 1988 and the other was an undesirable last resort which would not be in Chile's interests. Chile requested that the Panel make a finding of "retroactive prejudice" calculated on the basis of the losses and lost opportunities to Chilean exporters which had been demonstrated to the Panel. Chile also requested that the Panel propose that the CONTRACTING PARTIES recommend to the EEC that it take positive measures to compensate Chile for this damage. One possibility for compensation would be an appropriate reduction in the EEC duty rate during the peak period for Chilean apple shipments. The EEC argued that the Panel's terms of reference did not allow it to go beyond the framework of Article XXIII:2, and create new obligations.¹⁷⁴

"The Panel observed that it was customary for a panel examining complaints under paragraph 2 of Article XXIII to make a finding regarding nullification or impairment of benefits and to recommend the termination of measures found to be inconsistent with the General Agreement. It noted that there was no provision in the General Agreement obliging contracting parties to provide compensation, and that the Annex to the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance indicated that:

'... The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement.'

"The Panel further recalled that a 1965 Secretariat note discussed this issue in relation to residual quantitative restrictions affecting developing countries. This note indicated:

'... Where a proposal for compensation has been made, it would appear that it is open to the CONTRACTING PARTIES to make an assessment of the loss sustained ... and to make a recommendation that pending elimination of these restrictions the country applying such restrictions should consider the establishment of other appropriate concessions which would serve to compensate this loss. There are, however, two points which need to be noted in this connection. Firstly, any such recommendation under the provisions of the present Article XXIII can be implemented only to the extent that it proves acceptable to the contracting party to whom it is addressed. If such contracting party is not in a position to accept the recommendation, the final sanction must remain the authority for withdrawing equivalent obligations as provided in paragraph 2 of Article XXIII.

¹⁷⁰L/2278, adopted on 3 March 1965, 13S/45, 48, para. 12.

¹⁷¹L/5331, adopted on 1 October 1982, 29S/110, 117, para. (h).

¹⁷²*Ibid.*, para. (g).

¹⁷³*Ibid.*, para. (h).

¹⁷⁴L/6491, adopted on 22 June 1989, 36S/93, 120-121, paras. 10.2-10.4.

‘Secondly, the nature of the compensatory concessions and the items on which these are offered would have to be determined by the contracting party to whom the recommendation is directed and would have to be a matter of agreement between the parties concerned. It would not be possible for a panel or other body set up by the CONTRACTING PARTIES to adjudicate on the specific compensations that should be offered ...’

“The Panel endorsed the views contained in this note. It recognized that it would be possible for the EEC and Chile to negotiate compensation consistent with the provisions of the General Agreement; however the Panel did not consider that it would be appropriate for it to make a recommendation on this matter.”¹⁷⁵

See also the Secretariat Note referred to immediately above, on “Compensation to Less-developed Contracting Parties for Loss of Trading Opportunities Resulting from the Application of Residual Restrictions”, done in preparation for the Ad-Hoc Working Group on Legal Amendments of the Committee of Trade and Development in 1965 (see further at page 764 below).¹⁷⁶ See also a 1989 Secretariat Note on “Compensation in the Context of GATT Dispute Settlement Rules and Procedures”.¹⁷⁷

Paragraphs 156 and 157 of the 1990 Panel Report on “EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins” make the following findings and recommendations with respect to the non-violation nullification or impairment claims made:

“The Panel ... found that benefits accruing to the United States under Article II of the General Agreement in respect of the zero tariff bindings for oilseeds in the Community Schedule of Concessions were impaired as a result of the introduction of production subsidy schemes which operate to protect Community producers of oilseeds completely from the movement of prices of imports and thereby prevent the tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds. The Panel recommends that the CONTRACTING PARTIES suggest that the Community consider ways and means to eliminate the impairment of its tariff concessions for oilseeds.

“The Panel finally considered that, as the inconsistency with Article III:4 and the impairment of the tariff concessions arise from the same Community Regulations, a modification of these Regulations in the light of Article III:4 could also eliminate the impairment of the tariff concessions. The Panel therefore recommends that the CONTRACTING PARTIES take no further action under Article XXIII:2 in relation to the impairment of the tariff concessions until the Community has had a reasonable opportunity to adjust its Regulations to conform to Article III:4”.¹⁷⁸

The 1992 Report of the Members of the Original Oilseeds Panel on “Follow-up on the Panel Report ‘EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins’” includes the following conclusions:

“With reference to paragraph 156 of the Oilseeds Panel Report, the present Panel finds that benefits accruing to the United States under Article II of the General Agreement in respect of the zero tariff bindings for oilseeds in the Community Schedule of Concessions continue to be impaired by the production subsidy scheme provided for in Council Regulation (EEC) No 3766/91.

“With reference to paragraph 157 of the Oilseeds Panel Report, the Panel considers that there is no reason for the CONTRACTING PARTIES to continue to defer consideration of further action in relation to the impairment of the tariff concessions.

“The Panel accordingly recommends that the Community should act expeditiously to eliminate the impairment of the tariff concessions - either by modifying its new support system for oilseeds or by renegotiating its tariff concessions for oilseeds under Article XXVIII. In the event that the dispute is not

¹⁷⁵ *Ibid.*, 36S/134, paras. 12.35-12.36.

¹⁷⁶ COM.TD/5, dated 2 March 1965.

¹⁷⁷ MTN.GNG/NG13/W/32, dated 14 July 1989.

¹⁷⁸ L/6627, adopted on 25 January 1990, 37S/86, 132, paras. 156-157.

resolved expeditiously in either of these ways, the CONTRACTING PARTIES should, if so requested by the United States, consider further action under Article XXIII:2 of the General Agreement".¹⁷⁹

See also below at pages 695, 696 and 700 on the further follow-up to this panel report, as well as material under Article XXVIII on the subsequent invocation of Article XXVIII:4 by the EC.

(d) Recommendations in the absence of a finding of either violation or non-violation nullification or impairment

In the discussion at the June 1989 Council meeting of the Panel report on "United States - Trade Measures affecting Nicaragua"¹⁸⁰, which has not been adopted, the representative of Nicaragua stated that the Panel report "could not be adopted unless complementary decisions were also taken. ... the Panel had been unable to fulfil its fundamental tasks under Article XXIII, namely: (a) to make findings as to whether or not the United States was complying with its obligations under the General Agreement ... and (b) to make findings as to whether the embargo nullified or impaired benefits accruing to Nicaragua under the General Agreement ... As the report explained, this had been due to the limitations imposed by the Panel's terms of reference. To adopt the report without any further decisions by the Council to redress this situation would create an extremely dangerous precedent. It would mean that the CONTRACTING PARTIES refused a contracting party's right to have its complaint examined in accordance with Article XXIII:2— a right which, in the case of the application of Article XXI, was recognized by the CONTRACTING PARTIES in the Decision of 30 November 1982".¹⁸¹

In Council discussion of the Panel Report on "United States - Restrictions on the Importation of Sugar and Sugar-containing Products applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions"¹⁸², in which the Panel did not find any inconsistency with the General Agreement and therefore did not propose any recommendations, the EC representative referred to the Council action on the Panel Report on "Spain - Measures concerning Domestic Sale of Soyabean Oil"¹⁸³, and stated that "the Panel had not, indeed, made recommendations, but had merely offered a number of reasonings and conclusions. He wondered what the adoption of the report would mean ... and proposed that the Council take note of the report at hand. ... The representative of the United States said that the basic flaw in the proposal to merely take note of the Panel report on the ground that it contained no recommendation was that, should this approach be followed, it would imply that every time a complainant lost a case, the relevant report would not be adopted".¹⁸⁴ The Panel Report was adopted on 7 November 1990.

(e) Time frame for implementation of recommendations or rulings

At the Sixth Session in September 1951, the delegations of the Netherlands and of Denmark each submitted a complaint under paragraph 2 of Article XXIII regarding the July 1951 enactment by the United States of Section 104 of the Defense Production Act of 1951, which imposed quantitative restrictions and prohibitions on the importation of dairy products into the United States.¹⁸⁵ A number of other contracting parties also indicated that they had requested consultations under Article XXIII:1. The Chairman, summing up the initial discussion of this item at the Sixth Session, noted that "there was general agreement that Section 104 of the Defence Production Act was an infringement of Article XI of the General Agreement. That the provisions of this Article were contravened was accepted by the United States delegation, and, to rectify the situation, the executive branch of the United States Government was making serious efforts to get the repeal of that Section. Secondly, it was clear that if these efforts should fail to produce satisfactory results the matter would have to be considered under Article XXIII of the Agreement regarding impairment and nullification; this might involve withdrawals of concessions by other contracting parties; and it was hoped that it would not prove necessary ...".¹⁸⁶ At the end of the Sixth Session a Resolution was adopted which recognized that concessions had been nullified or impaired and that the import restrictions constituted an infringement of Article XI; recognized that "the circumstances are

¹⁷⁹DS28/R, dated 31 March 1992, 39S/91, 118-119, paras. 90-92.

¹⁸⁰L/6053, unadopted. See also C/W/506 (statement by Nicaragua on the Panel report), C/W/522 (communication from Nicaragua), C/W/524 (draft decision submitted by Nicaragua), C/W/525 (statement by certain Latin American contracting parties).

¹⁸¹C/M/234, p. 40, referring to Decision at 29S/23.

¹⁸²L/6631, adopted on 7 November 1990, 37S/228.

¹⁸³L/5142, noted by the Council on 3 November 1981, C/M/152, p. 7-19; see material at page 762 below.

¹⁸⁴C/M/241, p. 15-16.

¹⁸⁵Netherlands: GATT/CP.6/26 dated 19 September 1951; Denmark: GATT/CP.6/28 dated 21 September 1951.

¹⁸⁶GATT/CP.6/SR.10, p. 9.

serious enough to justify recourse ... to Article XXIII paragraph 2” by the contracting parties that had suffered serious damage as a result; and “counsel[ed] the contracting parties affected, in view of the continuing determination of the United States Government to seek the repeal of Section 104 of the United States Defense Production Act and the high priority and urgency which it has stated it will give to further action to this end, to afford to the United States Government a reasonable period of time, as it has requested, in order to rectify the situation through such repeal ...”.¹⁸⁷ Concerning further events in this case, see the material below at pages 690, 693, 695 and 696.

Paragraph 22 of the 1979 Understanding indicates that recommendations by the CONTRACTING PARTIES under Article XXIII:2 are to be implemented “within a reasonable period of time”.¹⁸⁸ This obligation has been referred to by various contracting parties as “customary GATT practice”.¹⁸⁹

Footnote 2 to paragraph (e) of the Illustrative List of Export Subsidies annexed to the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement provides *inter alia*, “Where measures incompatible with the provisions of paragraph (e) exist, and where major practical difficulties stand in the way of the signatory concerned bringing such measures promptly into conformity with the Agreement, the signatory concerned shall, without prejudice to the rights of other signatories under the General Agreement or this Agreement, examine methods for bringing these measures into conformity within a reasonable period of time”.

Paragraph (vii) of the 1982 Ministerial Decision provides that “.. Where a decision on the findings contained in a report calls for a ruling or a recommendation by the Council, the Council may allow the contracting party concerned a reasonable specified time to indicate what action it proposes to take with a view to a satisfactory settlement of the matter, before making any recommendation or ruling on the basis of the report”.

Paragraphs I(1) and (2) of the 1989 Improvements provide:

“1. Prompt compliance with recommendations or rulings of the CONTRACTING PARTIES under Article XXIII is essential in order to ensure effective resolution of disputes to the benefit of all contracting parties.

“2. The contracting party concerned shall inform the Council of its intentions in respect of implementation of the recommendations or rulings. If it is impracticable to comply immediately with the recommendations or rulings, the contracting party concerned shall have a reasonable period of time in which to do so.”

(f) *Implementation and other obligations under the General Agreement*

At the February 1988 Council meeting, in discussion of the Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”¹⁹⁰, the representative of Australia cited “a history of bilateral negotiations outside GATT’s scope”, and sought advice from the Secretariat on “whether whatever action taken to implement the report would carry an inherent obligation to act fully within the provisions of the General Agreement, in particular, the obligation to take actions having an m.f.n. effect”. The Deputy Director-General, replying to Australia’s questions, “referred, on the first point, to paragraph 22 of the 1979 Understanding which indicated that the responsibility of the CONTRACTING PARTIES was to keep under review a matter which had been the subject of a recommendation or ruling. If such a recommendation, adopted by the Council, were not implemented, it remained open to the contracting party concerned to bring the matter to the CONTRACTING PARTIES for further action. Were the CONTRACTING PARTIES to make ‘suitable efforts’ on the basis of this referral by the contracting party bringing the case, such efforts could only be made with a view to finding an ‘appropriate solution’, for which only a solution within the terms of the General Agreement would qualify”.¹⁹¹

¹⁸⁷Resolution of 26 October 1954 on “United States Import Restrictions on Dairy Products”, II/16, 17, adopted at GATT/CP.6/SR.27, p. 8.

¹⁸⁸26S/214, para. 22.

¹⁸⁹C/M/178, p. 3-4.

¹⁹⁰L/6253, adopted on 2 February 1988, 35S/163.

¹⁹¹C/M/217, p. 21-22.

g) *Compensation as a temporary measure pending implementation of recommendations or rulings*

During the same discussion referred to immediately above, the representative of Australia asked for Secretariat advice on the question "... if, at some point in the implementation of this report, the question arose of compensation as a means of implementation, whether the following terms of paragraph 4 of the Annex to the 1979 Understanding would fully apply: 'The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement'". The Deputy Director-General stated in reply that "his understanding was that it was clearly preferable that a solution mutually acceptable to the parties could be reached before the matter became the subject of a decision by the Council or the CONTRACTING PARTIES. Were that not to be the case, the CONTRACTING PARTIES' action following consideration of the matter and the adoption of any recommendations would be directed, as paragraph 4 of the Annex stated, to securing the 'withdrawal of the measures concerned', and were that not possible, to providing for compensatory adjustment until the withdrawal became possible".¹⁹²

The 1990 Panel Report on "United States - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions" notes that the EEC had claimed that restrictions on imports of sugar-containing products were inconsistent with Article XI even whether or not they met the terms of the waiver concerned, that the waiver simply suspended the obligation to implement provisions of the General Agreement, that these restrictions nullified or impaired benefits accruing to the EEC under the General Agreement, and that the EEC was entitled to compensation from the US pending the withdrawal of these restrictions.

"... the Panel noted that Article XXIII:1(b) applies whether or not the measure at issue conflicts with the General Agreement and that, therefore, the question of whether a measure inconsistent with Article XI:1 remains inconsistent with the General Agreement even though covered by a waiver cannot, by itself, determine whether it nullifies or impairs benefits accruing under the General Agreement within the meaning of that provision. ...

"The Panel further examined whether the EEC had provided a detailed justification for its claim that the United States owes compensation for its actions under the Waiver. As pointed out in a previous panel report adopted by the CONTRACTING PARTIES, there is no provision in the General Agreement obliging contracting parties to provide compensation (L/6491, page 48). Paragraph 4 of the Annex to the Understanding on Dispute Settlement which the EEC invokes as a basis for its claim gives contracting parties the possibility to offer compensation as a temporary measure when the immediate withdrawal of a measure found to be inconsistent with the General Agreement is impracticable. A contracting party might, in conformity with that provision, choose to grant compensation to forestall a request for an authorization of retaliatory measures under Article XXIII:2, but the Understanding does not oblige it to do so. The Panel therefore considered that the EEC did not provide the required justification for its claim that the alleged nullification or impairment entitles it to compensation by the United States."¹⁹³

(h) *Multilateral surveillance of implementation*

Paragraph 22 of the 1979 Understanding provides:

"The CONTRACTING PARTIES shall keep under surveillance any matter on which they have made recommendations or given rulings".

Paragraph (viii) of the 1982 Ministerial Decision provides:

"... In furtherance of the provisions of paragraph 22 of the Understanding the Council shall periodically review the action taken pursuant to such recommendations. The contracting party to which such a

¹⁹²*Ibid.*

¹⁹³L/6631, adopted on 7 November 1990, 37S/228, 262, paras. 5.21-5.22; reference is to 1989 panel report on EEC apple restrictions (see p. 682).

recommendation has been addressed, shall report within a reasonable specified period on action taken or on its reasons for not implementing the recommendation or ruling by the CONTRACTING PARTIES”.

In compliance with this paragraph and with paragraph (ii) of the same 1982 Decision, the Director-General presented to the Council on 9 March 1983 “a full report on the state of the panels presently in operation”.¹⁹⁴ The Director-General thereafter has submitted such reports to the Council every six months, in June and November. In his report to the Council in June 1985, the Director-General noted that at the meeting of the Council on 12 March 1985,¹⁹⁵ it had been suggested that he should include in his regular reports some remarks on the implementation of panel recommendations. Since 1985, the Director-General’s semi-annual report to the Council on the status of work in panels has included a discussion of the status of implementation of panel reports.¹⁹⁶

Paragraph I.3 of the 1989 Improvements provides:

“The Council shall monitor the implementation of recommendations or rulings adopted under Article XXIII:2. The issue of implementation of the recommendations or rulings may be raised at the Council by any contracting party at any time following their adoption. Unless the Council decides otherwise, the issue of implementation of the recommendations or rulings shall be on the agenda of the Council meeting after six months following their adoption and shall remain on the Council’s agenda until the issue is resolved. At least ten days prior to each such Council meeting, the contracting party concerned shall provide the Council with a status report in writing of its progress in the implementation of the panel recommendations or rulings”.

Discussions of implementation of panel reports have been held on numerous occasions since 1989. In July 1992 the Council agreed that its Chairman would hold consultations on the handling of such discussions in Council meetings. In March 1993, the Chairman announced that his consultations had shown that from a purely procedural point of view, the scope of the 1989 Decision did not extend to panel reports which predated it and, consequently, that they should not be listed or considered under this item on the Council’s agenda. It had been pointed out, in this connection, that contracting parties retained the right to raise any issues related to those panel reports under separate agenda items. It had therefore been understood that this item would continue to appear on the agenda in its present form.¹⁹⁷

(i) *Proceedings to examine implementation of particular panel reports*

In 1962 the CONTRACTING PARTIES made recommendations to seven contracting parties on adopting the Report of the Panel on “Uruguayan Recourse to Article XXIII.” The decision in question provides: “As a part of these recommendations the contracting parties concerned were asked to report by 1 March 1963 on action taken to comply with the recommendations or on any other satisfactory adjustment, such as the provision of suitable concessions acceptable to Uruguay. If by that date any recommendation has not been carried out and no satisfactory adjustment has been effected, the circumstances will be deemed to be ‘serious enough’ to justify action under the penultimate sentence of paragraph 2 of Article XXIII and Uruguay will be entitled immediately to request authority to suspend obligations or concessions”.¹⁹⁸ In 1963, this Panel was reconvened at the request of Uruguay, and the Uruguayan delegation requested that it consider the replies received from the seven countries and make a recommendation on the degree of compliance with the CONTRACTING PARTIES’ recommendations.¹⁹⁹

Paragraph 22 of the 1979 Understanding provides:

“... If the CONTRACTING PARTIES’ recommendations are not implemented within a reasonable period of time, the contracting party bringing the case may ask the CONTRACTING PARTIES to make suitable efforts with a view to finding an appropriate solution”.

¹⁹⁴C/M/166, p. 17.

¹⁹⁵C/M/186.

¹⁹⁶C/124, C/136, C/139, C/141, C/148, C/152, C/156, C/160, C/167, C/170, C/172, C/175, C/178, C/180, C/181, C/182, C/183, C/186, C/186/Corr.1.

¹⁹⁷C/M/262, p. 13.

¹⁹⁸11S/56, Recommendation of 16 November 1962.

¹⁹⁹L/2074, adopted on 3 March 1965, 13S/35, 37, para. 6.

Paragraph (viii) of the 1982 Ministerial Decision, referred to directly above, further provides: "... The contracting party bringing the case may also ask the CONTRACTING PARTIES to make suitable efforts with a view to finding an appropriate solution as provided in paragraph 22 of the Understanding".

The Panel Report on "United States Tax Legislation (DISC)"²⁰⁰, adopted in December 1981, examined provisions in US tax law providing for deferral of taxes on a portion of income from export sales when such income was held in a "Domestic International Sales Corporation" (DISC). The Panel found that there was a *prima facie* case of nullification or impairment of benefits. During Council discussion in November 1984 of the US Foreign Sales Corporation Act enacted in response to this panel report, paragraph 22 of the 1979 Understanding was invoked in support of a request for plurilateral consultations to examine the question of the taxes which had been deferred under the DISC legislation and which this new legislation had now forgiven. The representative of the United States objected to the establishment of a plurilateral follow-up review pursuant to paragraph 22 of the 1979 Understanding and said

"that the Community was suggesting that Article XXIII somehow required payment of some kind of back damages, and pointed out that this Article promoted prospective remedies. The FSCA was the response to the DISC Panel report".²⁰¹

At the Council meeting in January 1985 "the Community remained convinced that paragraph 22 of the 1979 Understanding ... provided for the type of consultation that it was requesting [but] in view of the US attitude, decided to follow the procedures adopted on 10 November 1958 under Article XXII on questions affecting the interests of a number of contracting parties (BISD 7S/24)".²⁰²

The Report of the Members of the Original Oilseeds Panel on "Follow-up on the Panel Report 'EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins'" notes, concerning the background of their work in 1992:

"Following discussions regarding the follow-up on the Oilseeds Panel Report at previous meetings of the Council, the United States proposed at the Council meeting on 8 October 1991 that the original Oilseeds Panel be reconvened for the purpose of assisting the CONTRACTING PARTIES in determining whether measures being taken by the European Economic Community (the Community) would bring its regulations into GATT conformity and would eliminate the impairment of the Community's tariff concessions on oilseeds. Following further discussions in the Council and informal consultations, the CONTRACTING PARTIES at their Forty-Seventh Session reached an agreement on 3 December 1991 (SR.47/1 and DS28/1 refer) under which the members of the original Oilseeds Panel were reconvened to begin work on the basis of document W.47/22 which provides as follows:

'Paragraph I.3 of the "Improvements to the GATT Dispute Settlement Rules and Procedures," adopted 12 April 1989 (BISD 36S/61), provides that the Council shall monitor the implementation of recommendations and rulings adopted under Article XXIII:2. Acting pursuant to this provision, the CONTRACTING PARTIES hereby request the Director-General to reconvene the members of the Panel on European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, adopted on 25 January 1990 (BISD 37S/86), for the purpose of examining whether the measures taken by the European Community in Council Regulation (EEC) 3766/91 of 12 December 1991, establishing a support system for producers of soya beans, rapeseed, colza seed and sunflower seed, comply with the recommendations and rulings, as expressed in the Conclusions (paragraphs 155-157), of the Oilseeds Panel Report as adopted on 25 January 1990. The original Panel Members shall provide such findings as will assist the CONTRACTING PARTIES within 90 days of this decision'".²⁰³

²⁰⁰L/4422, adopted on 7 December 1981, 23S/98.

²⁰¹C/M/183, p. 77.

²⁰²C/M/185, p. 4. See request for consultations at L/5774 (communication dated 18 January 1985); see also Article XXII in this Index for these procedures.

²⁰³DS28/R, dated 31 March 1992, 39S/91, 92, para. 3.

The “Introductory Comments” delivered by the Chairman of this body at the first meeting with the parties on 3-4 February 1992, which are attached to this report, indicate that

“... the Members of the original Panel have been reconvened for a specific purpose and not, for example, to re-try the whole case ab initio, or to pass judgement on the consistency of the new Community support system for oilseeds in relation to provisions of the General Agreement other than those that were directly relevant to the original Panel’s reasoning and conclusions ...

“In these circumstances we consider that the Community is required in these proceedings to demonstrate that the measures it has taken satisfy the ruling relating to Article III:4 in paragraph 155 of the Oilseeds Panel Report; and that, in relation to the ruling in paragraph 156 of that report, as qualified by paragraph 157 thereof, the Community would be expected to demonstrate, if this is what the Community is asserting, that the measures it has taken have in fact also eliminated the impairment of concessions as found by the original Panel. In other words, if the assertion of the Community is that the impairment of concessions as found by the original Panel has been eliminated, then this body would expect the Community to substantiate its assertion because this is a matter which has a bearing on the matters to be examined by this body and on the nature of the findings it is required to make in terms of its mandate”.²⁰⁴

For the conclusions of this body, see page 683 above.

(5) “may consult with ... the Economic and Social Council of the United Nations and with any appropriate intergovernmental organization ... where ... necessary”

During the Second Session of the Preparatory Committee in Geneva, it was stated that consultations with other intergovernmental organizations might prove “necessary” before taking action in “a general deflationary situation” where the matter was not exclusively within the competence of the ITO and where remedial action might best be taken outside the field of activity of the ITO. It was noted in this connection that the inclusion of the words “if necessary” meant that “if the matter is exclusively one within the competence of the ITO itself, then the ITO is not called upon to consult with anybody”.²⁰⁵

As noted at page 669 above, the Report of the Review Working Party on “Organizational and Functional Questions” in 1955 notes, in connection with the rejection of a proposal to include in the General Agreement provisions for initiating consultations in urgent cases to prevent the international spread of a decline in employment, production or demand, that “... the kind of action [proposed] was already provided for in existing or proposed new Articles of the Agreement. It was clear, for example, that Article XXIII contemplates that any country which considers that a situation had arisen which impeded the attainment of any objective of the Agreement ... may refer the matter to the CONTRACTING PARTIES, which then would be obliged promptly to investigate the matter and to make appropriate recommendations. It was also clear that in such a case the CONTRACTING PARTIES would be free to enter into consultations with other interested international bodies which would be in a position to make a contribution to the problem presented”.²⁰⁶

In 1951, a working party was established under Article XXIII:2 to examine a United States complaint concerning Belgian restrictions on imports from the dollar area. The terms of the reference of the working party provided that “In its consideration of this matter, the Working Party should consult as necessary with the International Monetary Fund in accordance with Article XV of the General Agreement”.²⁰⁷ The 1990 Panel Report on “Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes” notes that this Panel consulted with officials of the World Health Organization in accordance with the request of Thailand and the understanding between the parties to the dispute that “Thailand will make a request for the Panel to consult with competent international organizations on technical aspects such as the health effects of cigarette use and consumption ... if Thailand makes such a request, the Panel may so consult”.²⁰⁸

²⁰⁴ *Ibid.*, 39S/126-127, Annex B, paras. 3 and 5.

²⁰⁵ EPCT/A/PV/12, p. 15-16.

²⁰⁶ L/329, adopted on 28 February, 5 and 7 March 1955, 3S/231, 241, para. 29.

²⁰⁷ GATT/IC/SR.3, p. 20.

²⁰⁸ DS10/R, adopted on 7 November 1990, 37S/200, 201, paras. 3 and 5, and 216-220, paras. 50-62.

(6) “serious enough”

As noted above on page 684, on 26 October 1951 at the Sixth Session, the CONTRACTING PARTIES adopted a Resolution on “United States Import Restrictions on Dairy Products” which provided *inter alia* that “concessions granted by the United States Government to contracting parties under the General Agreement have been nullified or impaired within the meaning of Article XXIII of the General Agreement ... a large number of contracting parties have indicated that they have suffered serious damage as a result of this nullification or impairment, and ... the circumstances are serious enough to justify recourse by those contracting parties to Article XXIII paragraph 2”. However, the Resolution urged the contracting parties affected, in view of the continuing determination of the United States Government to seek repeal of the import restrictions to afford to the United States “a reasonable period of time, as it has requested, in order to rectify the situation through such repeal”.²⁰⁹

During the Review Session of 1954-55, the Review Working Party on Organizational and Functional Questions considered various proposals for the amendment of Article XXIII. Denmark, Norway and Sweden proposed to add the following interpretative note to paragraph 2 of Article XXIII: “It is understood that the recommendation referred to in paragraph 2 should aim at a positive solution of the matter through the removal of the measure or measures in question or the provision of compensation for the damage suffered. As a rule retaliatory measures should not be authorized unless such recommendations have failed to lead to a solution within a reasonable period of time”.²¹⁰ The Report of the Working Party notes as follows:

“... The representative of the Scandinavian countries, when introducing the proposal, stressed that action by the CONTRACTING PARTIES under Article XXIII should be directed towards the maintenance of a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in the original situation; it was, therefore, desirable that resort should be had to retaliatory action only when all other possibilities had been explored.

“The proposal was withdrawn in the light of the agreement by the Working Party that, subject to the qualifications explained in the following paragraph, the principle set out in the proposed interpretative note conformed with both the intention of the Article and the practice the CONTRACTING PARTIES had hitherto followed in applying its provisions. The Working Party considered that the requirement in paragraph 2 of the Article that the circumstances must be ‘serious enough’ limits the possibility of authorizing a contracting party or parties to take appropriate retaliatory action to cases where endeavours to solve the problem through the withdrawal of the measures causing the damage, the substitution of other concessions, or some other appropriate action have not proved to be possible, and where there is considered to be a substantial justification for retaliatory action, as in cases in which such authorization appears to be the only means either of preventing serious economic consequences to the country for which a benefit has been nullified or impaired, or the only means of restoring the original situation”.²¹¹

The 1962 Panel Report on “Uruguayan Recourse to Article XXIII” notes that “the requirement that the situation must be serious enough limits the applicability of the provision to cases where there is nullification or impairment; it would at any rate be difficult to conceive a situation in which the suspension of concessions or obligations could be appropriate where nullification or impairment was not involved”.²¹² The Recommendation adopted on 16 November 1962 with this Panel report provides in part:

“On adopting the report of the Panel on Uruguayan Recourse to Article XXIII, the CONTRACTING PARTIES, acting pursuant to paragraph 2 of that Article, made certain recommendations to the Governments of ...

“As part of these recommendations the contracting parties concerned were asked to report by 1 March 1963 on action taken to comply with the recommendations or on any other satisfactory adjustment,

²⁰⁹II/16-17. See discussion at Sixth Session GATT/CP.6/SR.10, press releases GATT/39 - GATT/43, and GATT/CP.6/SR.27; memoranda by the Netherlands and Denmark, GATT/CP.6/26 and GATT/CP.6/28; follow-up discussion in the Intersessional Committee, IC/SR.3; appointment of working party by Intersessional Committee, GATT/CP.129/Add.1.

²¹⁰L/273 (Denmark, omits second sentence of proposed note), L/275 (Sweden), L/276 (Norway).

²¹¹L/327, adopted on 28 February, 5 and 7 March 1955, 3S/231, 250-251, paras. 62-63.

²¹²L/1923, adopted on 16 November 1962, 11S/95, 99, para. 13.

such as the provision of suitable concessions acceptable to Uruguay. If by that date any recommendation has not been carried out and no satisfactory adjustment has been effected, the circumstances will be deemed to be 'serious enough' to justify action under the penultimate sentence of paragraph 2 of Article XXIII and Uruguay will be entitled immediately to request authority to suspend obligations or concessions ...".²¹³

As regards this two-stage procedure, the Panel Report notes:

"In recommending this two-stage procedure, the Panel had principally in mind, once again, the requirement stated in Article XXIII:2 that the situation must be 'serious enough' before suspension can be authorized. It noted, as a report of the ninth session (BISD 3S/250-251) had made clear, that the action of authorization of suspension of concessions or obligations should never be taken except as a last resort; it also noted that the aim of Uruguay at this stage was to seek the prompt removal of the measures in question".²¹⁴

The 1984 Panel Report on "United States Manufacturing Clause" found, *inter alia*, that a clause of the US copyright law was inconsistent with Article XI:1 and that this inconsistency could not be justified under the Protocol of Provisional Application. The Panel also found as follows:

"The Panel noted that the US had argued that, even if the Panel were to find nullification or impairment of a benefit accruing to the European Communities under the General Agreement, the circumstances would not be serious enough to justify authorization of a suspension of obligations or concessions under Article XXIII:2, since the European Communities had suffered no economic harm. The Panel decided not to examine this argument, because the complaining party, the European Communities, had not requested the Panel to make findings concerning the authorization of suspension of concessions under Article XXIII".²¹⁵

The Panel Report notes that at the time of the panel proceeding, the clause was scheduled to expire on 1 July 1986. In a communication of 28 February 1986 the EEC noted its "deep concern that legislation has now been tabled in the United States Congress with a view not only to render the Clause permanent but even to expand its coverage. ... Were such legislation to be adopted, the United States would not only have failed to implement the Panel recommendation; it would knowingly have enacted new legislation in breach of its international obligations and commitments ...". The EEC requested authority under Article XXIII:2 "to suspend the application of concessions towards the United States equivalent to the economic damage caused to the Communities. The Community proposes that such suspension should become applicable in the event that further legislation inconsistent with GATT comes into effect in the United States in succession to the present Manufacturing Clause after its expiry ...".²¹⁶ In Council discussion in April 1986, the EC representative asked the Council to consider the possible extension of the clause, nearly two years after the Report had found it to be inconsistent with Article XI, as being "sufficiently serious ... to justify the suspension of concessions to the United States as provided in Article XXIII:2. This matter should be treated as a question of principle, irrespective of the volume of trade involved, because a contracting party would not only be failing to remove a measure found to be inconsistent with GATT but would be extending and enlarging the scope of the measure".²¹⁷ He further stated that the circumstances would be even more serious if the new legislation were to take effect.²¹⁸ The clause expired on 1 July 1986.²¹⁹

At the October 1990 Council meeting, referring to the 1988 Panel Report on "Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies"²²⁰ the United States stated that practices referred to in the Panel Report "remained in place despite Canada's obligation to bring them into GATT-conformity", and requested that "the Council decide, pursuant to Article XXIII:2, that the circumstances concerning this matter were serious enough to authorize the United States to suspend the application to Canada of appropriate concessions or other obligations". In addition, the United States sought

²¹³11S/56.

²¹⁴L/1923, adopted on 16 November 1962, 11S/95, 102, para. 21.

²¹⁵L/5609, adopted on 15/16 May 1984, 31S/74, 91, para. 41.

²¹⁶L/5968.

²¹⁷C/M/196, p. 4.

²¹⁸C/M/198, p. 9.

²¹⁹C/M/201, p. 14.

²²⁰L/6304, adopted on 22 March 1988, 35S/37.

Council authorization to withdraw concessions in the event that Canada did not comply with the Panel's recommendations. The representative of the EEC, which was the applicant party in the 1988 proceeding, said that the Community "welcomed the fact that the United States, in defence of its trade interests, took recourse, for the first time, to the procedures of Article XXIII:2 to request authorization to suspend the application of US GATT concessions".²²¹ At the following Council meeting in November, the US representative stated that the United States would request establishment of a panel and would request that the 1988 Panel be reconvened and make findings on an expedited basis.²²²

(7) "may authorize ... to suspend"

At its meeting on 8-9 February 1989²²³ the Council agreed to a suggestion by the European Communities that prior to the approval of the agenda, there be a general discussion on the subject of unilateral measures. After statements by a number of contracting parties on this subject, the Director-General commented that

"... His own conclusion was to remind governments that the cornerstone of cooperation under the GATT was their readiness to submit their differences of views as to the GATT-conformity of their measures to the process of consultation and dispute settlement provided by the General Agreement.

"He considered it his duty to refer to what the drafters of the Havana Charter had in mind when they had evolved this concept of cooperation through the use of the process of consultation and dispute settlement, and in particular in respect of the recourse to unilateral measures. He quoted Clair Wilcox, one of the drafters of the Havana Charter, who had said 'we have introduced [in the Havana Charter provisions corresponding to Article XXIII:2] a new principle in international economic relations. We have asked the nations of the world to confer upon an international organization the right to limit their power to retaliate. We have sought to tame retaliation, to discipline it, to keep it within bounds. By subjecting it to the restraints of international control, we have endeavoured to check its spread and growth, to convert it from a weapon of economic warfare to an instrument of international order'.²²⁴

"As for 'finger-pointing', he said that he had no fingers but he did have the General Agreement by which all contracting parties were bound. This Agreement said that discriminatory import tariffs were contrary to its Article I. There was no exception in the General Agreement which could justify discriminatory import tariffs imposed for the particular purpose of inducing another contracting party to bring its trade policies into conformity with the General Agreement. The CONTRACTING PARTIES could, however, - in particular where it was found that a contracting party was maintaining measures contrary to the General Agreement - be requested to authorize, in accordance with Article XXIII:2, the suspension of obligations towards a contracting party failing to observe its obligations under the General Agreement".²²⁵

(a) Suspension of concessions under Article XXIII:2 and proposals therefor

The 1979 Understanding Annex on customary practice provides in paragraph 4:

"... The last resort which Article XXIII provides to the country invoking this procedure is the possibility of suspending the application of concessions or other obligations on a discriminatory basis vis-a-vis the other contracting party, subject to authorization by the CONTRACTING PARTIES of such measures. Such action has only rarely been contemplated and cases taken under Article XXIII:2 have led to such action in only one case."

The instance referred to by this paragraph occurred in 1952. As noted above at pages 684 and 690, a Resolution adopted in the Sixth Session on "United States Import Restrictions on Dairy Products" determined that the circumstances were "serious enough", and required a follow-up report by the United States not later than

²²¹C/W/646, C/M/245, p. 28-29.

²²²C/M/246, p. 14-17. Concerning the composition of this Panel see page 726 below; concerning the US request for expedited findings see page 757 below.

²²³C/M/228.

²²⁴The text refers to EPCT/A/PV/6, p. 4.

²²⁵Discussion on Unilateral Measures, C/163, p. 14.

the opening of the Seventh Session in 1952. During discussion in the Intersessional Committee between the Sixth and Seventh Sessions, the issue was raised whether this Resolution in itself provided authorization for the suspension of application of concessions under Article XXIII:2.

“The Chairman agreed with the interpretation of the Netherlands representative, that no contracting party was entitled to take retaliatory action towards the United States until an authorization had been obtained from the CONTRACTING PARTIES in terms of Article XXIII:2; the purpose of requiring such an authorization was to prevent contracting parties from taking unnecessary and excessive measures in retaliation. It was clear from the provisions of the Agreement that if the United States Government should fail to secure the repeal of the legislation in question and to re-open its market to European exporters of dairy products, the European contracting parties concerned would have to present their case to the CONTRACTING PARTIES and to request an authorization for retaliatory action ...”²²⁶

At the Seventh Session, having received the report that these import restrictions had not been repealed²²⁷, the CONTRACTING PARTIES agreed to establish a Working Party to examine the proposal made at the Sixth Session by the Netherlands for measures to be taken under Article XXIII:2.²²⁸ On 8 November 1952 the CONTRACTING PARTIES adopted the Report of the Working Party and the Determination therein on “Netherlands measures of suspension of obligation to the United States”.²²⁹ This Determination authorized the Netherlands to “suspend the application to the United States of their obligations under the General Agreement to the extent necessary to allow the Netherlands Government to impose an upper limit of 60,000 metric tons on imports of wheat flour from the United States during the calendar year 1953”.²³⁰ See also the material at page 696 and following on how the amount of this suspension was determined.

At the same meeting the CONTRACTING PARTIES adopted a Resolution which confirmed the findings in the Sixth Session Resolution, recommended “notwithstanding any recourse that contracting parties may take to Article XXIII while these restrictions are in effect ... that the United States Government ... continue its efforts to seek the repeal of Section 104 of the Defense Production Act as the only satisfactory solution of this problem” and requested a further report by the United States no later than the opening of the Eighth Session.²³¹

In 1962, a Panel Report on “French Import Restrictions” suggested that the CONTRACTING PARTIES recommend to the French Government the withdrawal of import restrictions which the Panel found were inconsistent with Article XI. The Panel also suggested

“that the CONTRACTING PARTIES recommend to the United States Government that it refrain, for a reasonable period, from exercising its right, under the procedures of paragraph 2 of Article XXIII, to propose suspension of the application of equivalent obligations or concessions”.²³²

On 8 September 1972, the United States made a proposal to suspend tariff concessions on articles of French origin covering trade of US\$12.2 million, because the French Government had not withdrawn import restrictions inconsistent with Article XI.²³³ At the Council meeting of 19 September 1972, the United States stated that although some restrictions had been removed, full satisfaction had not been obtained, and it had not been possible to achieve agreement on elimination of remaining import restrictions within two years. The Chairman of the Council “reaffirmed the conclusions and recommendations of the CONTRACTING PARTIES, as set out in paragraphs 6 and 7 of the Panel Report of 14 November 1962, and in particular the entitlement of the United States to make a proposal regarding the suspension of the application to France of equivalent obligations and concessions, in

²²⁶GATT/IC/SR.3, p. 4.

²²⁷Report by the United States at L/19, Add.1 and Add.1/Corr.1.

²²⁸SR.7/10, p. 2-9; see Netherlands proposal, GATT/CP.6/26; see also Danish memorandum, GATT/CP.6/28.

²²⁹SR.7/16, p. 4-7; Working Party report, L/61.

²³⁰IS/33.

²³¹“United States Import Restrictions on Dairy Products,” Resolution of 8 November 1952, IS/31; see L/59, draft resolution, adoption at SR.7/16 p. 4.

²³²L/1921, adopted on 14 November 1962, 11S/94, 95, para. 7.

²³³L/3744.

accordance with the provisions of paragraph 2 of Article XXIII".²³⁴ See also the discussion of the amount of this proposed suspension at page 698 below.

In 1985 Canada referred to the Netherlands suspension and the US proposal of 1972 in support of its requests for the establishment of a Panel on "United States - Restrictions on Imports of Certain Sugar-containing Products" and for Council authorization of immediate suspensions of obligations on an interim basis pending the results of the Panel's deliberations.²³⁵ The panel was established but the Council did not agree to authorize such a suspension.²³⁶

See the material above on page 691 concerning the request by the EEC in 1986 for suspension of concessions in the event of enactment of legislation extending the "manufacturing clause" of the United States copyright law. That request did not include a quantification of the amount nor a list of products with respect to which action would be taken.²³⁷

In connection with the follow-up on the 1987 Panel Report on "United States - Taxes on Petroleum and Certain Imported Substances", which was adopted in June 1987, the EEC requested on 11 March 1988 that the "Council authorize it, in accordance with the provisions of Article XXIII:2 of the General Agreement, to suspend the application to the United States of concessions equivalent to the economic injury caused to the Community". The request noted that "The Community and other contracting parties have repeatedly raised the question of the implementation by the United States of the Panel's recommendation, but without being able to obtain satisfactory results. Furthermore, the United States has not offered any compensation". The EEC later stated that in its view there was "an annual injury for the Community of US\$7.24 million" and circulated a list of products with respect to which the EEC proposed to levy an additional duty of 2.5 per cent ad valorem.²³⁸ In connection with the same Panel Report, on 28 September 1989 Canada requested "the authority of the CONTRACTING PARTIES to suspend the application to the United States of concessions substantially equivalent to the economic injury caused to Canada due to the failure of the United States to comply with the conclusions of the panel report adopted by the Council in June 1987". The request included a figure for annual injury to Canada of US\$9.2 million, calculated by the same method as in the EEC request above, and a list of products with respect to which Canada proposed to apply an additional duty of 2.5 per cent ad valorem.²³⁹ See further the discussion on these two requests below at page 698.

See also the reference above at page 691 to the 1990 request by the United States for suspension of concessions with respect to Canada in relation to the 1988 Panel Report on "Canada - Import, Distribution and Sale of Alcoholic Drinks by Provincial Marketing Agencies".²⁴⁰

At the 14 July 1992 Council meeting, the United States raised the issue of follow-up to the 1992 Panel Report on "Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies".²⁴¹ Citing measures adopted by the province of Ontario since the 18 February 1992 adoption of this Panel Report, the United States requested the Council to authorize the suspension of concessions with respect to Canada in an amount not to exceed US\$80.7 million.²⁴² The representative of Canada stated that

"Canada regarded the United States' request for authority to suspend concessions as unwarranted because the United States had not provided the Council with a sufficient basis on which to address the question. A proper request would call for an indication to the Council prior to its meeting of the specific action being proposed, i.e., the product coverage, the amount of trade involved and the tariff rates to be applied Canada was prepared to have the Council agree to an expedited review of the specific measures raised by the United States, namely the increase in Ontario's environmental levy, the operation of the import monopoly and the pricing of beer imported into Ontario. This could be done along the lines of

²³⁴C/M/80, p. 5.

²³⁵C/M/186, p. 18-19.

²³⁶At the request of Canada, further proceedings of this panel were suspended; at the 12 November 1991 Council meeting Canada agreed to terminate the panel (C/M/253).

²³⁷L/5968.

²³⁸C/W/540 and Add.1.

²³⁹C/W/608.

²⁴⁰L/6304, adopted on 22 March 1988, 35S/37.

²⁴¹DS17/R, adopted on 18 February 1992, 39S/27.

²⁴²C/M/258, p. 20.

paragraph 19.5 of the draft text on dispute settlement in the Uruguay Round Draft Final Act (MTN.TNC/W/FA) which called for an examination and decision within ninety days ... Retaliation without the authorization of the CONTRACTING PARTIES was clearly contrary to GATT obligations. Were the United States to disregard its obligations and retaliate against Canadian products without the authority of the Council, Canada reserved the right to respond accordingly".²⁴³

The United States representative responded that "The United States did not consider it acceptable for the GATT to respond to this continuing discrimination by suggesting that the appropriate mechanism was yet another panel report. Presumably, once another panel report had been issued, Ontario would make another minor change in its law in a way that would require the United States to come back to the GATT again".²⁴⁴ On 27 July 1992, Canada informed the CONTRACTING PARTIES that on 24 July, the United States had imposed a surtax of 50 per cent ad valorem on imports of beer brewed or bottled in Ontario, affecting exports of over C\$99 million in 1991; and that Canada would impose a surtax of 50 per cent ad valorem on imports of beer brewed by two United States companies destined for the province of Ontario, affecting some C\$9.3 million in trade, to be removed upon removal of the United States surtax. Canada stated as well that it would accept the result of an expedited examination of the issues, that this examination could include the issue of damages, and that "Canada would not stand in the way of a properly constituted decision of the Council on suspension of concessions".²⁴⁵ At the September 1992 Council meeting, there was a difference of views between Canada and the United States as to whether the issues being complained of had been subject to adjudication by a panel, and as to the desirability of the expedited review proposed by Canada. A number of other contracting parties expressed concern at the use of unilateral measures.²⁴⁶

At the November 1992 Council meeting, in discussion of the follow-up to the 31 March 1992 Report of the Members of the Original Oilseeds Panel on "Follow-up on the Panel Report on 'EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins'",²⁴⁷ the United States requested under Article XXIII:2 "that the Chairman put the following proposition to the Council at the present meeting: 'The CONTRACTING PARTIES authorize the United States to suspend the application to the European Community of concessions under the General Agreement in the amount of US\$1 billion'".²⁴⁸ In the discussion of this request the representative of the EEC stated that "The present situation in this dispute stemmed from the report of the reconvened Panel members, which had recommended that the Community act promptly to eliminate the impairment of its tariff concessions by modifying its oilseed subsidy scheme or by renegotiating its concessions under Article XXVIII. The Community had not been requested to combine the two alternatives, but had been allowed to choose between them; it had accordingly chosen the Article XXVIII procedure, with the Council's approval. The Council should therefore be consistent and not tamper with the Community's choice. He recognized that the Panel's recommendation had also stated that in the event that the dispute was not resolved expeditiously in either of these ways, the CONTRACTING PARTIES should, if requested by the United States, consider further action under Article XXIII:2. He did not challenge the United States' right to seek authorization for the withdrawal of concessions, but he could answer neither positively nor negatively".²⁴⁹ See also above at page 683 and below at pages 696 and 700.

(b) *Procedures for decision on suspension under Article XXIII:2*

The records of the Seventh Session on the adoption on 8 November 1952 of the Working Party Report and the Determination therein on "Netherlands Measures of Suspension of Obligation to the United States"²⁵⁰ (in connection with the United States' import restrictions on dairy products) note the statement of the United States representative that "His delegation was prepared to accept the decision but in view of its nature, wished to be recorded as abstaining on the taking of the decision" and of the Netherlands representative that "he also, for the

²⁴³*Ibid.*, p. 24.

²⁴⁴*Ibid.*, p. 25-26. See also Communication from the United States of 14 August 1992, DS17/8.

²⁴⁵DS17/7.

²⁴⁶C/M/259, p. 27-31. The surtaxes were removed by both sides upon the signature, on 5 August 1993, of a Memorandum of Understanding on Provincial Beer Marketing Practices (DS17/10, dated 28 September 1993).

²⁴⁷DS28/R, 39S/91.

²⁴⁸C/M/260, p. 15.

²⁴⁹*Ibid.*, p. 25.

²⁵⁰SR.7/16, p. 4-7; Working Party report, L/61. See also above at page 693.

same reasons as the United States delegation, would abstain from voting on the decision”.²⁵¹ The Report was adopted with the United States and Netherlands abstaining.²⁵²

Paragraph (x) of the 1982 Ministerial Declaration provides:

“The Parties to a dispute would fully ... participate and have their views recorded in the considerations of the further actions provided for under paragraphs (viii) and (ix) above. The CONTRACTING PARTIES reaffirmed that consensus will continue to be the traditional method of resolving disputes; however, they agreed that obstruction in the process of dispute settlement shall be avoided.¹ It is understood that decisions in this process cannot add to or diminish the rights and obligations provided in the General Agreement”.

Footnote 1 to this paragraph provides: “This does not prejudice the provisions on decision making in the General Agreement”.

At the November 1992 Council meeting at the close of the discussion on the follow-up to the 31 March 1992 Report of the Members of the Original Oilseeds Panel on “Follow-up on the Panel Report on ‘EEC - Payments and Subsidies Paid to Processors and Products of Oilseeds and Related Animal-feed Proteins’”,²⁵³ the Chairman noted that “the Council had a specific request from the United States for an authorization to suspend concessions under Article XXIII:2, and he was unable to pronounce any consensus thereon”.²⁵⁴

(8) “such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances”

(a) Basis of suspension under Article XXIII:2

During negotiation of the General Agreement in 1947, it was stated that this phrase, taken from the nullification or impairment Article of the Charter, “clearly means ... the concession is suspended in respect of the trade of a particular Member ... If a particular Member takes action contrary to the Charter, other Members may suspend the application to the trade of that Member of concessions granted. That means that other countries should not be penalized because one country has failed to carry out its commitments”.²⁵⁵

See also the references at pages 693 and 698 to the 1972 proposal by the United States under Article XXIII to suspend concessions with respect to imports originating in France, and to the Chairman’s statement in response.

(b) Determination of extent of suspension under Article XXIII:2

The 1952 Report of the Working Party in the Seventh Session on “Netherlands Action under Article XXIII:2 to Suspend Obligations to the United States” provides as follows:

“... the Netherlands delegation requested the CONTRACTING PARTIES, in accordance with Article XXIII:2, to authorise the Netherlands to suspend the application to the United States of its obligations under the Agreement to the extent necessary to allow the Netherlands to impose an upper limit of 57,000 metric tons on imports of wheat flour from the United States during the calendar year 1953. This would constitute an annual reduction of approximately 15,000 metric tons from the rate of current imports from the United States.

“The Working Party was instructed by the CONTRACTING PARTIES to investigate the appropriateness of the measure which the Netherlands Government proposed to take, having regard to its equivalence to the impairment suffered by the Netherlands as a result of the United States restrictions.

²⁵¹SR.7/16, p. 4 and 5.

²⁵²*Ibid.*, p. 7.

²⁵³DS28/R, 39S/91.

²⁵⁴C/M/260, p. 26.

²⁵⁵EPCT/TAC/PV/18, p. 42.

“The Working Party felt that the appropriateness of the measure envisaged by the Netherlands Government should be considered from two points of view: in the first place whether, in the circumstances, the measure proposed was appropriate in character, and secondly, whether the extent of the quantitative restriction proposed by the Netherlands Government was reasonable, having regard to the impairment suffered.

“Although the Working Party recognized that it was appropriate to consider calculations of the trade affected by the measures and countermeasures in question, it was aware that a purely statistical test would not, by itself, be sufficient and that it would also be necessary to consider the broader economic elements entering into the assessment of the impairment suffered. It was agreed therefore that it would be proper to take into account the contention of the Netherlands Government that the restrictions imposed by the United States had had serious effects on the efforts which were being made by the Netherlands to stimulate its exports to the United States not only of the products subject to the restrictions but of other products as well, and the further contention of the Netherlands Government that the restrictions had affected its efforts to overcome balance-of-payments difficulties with which the country was confronted.

“The Working Party recognised the difficulties inherent in fixing, with any real precision, the point at which any proposed measure could no longer be considered reasonable. ... the Working Party decided to recommend a measure somewhat different in magnitude form that proposed by the Netherlands.”²⁵⁶

The Chairman of the Working Party stated concerning its Report that he “wished to make it clear that the Working Party’s considerations had included various statistical calculations, the additional elements of the damage suffered, and finally, the purpose for which the measure was proposed. As stated in the report, this examination led to two conclusions - first that the measure proposed was not unreasonable, and secondly that the somewhat lower figure would be more appropriate in the sense best calculated to achieve the purpose for which the measure was taken, i.e. the removal of the United States restrictions. In his view the test of appropriateness under Article XXIII was a different concept from mere reasonableness, in that account must be taken of the desirability of limiting such action to that best calculated in the circumstances to achieve the objective”.²⁵⁷

The Determination of 8 November 1952 on “Netherlands Measures of Suspension of Obligations to the United States” provides

- “1. that the measure proposed by the Netherlands Government is appropriate in character, and
 - “2. that, having regard to
 - “(i) the value of the trade involved,
 - “(ii) the broader elements in the impairment suffered by the Netherlands, and
 - “(iii) the statement of the Netherlands Government that its principal objective in proposing the measure in question is to contribute to the eventual solution of the matter in accordance with the objectives and spirit of the General Agreement,
- the limitation by the Netherlands of imports of wheat flour from the United States to 60,000 tons in 1953 would be appropriate within the meaning of Article XXIII ...”.

and authorizes the Netherlands Government “to suspend the application to the United States of their obligations under the General Agreement to the extent necessary to allow the Netherlands Government to impose an upper limit of 60,000 metric tons on imports of wheat flour from the United States during the calendar year 1953”.²⁵⁸

The Report of the Panel on the “Uruguayan Recourse to Article XXIII” on its work when it was reconvened in 1963 notes that the Panel forwarded to the Uruguayan delegation its comments on reports made by the

²⁵⁶L/61, adopted on 8 November 1952, 1S/62, 63-64, paras. 1-6.

²⁵⁷SR.7/17, p. 1.

²⁵⁸1S/32-33.

contracting parties to which the recommendations had been addressed, and further notes: "The Panel stands ready to deal with any proposals which Uruguay, after further reflection, might wish to submit in terms of the penultimate sentence of Article XXIII:2, concerning the suspension of Uruguay's obligations and concessions. In that event, the Panel expects promptly to recommend, for consideration and approval by the Council, whether, in each case, the proposed compensation was or was not appropriate in the circumstances".²⁵⁹

As noted above at page 693, in 1972 the United States gave notice, as a follow-up to the 1962 Panel Report on "French Import Restrictions", that as the Government of France had not withdrawn all of the restrictions found by that Panel to be inconsistent with Article XI, "in conformity with the recommendation of the decision of the CONTRACTING PARTIES on 14 November 1962, the United States has decided to exercise its right to propose suspension of equivalent concessions" on articles of French origin covering trade of US\$12.2 million.²⁶⁰ At the Council meeting of 19 September 1972 the United States further described its proposal as follows:

"This amount covered only the impairment attributed to restrictions on agricultural products and the United States reserved its position as to the industrial products concerned. The amount was based on a conservative estimate of what, in the absence of quantitative restrictions, United States exports could be of three agricultural products: canned fruit, dried prunes and dried and dehydrated vegetables. No account had been taken of restrictions remaining on certain tomato products. The estimate was based on trends of United States exports in other European markets which were free from restrictions and also reflected United States export experience under quotas and French administrative arrangements. The United States delegation considered this a fair proposal which, in their view, should be acceptable to the Council".

The Chairman pointed out that "in a case like this, the Council normally would wish to seek the recommendations of a panel of experts on the question of the appropriateness of the United States proposal, in particular as to the amount of trade coverage involved. ... he suggested that the two parties concerned should consult between themselves with a view to reaching agreement, in particular as regards the amount proposed by the United States". The two parties so agreed.²⁶¹ No further action was taken by the Council, as a bilateral solution was reached.

Article 18.9 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII provides that "... If the Committee's recommendations are not followed within a reasonable period, the Committee may authorize appropriate countermeasures (including withdrawal of GATT concessions or obligations) taking into account the nature and degree of the adverse effect found to exist. ..."²⁶²

The Panel Report on "United States - Taxes on Petroleum and Certain Imported Substances"²⁶³ was adopted on 17 June 1987. The implementation of this Panel Report was raised in the Council and at the Session of the CONTRACTING PARTIES a number of times in 1987, 1988 and 1989 by the parties to the dispute and by other contracting parties. As noted above at page 694, in March and April 1988 the EEC requested the Council to authorize, in accordance with Article XXIII:2, the retaliatory withdrawal of equivalent concessions granted to the United States in respect of specific products.²⁶⁴ At the May 1988 Council meeting, the United States representative, supported by a number of delegations, stated that his Government could not agree to the request and proposed that a working party be convened to examine it. In response to questions on calculation of the level of damages and the work of such a working party, the Legal Adviser to the Director-General stated that

"... there were a few provisions in the General Agreement where retaliation was foreseen. In two of those, Articles XIX and XXVIII, retaliation was defined as the withdrawal of substantially equivalent concessions. In the case of Article XXIII, the wording was wider, referring to measures determined to be appropriate in the circumstances, which meant that there was a wider leeway in calculating the retaliatory measures under Article XXIII than under Articles XIX or XXVIII A working party in

²⁵⁹L/2074, adopted on 3 March 1965, 13S/35, 37, para. 6.

²⁶⁰L/3744.

²⁶¹C/M/80.

²⁶²26S/77. See also a Secretariat Note on "Negotiating History of Article 18:9 and the treatment of reports of Working Parties and Panels under Article XXIII of the General Agreement", SCM/W/48, dated 11 May 1983.

²⁶³L/6175, adopted on 17 June 1987, 34S/136.

²⁶⁴C/W/540 & Add.1.

the present case would examine whether the retaliatory measures proposed by the Community would be appropriate in the circumstances; that would include the question of how to calculate the damage and the compensation”.²⁶⁵

At the June 1988 Council meeting the Chairman stated that “there were essentially technical questions to be answered, and a working party might not be the most suitable way to address them”.²⁶⁶ At its 22 September 1988 meeting, the Council discussed a Secretariat Note providing technical advice on, *inter alia*, the correctness of the Community’s assessment of damages.²⁶⁷ The representative of Mexico remarked concerning the Secretariat Note that

“... from a legal point of view, the Secretariat had begun with the premise of the withdrawal of substantially equivalent concessions which, while applicable to the renegotiation of concessions under Article XXVIII of the General Agreement, did not correspond to the letter or spirit of Article XXIII:2, which was the applicable Article in dispute settlement cases This question was of paramount importance in distinguishing between renegotiations of concessions consistent with GATT rules, and measures which were GATT-inconsistent. The latter implied a different response in order to re-establish provisionally the balance between a contracting party’s rights and obligations ... one had to take into consideration the purpose for which the action had been proposed, i.e. the elimination of the US measure”.²⁶⁸

The Deputy Director-General confirmed that

“... Article XXIII:2, unlike Article XXVIII, did not speak about equivalent concessions. Therefore, it was not really a question of authorizing the withdrawal of equivalent concessions as such. That was why the Secretariat had pointed out that Article XXIII did not require that the amount of retaliation should be equivalent, and that the CONTRACTING PARTIES might wish to determine what other factors to take into account in examining the appropriateness of the proposed retaliatory measure. All the Secretariat could do was to help in an examination of the appropriateness of the retaliatory measure to be taken by the Community. It could not, in the context of the advice given to the Community, take into account what would be the appropriate level of the retaliatory measures that might be authorized on a global basis. In this case, it was the Community which had indicated what retaliatory action it wished to take; any other contracting party which considered that its interests were affected had the possibility of indicating that - as all other means of solving the problem had failed in its view to provide results - this was the action it would propose to take. Then, of course, it would be for the CONTRACTING PARTIES in their best judgment to decide whether to authorize that action”.²⁶⁹

As an interim solution the United States proposed negotiations with affected contracting parties on the issue of compensatory adjustments pending the early elimination by Congress of the GATT-inconsistent aspects of the tax.

In connection with the September 1989 request by Canada for authorization to withdraw concessions in connection with the same matter (referred to above at page 694), Canada stated at the October 1989 Council meeting that “Canada believed that the Council possessed sufficient information to allow it to determine the two essential points: (1) that the circumstances were serious enough to warrant Canada’s proposed action, and (2) that Canada’s request was appropriate in the circumstances. One option for dealing with this matter would be to establish a small group, perhaps along the lines of a panel, to examine Canada’s request against these two criteria and to report quickly. Both Canada and the United States could present information to the group, but neither would participate in the group’s decision. This would be consistent with the only existing precedent, established in 1952, regarding a dispute between the Netherlands and United States. ... the term ‘small group’ had been used in the case of the 1952 precedent. The small group had operated in fact along the lines of a panel, having heard arguments from the two sides on the question of whether (1) the circumstances had been serious enough to warrant the action, and (2) the action proposed had been appropriate in the circumstances. The group had then made up its mind, in the absence of the two parties concerned, and had come up very quickly with its

²⁶⁵C/M/220, p. 36.

²⁶⁶C/M/222, p. 24.

²⁶⁷Spec(88)48.

²⁶⁸C/M/224, p. 17.

²⁶⁹C/M/224, p. 19.

recommendation ... ”.²⁷⁰ At this and the October 1989 Council meeting the United States indicated that it could not accept such a group.²⁷¹

See also above at page 694 concerning the proposal of Canada in 1992 for an expedited review to combine examination of measures cited by the United States in connection with the implementation of the 1992 Panel Report on “Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies”²⁷² and the issue of damages.

At the September 1992 Council meeting, in connection with the discussion of the follow-up to the 31 March 1992 Report of the Members of the Original Oilseeds Panel on “Follow-up on the Panel Report on ‘EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins’”,²⁷³ the United States requested that the Council establish an arbitral body “solely to determine the total value to be ascribed to the nullification or impairment” which would be composed of the two surviving members of the original oilseeds panel and a third member to be selected by the Director-General. The arbitration panel would render its decision in thirty days and its determination would be binding on both the United States and the EEC.²⁷⁴ The EEC representative noted in response that arbitration could only be voluntary and there was no obligation to accept such a procedure; the Community could not accept the proposed arbitration procedure, not only in the oilseeds case, but also more generally because of the GATT precedent it would create. After debate, the Chairman said that it had not been possible to build consensus for the arbitration proposal of the United States.²⁷⁵

C. RELATIONSHIP BETWEEN ARTICLE XXIII AND OTHER GATT ARTICLES

1. General

As noted in Section III below, the Charter provisions corresponding to Article XXII (on consultations in respect of commercial policy measures) were located in the commercial policy chapter, Chapter IV, and the nullification and impairment provisions corresponding to Article XXIII applied to the entire Charter and were located in Chapter VIII. The Havana Reports record the following notification to other Committees of the Havana Conference by the Sixth Committee, which considered Chapter VIII:

“The Sixth Committee has discussed the question of the relationship between Chapter VIII and other parts of the Charter. In the light of its discussion the Committee wishes to make known to other Committees of the Conference that, in its opinion, where an article of the Charter other than those contained in Chapter VIII establishes procedures for action by a Member or by the Organization, action in accordance with that procedure should precede that provided for in Chapter VIII, but shall not, unless it is so specified, impair the rights of Members under Chapter VIII. However, it is the view of the Committee that if consultation or investigation has taken place under the provisions of another article, the Organization may regard such consultation or investigation as fulfilling, either in whole or in part, any similar procedural requirement in Chapter VIII”.²⁷⁶

2. Article VI

The report of the Havana Sub-Committee on the customs articles of the Charter notes that “It was ... the general view of the Sub-Committee that the point of chief concern to [certain countries] ... (*i.e.* adequate means for dealing with abuses by a Member unnecessarily levying anti-dumping or countervailing duties) was adequately covered by the general provisions of the Charter, particularly by Articles 41 [XXII] and 93 [XXIII]”.²⁷⁷

²⁷⁰C/M/236, p. 20-21.

²⁷¹C/M/236, p. 21, C/M/237, p. 11-12.

²⁷²DS17/R, adopted on 18 February 1992, 39S/27.

²⁷³DS28/R.

²⁷⁴DS28/3.

²⁷⁵C/M/259, p. 35, 49.

²⁷⁶E/CONF.2/C.6/63, Havana Reports, p. 159.

²⁷⁷Havana Reports, p. 74, para. 22.

The 1955 Panel Report on “Swedish Anti-Dumping Duties” examined a Swedish Decree imposing a basic price scheme under which an anti-dumping duty was levied on imports of nylon stockings whenever the invoice price was lower than a minimum price fixed by the Swedish Government. The Italian government had argued that the Decree was inconsistent with Article VI because “the Swedish Government has not proved that the export of Italian nylon stockings has been carried out at dumping prices or that the conditions referred to in Article VI (for example, material injury to national products) have been fulfilled”.²⁷⁸

“The Panel ... considered the argument developed by the Italian representative to the effect that the Swedish Decree [on a basic price scheme for stocking imports] reversed the onus of proof since the customs authorities can act without being required to prove the existence of dumping practices or even to establish a *prima facie* case of dumping. ... it was clear from the wording of Article VI that no anti-dumping duties should be levied unless certain facts had been established. As this represented an obligation of the contracting party imposing such duties, it would be reasonable to expect that that contracting party should establish the existence of these facts when its action is challenged”.²⁷⁹

“... The Italian delegation contended that the main injury suffered by exporters was due to the fact that the Swedish Government was levying an anti-dumping duty on Italian stockings although it had not established that the export prices of the products were less than the normal value of those products as required in Article VI of the GATT. The Panel agreed that if the Swedish Decree was being applied in such a manner as to impose an anti-dumping levy in the absence of dumping practices, the Italian Government ... could claim an impairment of benefits.

“The Swedish representative stated that it appeared doubtful to his delegation that the CONTRACTING PARTIES could consider that question and that it was the right of the national authorities to decide whether dumping had really taken place. The Panel agreed that no provision of the General Agreement could limit in any way the rights of national authorities in that respect. But for the reason set forth in paragraph 15 above, it would be reasonable to expect from the contracting party which resorts to the provisions of Article VI, if such action is challenged, to show to the satisfaction of the CONTRACTING PARTIES that it had exercised its rights consistently with those provisions”.²⁸⁰

In the 1985 Panel Report on “New Zealand - Imports of Electrical Transformers from Finland”,

“The Panel ... considered the evidence put forward by both sides as to the appropriateness of the cost elements used by the New Zealand authorities in arriving at their decision that dumping had occurred. The Panel noted that this evidence was of a highly technical nature, especially because it related to complicated custom-built products. It also noted that Article VI did not contain any specific guidelines for the calculation of cost-of-production and considered that the method used in this particular case appeared to be a reasonable one. In view of this and having noted the arguments put forward by both sides as regards the costing of certain inputs used in the manufacture of the transformers, the Panel considered that there was no basis on which to disagree with the New Zealand authorities’ finding of dumping and proceeded to the question of whether the imports in question had caused or threatened to cause injury to the New Zealand transformer industry.

“The Panel noted the view expressed by the New Zealand delegation that the determination of material injury was a matter specifically and expressly reserved, under the terms of Article VI:6 (a), for the decision of the contracting party levying the anti-dumping duty. It also noted the contention that other contracting parties might inquire as to whether such a determination had been made, but that the latter could not be challenged or scrutinized by other contracting parties nor indeed by the CONTRACTING PARTIES themselves. The Panel agreed that the responsibility to make a determination of material injury caused by dumped imports rested in the first place with the authorities of the importing contracting party concerned. However, the Panel could not share the view that such a determination could not be scrutinized if it were challenged by another contracting party. On the contrary, the Panel believed that if a contracting party

²⁷⁸L/215, dated 29 July 1954.

²⁷⁹L/328, adopted on 26 February 1955, 3S/81, 85-86, para. 15.

²⁸⁰*Ibid.*, 3S/87-88, para. 22-23.

affected by the determination could make a case that the importation could not in itself have the effect of causing material injury to the industry in question, that contracting party was entitled, under the relevant GATT provisions, in particular Article XXIII, that its representations be given sympathetic consideration and that eventually, if no satisfactory adjustment was effected, it might refer the matter to the CONTRACTING PARTIES, as had been done by Finland in the present case. To conclude otherwise would give governments complete freedom and unrestricted discretion in deciding anti-dumping cases without any possibility to review the action taken in the GATT. This would lead to an unacceptable situation under the aspect of law and order in international trade relations as governed by the GATT".²⁸¹

See also the discussion in the 1993 Panel Report on "United States - Measures Affecting Imports of Softwood Lumber from Canada".²⁸²

3. Articles XII and XVIII:B

The 1950 Report of the Working Party on "The Use of Quantitative Restrictions for Protective and Commercial Purposes"²⁸³ notes that

"It appeared to the Working Party that insofar as these types of practice were in fact carried on for the [protective and commercial] purposes indicated above and were not justified under the provisions of Articles XII to XIV relating to the use of import restrictions to protect the balance of payments or under other provisions of the Agreement specifically permitting the use of import restrictions, they were inconsistent with the provisions of the Agreement, and such misuse of import restrictions might appropriately provide a basis for recourse to the procedures laid down in the Agreement for the settlement of disputes. Moreover, it was not particularly relevant to the Agreement whether such practices were determined unilaterally or in the course of bilateral negotiations".²⁸⁴

In 1952, the United States brought a complaint against Belgian import restrictions which discriminated against imports from the dollar area in order to avoid a Belgian surplus in intra-European trade; a panel was established and was authorized to consult with the International Monetary Fund under Article XV regarding the justification for such restrictions.²⁸⁵

In the "Uruguayan Recourse to Article XXIII" in 1962, the complaint of Uruguay included, *inter alia*, balance-of-payments measures maintained by Denmark, Finland, and Japan. In each instance, the Panel Report noted that "the Panel would recall the view of contracting parties, as expressed in the consultations under Article XII:4, that the Government of [Denmark/Finland/Japan] should endeavour to ensure that the quantitative restrictions maintained under Article XII did not have incidental protective effects which would render their removal difficult when [Denmark/Finland/Japan] no longer had need to have recourse to Article XII".²⁸⁶

In its Report to the Council reviewing its work in the period 1970-74, the Committee on Balance-of-Payments Restrictions noted with regard to import surcharges and import deposits applied for balance-of-payments reasons:

"The procedural assimilation of surcharges to import restrictions by the Committee does not, of course, change the rights of contracting parties affected by surcharges. The Committee, in some of its conclusions on surcharges re-affirmed the rights of affected countries by stating that the decision to take note by the Council would in no way preclude recourse to the appropriate provisions of the General Agreement by any contracting party which considered that any benefits accruing to it under Article II of the Agreement in respect of any bound item were nullified or impaired as a consequence of the surcharge".²⁸⁷

²⁸¹L/5814, adopted on 18 July 1985, 32S/55, 67, paras. 4.3-4.4.

²⁸²SCM/162, adopted on 26 October 1993; see also communication from the Panel Chairman in SCM/163.

²⁸³GATT/CP.4/33 (Sales No. GATT/1950-3).

²⁸⁴*Ibid.*, para. 22.

²⁸⁵GATT/IC/7, GATT/IC/SR.3, p. 19-20. See also SR.7/11, SR.9/2.

²⁸⁶L/1923, adopted on 16 November 1962, 11S/95, Annexes E, F and J, at 11S/116 para. 4, 11S/119 para. 4, and 11S/133 para. 4.

²⁸⁷L/4200, paras. 40-42.

Paragraph 1 of the 1979 Declaration on “Trade Measures Taken for Balance-of-Payments Purposes” provides that “The procedures for examination stipulated in Articles XII and XVIII shall apply to all restrictive import measures taken for balance-of-payments purposes. ... The provisions of this paragraph are not intended to modify the substantive provisions of the General Agreement”.²⁸⁸

In the three parallel Panel Reports of 1989 on “Republic of Korea - Restrictions on Imports of Beef” Complaints by Australia²⁸⁹, the United States²⁹⁰ and New Zealand:²⁹¹

“The Panel examined Korea’s contention that its import restrictions ... were justified under the provisions of Article XVIII:B. The Panel noted Korea’s view that the compatibility with the General Agreement of Korea’s import restrictions could not be challenged under Article XXIII because of the existence of special review procedures in paragraphs 12(b) and 12(d) of Article XVIII:B, and the adoption by the CONTRACTING PARTIES of the results of the paragraph 12(b) reviews in the Balance-of-Payments Committee. The Panel decided first to consider whether the consistency of restrictive measures with Article XVIII:B could be examined within the framework of Article XXIII.

“The Panel considered the various arguments of the parties to the dispute concerning past deliberations by the CONTRACTING PARTIES on the exclusivity of special review procedures under the General Agreement. However, the Panel was not persuaded that any of these earlier deliberations in the GATT were directly applicable to the present dispute. Moreover, the Panel had a clear mandate to examine Korea’s beef import restrictions under Article XXIII. The Panel’s terms of reference, as agreed by Korea and [Australia/New Zealand/the United States], and approved by the Council, required the Panel, however, to examine the beef import restrictions ‘in the light of the relevant GATT provisions’, which included Article XVIII:B.

“The Panel examined the drafting history of Article XXIII and Article XVIII, and noted that nothing was said about priority or exclusivity of procedures of either Article. The Panel observed that Article XVIII:12(b) provided for regular review of balance-of-payments restrictions by the contracting parties. Article XVIII:12(d) specifically provided for consultations on balance-of-payments restrictions at the request of a contracting party where that party established a *prima facie* case that the restrictions were inconsistent with the provisions of Article XVIII:B or those of Article XIII, but the Article XVIII:12(d) provision had hitherto not been resorted to. In comparison, the wording of Article XXIII was all-embracing; it provided for dispute settlement procedures applicable to all relevant articles of the General Agreement, including Article XVIII:B in this case. Recourse to Article XXIII procedures could be had by all contracting parties. However, the Panel noted that in GATT practice there were differences with respect to the procedures of Article XXIII and Article XVIII:B. The former provided for the detailed examination of individual measures by a panel of independent experts whereas the latter provided for a general review of the country’s balance-of-payments situation by a committee of government representatives.

“It was the view of the Panel that excluding the possibility of bringing a complaint under Article XXIII against measures for which there was claimed balance-of-payments cover would unnecessarily restrict the application of the General Agreement. This did not preclude, however, resort to special review procedures under Article XVIII:B. Indeed, either procedure, that of Article XVIII:12(d) or Article XXIII, could have been pursued by the parties in this dispute. But as far as this Panel was concerned, the parties had chosen to proceed under Article XXIII”.²⁹²

Footnote 1 to the Uruguay Round Understanding on the Balance-of-Payments Provisions of the GATT 1994, which is incorporated into the GATT 1994, provides that “Nothing in this Understanding is intended to modify the rights and obligations of Members under Articles XII or XVIII:B of GATT 1994. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of restrictive import measures taken for balance-of-payments purposes.”

²⁸⁸L/4904, adopted 28 November 1979, 26S/205, 206, para. 1.

²⁸⁹L/6504, adopted on 7 November 1989, 36S/202.

²⁹⁰L/6503, adopted on 7 November 1989, 36S/268.

²⁹¹L/6505, adopted on 7 November 1989, 36S/234.

²⁹²*Ibid.*, paras. 94-97, 116-119, and 110-113 respectively.

4. Article XV

The Report of the Special Sub-Group on GATT/Fund Relations in the 1954-55 Review Session notes that there was a proposal, which the Sub-Group rejected as unnecessary, to add a note to Article XV:9(a) confirming the right to invoke Article XXIII with respect to exchange controls or exchange restrictions which were in accordance with the IMF Articles of Agreement.²⁹³

5. Article XVIII:C

The Report of the Review Working Party on “Quantitative Restrictions” includes an agreed interpretation of Article XVIII concerning the application of Article XXIII with respect to measures concurred with by the CONTRACTING PARTIES under Sections C or D of Article XVIII.²⁹⁴ The text of this interpretation appears at page 662 above.

The Panel Report on “Canada - Administration of the Foreign Investment Review Act” noted that “the Panel recognizes that in disputes involving less-developed contracting parties full account should be taken of the special provisions in the General Agreement relating to these countries (such as Article XVIII:C). The Panel did not examine the issues before it in the light of these provisions since the dispute only involved developed contracting parties”.²⁹⁵

6. Article XIX

During the Fifth Session of the CONTRACTING PARTIES, during discussion of Czechoslovakia’s complaint concerning the United States’ Article XIX action on women’s fur felt hats and hat bodies, there was a discussion of whether this complaint should be considered in the framework of Article XIX or Article XXIII. Czechoslovakia declined to accept a proposed declaration that Czechoslovakia would be entitled to take action under Article XIX:3. Instead, a working party was established under Article XXIII to examine whether the United States action had conformed to the requirements of Article XIX:1.²⁹⁶

The Panel Report on “Norway’s Article XIX Action on Certain Textile Products” notes the factual background of this dispute, which involved introduction by Norway of import restrictions on textiles from Hong Kong, authorization of establishment of a panel under Article XXIII:2, subsequent invocation of Article XIX:1 by Norway, consultations under (*inter alia*) Article XIX:2, and a second decision to establish a panel under Article XXIII:2.²⁹⁷ As Hong Kong stated to the Panel that it “was prepared to assume that Norway had the necessary justification for taking this action”, the Panel did not make a finding with respect to the invocation of Article XIX itself.²⁹⁸

During the March 1985 Council meeting, in connection with the discussion of proposed compensatory adjustments under Article XIX:3(a) by the EEC in response to a Canadian Article XIX action, Canada stated that it would seek a panel under Article XXIII to determine whether such compensatory adjustments were consistent with Article XIX:3(a); the issue was raised whether such a panel should be established under Article XIX:3(a) and not Article XXIII.²⁹⁹

7. Article XX

In discussions of the article on exceptions to the commercial policy chapter of the Charter, in the London Session of the Preparatory Committee, it was stated in relation to Article 30 of the draft Charter [XXII and XXIII] that “one of the main objectives of Article 30 was to prevent evasion of the provisions of Chapter IV. If a

²⁹³L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 198, para. 8, referring to note proposed by UK reprinted at 3S/205.

²⁹⁴L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 188, para. 63; see also discussion of non-violation nullification or impairment relative to the draft Article XVIII:C, W.9/129.

²⁹⁵L/5504, adopted on 7 February 1984, 30S/140, 158, para. 5.2.

²⁹⁶GATT/CP.5/SR.22 and SR.23.

²⁹⁷L/4959, adopted on 18 June 1979, 27S/119, 121, para. 5.

²⁹⁸*Ibid.* 27S/125, para. 14(a).

²⁹⁹C/M/186, p. 4.

Member country used the exceptions of sub-paragraph (b) [XX(b)] as a means of protection, Article 30 provided that another Member might make representations to the ITO and so obtain satisfaction. It was almost impossible to draft exceptions which could not be abused, if good faith was lacking. The League of Nations had adopted an Article on the lines of Article 30, precisely because they had been unable to formulate exceptions which would exclude all possibility of abuse”.³⁰⁰

8. Article XXI

During discussions at the Geneva session of the Preparatory Committee in 1947, the provisions now contained in Article XXI were removed from the Article on general commercial policy exceptions and relocated in a separate exception (Article 94) at the end of the Charter. In this connection, the question was raised whether the dispute settlement provisions of Article 35 of the New York Draft [XXII/XXIII] would nevertheless apply. It was stated that “It is true that an action taken by a Member under Article 94 could not be challenged in the sense that it could not be claimed that a Member was violating the Charter; but if that action, even though not in conflict with the terms of Article 94, should affect another Member, I should think that that Member would have the right to seek redress of some kind under Article 35 as it now stands. In other words, there is no exception from the application of Article 35 to this or any other Article.”³⁰¹ The records of the Geneva discussions of the Preparatory Committee indicate that the representative of Australia withdrew its reservation on the inclusion of a reference to “fissionable materials” in Article 94 in the light of a statement that the provisions of Article 35 [XXIII] would apply to Article 94 [XXI].³⁰² The addition of a note to clarify that the provisions of paragraph 2 of Article 35 [XXIII:2] applied to Article 94 was rejected as unnecessary.³⁰³

At the Third Session in 1949, Czechoslovakia requested a decision under Article XXIII:2 as to “whether the Government of the United States had failed to carry out its obligations under the Agreement through its administration of the issue of export licences”.³⁰⁴ The complaint was examined and rejected by a roll-call vote of 17 to 1 with 3 abstentions; see further under Article XXI.³⁰⁵

During the discussion in 1982 of trade restrictions affecting Argentina applied for non-economic reasons, the view was expressed “that the provisions of Article XXI were subject to those of Article XXIII:2”. Argentina reserved its rights under Article XXIII in respect of any injury resulting from trade restrictions applied in the context of Article XXI.³⁰⁶ Paragraph 2 of the “Decision Concerning Article XXI of the General Agreement” of 30 November 1982 stipulates that “... when action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement”.³⁰⁷

The 1984 Panel Report on “United States - Imports of Sugar from Nicaragua” examined the action taken by the US government to reduce the share of the US sugar import quota allocated to Nicaragua and distribute the reduction in Nicaragua’s allocation to El Salvador, Honduras and Costa Rica. The Panel Report notes that “The United States stated that it was neither invoking any exceptions under the provisions of the General Agreement nor intending to defend its actions in GATT terms ... the action of the United States did of course affect trade, but was not taken for trade policy reasons.”³⁰⁸

“The Panel noted that the measures taken by the United States concerning sugar imports from Nicaragua were but one aspect of a more general problem. The Panel, in accordance with its terms of reference ... examined those measures solely in the light of the relevant GATT provisions, concerning itself only with the trade issue under dispute.”³⁰⁹

³⁰⁰EPCT/C.II/50, p. 6.

³⁰¹EPCT/A/PV/33, p. 26-27.

³⁰²EPCT/A/PV/33, p. 29; see also EPCT/A/PV/33/Corr. 3.

³⁰³EPCT/A/PV/33, p. 27-29 and EPCT/A/PV/33/Corr.3.

³⁰⁴GATT/CP.3/SR.22, p. 9.

³⁰⁵GATT/CP.3/SR.22, p. 9; Decision of 8 June 1949 at II/28.

³⁰⁶C/M/157, p. 9; C/M/159, p. 14; C/M/165, p. 18.

³⁰⁷29S/24.

³⁰⁸L/5607, adopted on 13 March 1984, 31S/67, 72, para. 3.10.

³⁰⁹*Ibid.*, 31S/73, para. 4.1.

“... The Panel noted that the United States had not invoked any of the exceptions provided for in the General Agreement permitting discriminatory quantitative restrictions contrary to Article XIII. The Panel therefore did not examine whether the reduction in Nicaragua’s quota could be justified under any such provision.”³¹⁰

The follow-up on this Panel report was discussed in the Council meetings of May and July 1984. The United States said that it “had not obstructed Nicaragua’s resort to GATT’s dispute settlement process; it had stated explicitly the conditions under which the issue might be resolved; and it recognized that Nicaragua had certain rights under Article XXIII which it had reserved and could continue to exercise”.³¹¹ Nicaragua stated that it was aware of its rights under Article XXIII.

In Council discussion of Nicaragua’s request for the establishment of a panel on “United States - Trade Measures Affecting Nicaragua”, the representative of the United States stated that “while his delegation recognized that Article XXIII rights were not necessarily lost in all cases in which Article XXI was invoked, a panel had no power to address the validity of, or motivation for, invocation of Article XXI:(b)(3).”³¹² While a panel was established in that dispute, its terms of reference provided that the Panel would examine these measures “in the light of the understanding reached at the Council on 10 October 1985 that the Panel cannot examine or judge the validity or motivation for the invocation of Article XXI:(b)(iii) by the United States”.³¹³

In the 1986 Panel Report on “United States - Trade Measures affecting Nicaragua”, which has not been adopted, the Panel noted the different views of the parties regarding whether the United States’ invocation of Article XXI(b)(iii) was proper, and concluded that this issue was not within its terms of reference. With regard to Nicaragua’s claim of non-violation nullification or impairment of GATT benefits by actions taken under Article XXI, the Panel decided not to propose a ruling.³¹⁴ When the Panel’s report was discussed by the Council in November 1986, the US representative stated that “Nullification or impairment when no GATT violation had been found was a delicate issue, linked to the concept of ‘reasonable expectations’. It was not simply a question of trade damage, since no one doubted the existence of trade damage. Applying the concept of ‘reasonable expectations’ to a case of trade sanctions motivated by national security considerations would be particularly perilous, since at a broader level those security considerations would nevertheless enter into expectations ... the Panel had acted wisely in refraining from a decision that could create a precedent of much wider ramifications for the scope of GATT rights and obligations ...”.³¹⁵ The representative of Nicaragua stated that her delegation could not support adoption of the report, *inter alia* because it could only be adopted once the Council was in a position to make recommendations.³¹⁶

9. Article XXIV:4-9

During discussion in the Twelfth Session concerning the further examination of the Treaty of Rome, the representative of the Interim Committee for the Common Market and Euratom stated that “the Six drew the attention of the CONTRACTING PARTIES ... to the distinction which they made between, on the one hand, the discussions relevant to what they called an investigation as to whether the provisions of the Treaty were consistent with the provisions of paragraphs 5 to 9 of the Agreement and, on the other hand, the discussions which the CONTRACTING PARTIES would like to hold once the investigation had been completed. With regard to the latter discussions ... [the Six] could not accept any special procedures which would imply for them additional obligations which were not applied to the other contracting parties. In regard to the question under consideration, the provisions of Articles XXII and XXIII of the General Agreement should be sufficient for the holding of any consultations which the CONTRACTING PARTIES might desire”.³¹⁷

The conclusions agreed at the Thirteenth Session concerning the examination of the Treaty of Rome provide, *inter alia*:

³¹⁰*Ibid.*, 31S/74, para. 4.4.

³¹¹C/M/178, p. 27.

³¹²C/M/191, p. 41.

³¹³C/M/192, p. 6.

³¹⁴L/6053 (unadopted), dated 13 October 1986, paras. 5.4-5.11.

³¹⁵C/M/204.

³¹⁶C/M/204. See also communication from Nicaragua at C/W/506.

³¹⁷CRT/SR.5, p. 60. See also C/M/73, p. 5; C/M/162, p. 13; C/M/166, p. 12.

“The CONTRACTING PARTIES noted that the other normal procedures of the General Agreement would also be available to call in question any measures taken by any of the six parties in the application of the provisions of the Rome Treaty, it being open of course to such country to invoke the benefit of Article XXIV insofar as it considered that this Article provided justification for any action which might otherwise be inconsistent with a provision or provisions of the General Agreement”.³¹⁸

When the application of Article XXIV:5(a) to the common customs tariff of the EEC was discussed in the Nineteenth Session in 1961, the Executive Secretary stated that “The conclusion of the CONTRACTING PARTIES when they considered the Rome Treaty clearly indicated that all the procedures of the General Agreement, such as those of Article XXIII, were available to contracting parties to deal with any damage resulting from the application of the Rome Treaty. It was also indicated in the same reference that it was open to the six members of the EEC in any matters brought forward under these procedures to advance, if they wished to do so, their rights under Article XXIV to justify actions which were complained of as causing damage”.³¹⁹

A Canadian request for a panel in 1974, because of lack of agreement in the Article XXIV:6 negotiations upon the accession of Denmark, Ireland and the United Kingdom to the European Communities, led to the establishment of a panel under paragraphs 1(c) and 2 of Article XXIII; however, this panel was not activated because the parties reached an agreement. See the material on relationship with Article XXVIII starting at page 712, and see also the references to the Arbitration on Quality Wheat at page 768.

During the Council discussion in 1982 of the United States’ recourse to Article XXIII with regard to EEC measures on imports of citrus fruit and products under association agreements between the EEC and various countries, many contracting parties stressed the right of a contracting party to seek the establishment of a panel where bilateral settlement of a dispute had failed, and rejected the view that the earlier working party procedures under Article XXIV did preclude proceedings under Article XXIII. The Council agreed to establish a panel under Article XXIII.³²⁰ The 1985 Panel report on “EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region”, which has not been adopted, includes *inter alia* the following findings on the relationship between Articles XXIII and XXIV.

“... In the opinion of the Panel, the examination - or re-examination - of Article XXIV agreements was the responsibility of the CONTRACTING PARTIES. In the absence of a decision by the CONTRACTING PARTIES and without prejudice to any decision CONTRACTING PARTIES might take in the future on such a matter, the Panel was of the view that it would not be appropriate to determine the conformity of an agreement with the requirements of Article XXIV on the basis of a complaint by a contracting party under Article XXIII:1(a). The Panel did not preclude that amongst the procedures available to CONTRACTING PARTIES, a panel could be established to give an advisory opinion on the conformity of an agreement or an interpretation of specific criteria under Article XXIV to assist CONTRACTING PARTIES in making findings or recommendations under Article XXIV:7(b). However, the Panel was of the view that irrespective of the procedure to be followed for this purpose, including a panel, this should be done clearly in the context of Article XXIV and not Article XXIII, as an assessment of all the duties, regulations of commerce and trade coverage as well as the interests and rights of all contracting parties were at stake in such an examination, and not just the interests and rights of one contracting party raising a complaint.

“The Panel considered that the practice, so far followed by the CONTRACTING PARTIES, never to use the procedures of Article XXIII:2 to make recommendations or rulings on the GATT-conformity of measures subject to special review procedures was sound. It felt that the purposes these procedures served and the balance of interests underlying them would be lost if contracting parties could invoke the general procedures of Article XXIII:2 for the purpose of requesting decisions by the CONTRACTING PARTIES, on measures to be reviewed under the special procedures. The panel therefore concluded that it should, in the

³¹⁸7S/71, para. (f): see discussion at SR.13/15 p. 127-143, draft summing-up at Spec/321/58, drafts of conclusions at W.13/49 and Rev.1, debate and adoption of conclusions at SR.13/19, p. 187-202.

³¹⁹SR.19/7, p. 89-90.

³²⁰C/M/159, C/M/160, C/M/161, C/M/162.

absence of a specific mandate by the Council to the contrary, follow this practice also in the case before it and therefore abstain from an overall examination of the bilateral agreements.”³²¹

“The Panel further noted that in some of the conclusions on agreements, following their examination under Article XXIV:7, the CONTRACTING PARTIES had recalled that procedures for consultations under Article XXII had been accepted and had then noted that ‘the other normal procedures of the General Agreement would also be available to contracting parties to call into question any measures taken’ under the interim agreements (see Rome Treaty: BISD 7S/71; EFTA: BISD 9S/20; LAFTA: BISD 9S/21, and Finnish Association with EFTA: BISD 10S/24). The reference to ‘the other normal procedures of the General Agreement’, after the mention of Article XXII, can only be understood to mean the procedures of Article XXIII. The CONTRACTING PARTIES have established in the above conclusions that this procedure could be used to call into question ‘any measure’ taken by the parties to the agreements; they did not mention the possibility of calling into question the agreements as a whole, under the procedures of Article XXIII. Furthermore, the Panel noted that in the reports of the working parties relating to the respective EEC agreements with Egypt, Lebanon, and Jordan, it was specified that ‘as regards the possibility of consultations with the contracting parties concerning the incidence of the Agreement on their trade interests, which had been mentioned by some members of the Working Party, the spokesman for the European Communities stated that nothing prevented these countries from invoking the relevant provisions of the General Agreement, such as Articles XXII and XXIII’ (BISD 25S/119 para.15, 139 para.16, and 147 para.16).

“... a decision of the CONTRACTING PARTIES on the agreements would inevitably have amounted to a judgment on their conformity with Article XXIV. Had it been recognized that an agreement was in conformity with the requirements of Article XXIV, the implementation of this agreement could no longer be considered as nullifying or impairing benefits accruing under the General Agreement. On the other hand, had the agreement been considered by the CONTRACTING PARTIES as not being in conformity with the said requirements, its implementation would amount to a clear infringement of the provisions of the General Agreement which would constitute *prima facie* a clear case of nullification or impairment in the sense of Article XXIII:1(a).”³²²

The Panel’s conclusion “that in this particular situation the balance of rights and obligations underlying Articles I and XXIV of the General Agreement had been upset to the disadvantage of the contracting parties not parties to these agreements and that the United States was therefore entitled to offsetting or compensatory adjustment to the extent that the grant of the preferences had caused substantial adverse effects to its actual trade or its trade opportunities”³²³ was disputed by several contracting parties in the GATT Council discussion of the Panel report, which has not been adopted.³²⁴

In this connection see also the unadopted panel reports from 1993 and 1994 respectively on “EEC - Member States’ Import Régimes for Bananas” and “EEC - Import Régime for Bananas”.³²⁵

Paragraph 12 of the Uruguay Round Understanding on the Interpretation of Article XXIV of the GATT 1994, which is incorporated into the GATT 1994, provides as follows: “The provisions of Articles XXII and XXIII as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas of interim agreements leading to the formation of a customs union or free-trade area.”³²⁶

10. Article XXIV:12

Paragraphs 13-15 of the Uruguay Round Understanding on the Interpretation of Article XXIV of the GATT 1994, which is incorporated into the GATT 1994, provide as follows:

³²¹L/5776 (unadopted, dated 7 February 1985), paras. 4.15-4.16.

³²²*Ibid.*, paras. 4.18-4.19.

³²³*Ibid.*, para. 4.37; see also above at page 661.

³²⁴C/M/186, 187, C/W/462.

³²⁵DS32/R, paras. 364-372; DS38/R, paras. 157-164.

³²⁶Further concerning this provision, see MTN.TNC/W/125 and discussion thereof at SR.49/3 p. 16.

“13. Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.

“14. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a Member. When the Dispute Settlement Body has ruled that a provision of GATT 1994 has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.

“15. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of GATT 1994 taken within the territory of the former.”

See further under Article XXIV:12.

11. Article XXV:1

See material above at page 653 on the applicability of Article XXIII procedures to requests for rulings; material below at page 730 concerning interpretation by Panels of the provisions of decisions under Article XXV:1; and material below at page 719 concerning referral of disputes to the International Court of Justice. See also the material under Article XXV:1 on working parties under Article XXV:1.

12. Article XXV:5

The 1952 Report of the Working Party established to consider a waiver requested in respect of the European Coal and Steel Community notes that “the Working Party agreed that the adoption of the Decision would not debar any individual contracting party from having recourse to the provisions of Article XXIII if it considered that any benefit accruing to it under the Agreement was being nullified or impaired”.³²⁷ Similarly, the Decision of 3 March 1955 on the “hard-core waiver” provided that “any concurrence given in accordance with this Decision does not preclude the right of contracting parties affected to have recourse to Article XXIII”³²⁸ and the Decision of the same date granting a waiver to the United States “in connection with import restrictions imposed under Section 22 of the Agricultural Adjustment Act (of 1933) as amended” provides that “this Decision shall not preclude the right of affected contracting parties to have recourse to the appropriate provisions of Article XXIII”.³²⁹ The 1955 Report of the Working Party, on “Import Restrictions Imposed by the United States under Section 22 of the U.S. Agricultural Adjustment Act”, which drafted the text of this waiver, notes:

“The purpose of reiterating in paragraph 4 that the obligations of the Agreement are waived without prejudice to the right of the affected contracting parties to have recourse to the appropriate provisions of Article XXIII, is to re-emphasize that point in relation to the imposition of restrictions on additional products and the extension or intensification of existing restrictions. As the first declaration clause indicates, the right of other contracting parties to have recourse to the provisions of Article XXIII is not limited to such cases only, but applies to the Decision as a whole”.³³⁰

On 1 November 1956, the CONTRACTING PARTIES adopted a Decision on “Guiding Principles to be Followed in Considering Applications for Waivers from Part I or Other Important Obligations of the Agreement”. These include a provision that “Any decision granting a waiver should include procedures for future consultation on specific action taken under the waiver, and, where appropriate, for arbitration by the CONTRACTING PARTIES. ...”.³³¹ Some waiver decisions other than those referred to above also explicitly provide for the

³²⁷G/35, adopted on 10 November 1952, 1S/85, 88, para.10.

³²⁸3S/38, 41, para. C.

³²⁹3S/32, 35.

³³⁰L/339, adopted on 5 March 1955, 3S/141, 144, para. 9.

³³¹5S/25, adopted on 1 November 1956, para. (d).

possibility of “recourse to the appropriate provisions of Article XXIII”.³³² Other waiver decisions include special consultation and dispute settlement provisions without explicit reference to Article XXIII.³³³ There have been some cases of invocation of such special dispute settlement procedures, for instance in connection with the waiver to the United Kingdom for items traditionally admitted duty-free from countries of the Commonwealth.³³⁴

The Protocol for the Accession of Switzerland³³⁵ includes in paragraphs 4 and 5 reservations with regard to the application of Articles XI and XV:6; paragraph 6 of the Protocol provides that “Switzerland shall enter into consultations pursuant to Articles XXII and XXIII of the General Agreement upon request of any contracting party regarding the reservations mentioned in paragraphs 4 and 5 above ...”. When the text of this Protocol was submitted to the CONTRACTING PARTIES for approval, the Chairman stated that this reservation could be considered analogous to a waiver granted under Article XXV, paragraph 5, “in that such waivers normally contain a clause to the effect that the decision does not preclude the right of affected countries to have recourse to all the provisions of Article XXIII”.³³⁶

A footnote in the 1962 Panel Report on “Uruguayan Recourse to Article XXIII” provides:

“It is noted in this connexion that the status of a measure (that is, whether or not it is consistent with GATT) is not to be affected by a waiver decision taken subsequently. In fact, Decisions taken under Article XXV:5 granting waivers from GATT obligations have normally expressly provided for the continued validity of the procedures of Article XXIII in respect of the otherwise ‘waived’ obligations (cf. *inter alia*, BISD, Third Supplement, pages 35-41; Eighth Supplement, page 22)”.³³⁷

In Council discussion of the 1971 waiver for the Generalized System of Preferences, the “Chairman confirmed that the draft waiver was without prejudice to any article of the General Agreement other than Article I. Rights under Article XXIII of the General Agreement were, therefore, fully preserved”.³³⁸ The waiver decision was adopted “without prejudice to any other Article of the General Agreement”.³³⁹

The 1990 Panel Report on “United States - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions”³⁴⁰ examines the general issue of recourse to Article XXIII in relation to measures taken under a waiver granted under Article XXV:5, in the context of the specific claim of the EEC under Article XXIII concerning measures taken by the United States under the 1955 Waiver Decision referred to above for import restrictions and fees imposed under Section 22 of the US Agricultural Adjustment Act. Concerning the threshold claim of the United States that under the terms of the waiver, recourse to Article XXIII was “limited to ‘affected’ contracting parties and that the EEC is not affected by the measures taken under the Waiver” the Panel found that “the EEC had the right to an investigation of its complaint in accordance with Article XXIII:2 without having to demonstrate that it is ‘affected’ within the meaning of the Waiver”.³⁴¹

“The Panel ... examined the claim by the EEC that the restrictions on imports of sugar-containing products, being inconsistent with Article XI, nullified or impaired benefits accruing to the EEC under the General Agreement, whether or not they meet the terms of the Waiver and that the United States therefore owes compensation. The argument of the EEC on this point essentially is that a waiver does not alter the legal status of a measure; it merely suspends the obligation to implement provisions of the General

³³²See also German Import Restrictions, Decision of 30 May 1959, 8S/31, 33; Caribbean Basin Economic Recovery Act, L/5779, Decision of 15 February 1985, 31S/20, 23.

³³³See, e.g., 7S/37, 39; 8S/29, 31; 10S/51, 53; 14S/37, 39.

³³⁴Waiver at 2S/20, amended at 3S/25; see disputes brought by Germany regarding an increase in the margin of preference on ornamental pottery, IC/SR/44, SECRET/44; and brought by Brazil regarding margin of preference on bananas, C/M/9, L/1749, C/M/10, SR.20/2.

³³⁵14S/6, 8.

³³⁶SR.23/7.

³³⁷L/1923, adopted on 16 November 1962, 11S/95, 100, para. 15. Concerning the meaning in context of this footnote, see the material following from the Panel Report on “United States - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions”, L/6631, adopted on 7 November 1990, 37S/228.

³³⁸C/M/69.

³³⁹L/3545, adopted on 25 June 1971, 18S/25.

³⁴⁰L/6631, adopted on 7 November 1990, 37S/228.

³⁴¹*Ibid.*, 37S/255, para. 5.6.

Agreement. The presumption set forth in the Understanding on Dispute Settlement ... that a measure inconsistent with the General Agreement nullifies or impairs benefits accruing under that Agreement within the meaning of Article XXIII therefore applies independently of whether the measure is covered by a waiver. The EEC considers its position to be supported by a footnote in the panel report on the Uruguayan Recourse to Article XXIII which states that ‘... the status of a measure (that is, whether or not it is inconsistent with GATT) is not affected by a waiver decision’ (BISD 11S/100). The EEC, referring to a provision in the Understanding on Dispute Settlement which states that compensation should be resorted to only ‘as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement’ (BISD 26S/216), further claims that it is entitled to compensation as a temporary measure pending the withdrawal of the restrictions on imports of sugar-containing products.

“The Panel examined these arguments in the light of Article XXIII:1(a), which applies to claims of nullification or impairment of benefits accruing under the General Agreement as the result of ‘the failure of another contracting party to carry out its obligations under the General Agreement’. The Panel found that the restrictions on sugar-containing products, though inconsistent with the obligations of the United States under Article XI:1, conform to the terms of a decision of the CONTRACTING PARTIES waiving that obligation in accordance with Article XXV:5. Since both Article XI:1 and Article XXV:5 form part of the General Agreement, the imposition of the restrictions in conformity with the Waiver cannot constitute a ‘failure of [the United States] to carry out its obligations under this Agreement’ within the meaning of Article XXIII:1(a).

“The Panel then examined the implication of the note in the report on the Uruguayan Recourse to Article XXIII, according to which ‘... the status of a measure (that is, whether or not it is inconsistent with GATT) is not affected by a waiver decision ...’. The Panel noted that the panel which submitted this report had examined import restrictions imposed by Germany and that Germany had obtained a waiver for the restrictions but nevertheless insisted that they were covered by the existing legislation clause in the protocol by which it acceded to the General Agreement (BISD 8S/31 and 10S/126). Against this background the footnote can be understood to suggest that a decision by the CONTRACTING PARTIES to waive an obligation for a particular measure does not constitute a ruling by the CONTRACTING PARTIES that the measure is inconsistent with the General Agreement and that, consequently, a contracting party having obtained a waiver for a particular measure is not barred from arguing in proceedings under Article XXIII:2 that the measure would be consistent with the General Agreement even in the absence of the waiver. The footnote therefore does not support the conclusion that a contracting party imposing a measure inconsistent with a particular provision of the General Agreement but covered by the terms of a decision waiving the obligations under that provision in accordance with Article XXV:5 nevertheless fails to carry out its obligations under the General Agreement within the meaning of Article XXIII:1(a). The footnote can in the view of the Panel however be taken as an indication of the fact that a measure inconsistent with a particular provision of the General Agreement remains inconsistent with that particular provision even if the CONTRACTING PARTIES authorized in accordance with Article XXV:5 in exceptional circumstances the maintenance of the measure subject to specified conditions.

“The Panel then examined the EEC claim in the light of Article XXIII:1(b), which may be invoked in respect of the application of ‘any measure, whether or not it conflicts with the provisions of the General Agreement’, and consequently also in respect of any measure covered by a waiver. The CONTRACTING PARTIES confirmed this right when they declared in the Waiver that their decision ‘shall not preclude the right of affected contracting parties to have recourse to the appropriate provisions of Article XXIII’ (BISD 3S/35). The EEC considered that the CONTRACTING PARTIES had, when granting the Waiver, formally noted that measures taken under the Waiver constituted, in certain cases, an impairment of benefits under the General Agreement and that such impairment therefore does not have to be proven by it. The Panel noted that the CONTRACTING PARTIES, in the Waiver decision, declared that ‘they regret that the circumstances make it necessary for the United States to continue to apply import restrictions which, in certain cases, adversely affect the trade of a number of contracting parties, impair concessions granted by the United States and thus impede the attainment of the objectives of the General Agreement’ (BISD 3S/35). This declaration alone does not, in the view of the Panel, give adequate guidance as to the nature of those specific cases where concessions are impaired and, therefore it needs to be determined for each measure taken under the Waiver whether it causes such an impairment. The Panel therefore concluded

that the fact that the restrictions found to be inconsistent with Article XI:1 conform to the terms of the Waiver does not prevent the EEC from bringing a complaint under Article XXIII:1(b) of the General Agreement but it is up to the EEC to demonstrate that a nullification or impairment of benefits accruing to it under the General Agreement has resulted from these restrictions".³⁴²

The Understanding in Respect of Waivers of Obligations under the GATT 1994, which is incorporated into the GATT 1994, provides that "Any Member who considers that a benefit accruing to it under GATT 1994 is being nullified or impaired as a result of: (a) the failure of the Member to whom the waiver was granted to observe the terms or conditions of the waiver; (b) the application of a measure consistent with the terms and conditions of the waiver, may invoke the provisions of Article XXIII...".

13. Article XXVIII

In 1974, when Article XXIV:6 negotiations between Canada and the European Communities on the occasion of the accession to the EC of Denmark, Ireland and the United Kingdom did not produce a mutually satisfactory result, Canada referred the matter to the CONTRACTING PARTIES pursuant to paragraph 1(c) and 2 of Article XXIII. Canada requested that a panel of experts be appointed to investigate whether the new Schedules LXXII and LXXIibis maintained a general level of reciprocal and mutually advantageous concessions between Canada and the European Communities, not less favourable to trade than that provided for in Schedules XL, XLbis, XIX, XXII and LXI.³⁴³ The representative of the European Communities recalled "that the negotiations that had led to this new Schedule covered practically the whole of the customs tariffs in question and a difficult assessment of both a quantitative and qualitative character was therefore called for. The Community could not accept the proposal. The conciliation procedures of the GATT had hitherto mostly been used in cases of violations of the General Agreement; in the present case, a number of factors made this procedure inappropriate. Such an exercise would involve highly sophisticated assessments in complex trade fields where the criteria for reaching judgements were exceedingly imprecise ...".³⁴⁴ At the following Council meeting, the Chairman "concluded that it was the wish of the Council, with the exception of the European Communities, to establish such a panel and that he should, in due course, discuss the question of the panel in consultation with the parties most concerned".³⁴⁵ The panel was established but was not convened as the two parties reached a bilateral agreement.

At the September 1992 Council meeting, Argentina noted its request for recognition of its principal supplying interest under Article XXVIII with respect to EEC concessions on soyabeans and soyacakes. Argentina requested the establishment of a panel to examine this claim so that the CONTRACTING PARTIES could determine this interest under Article XXVIII:1. At the November 1992 Council meeting, the EEC stated that "Argentina's recourse to the dispute settlement mechanism in this case was inappropriate and improper" as in its view this was not a dispute between Argentina and the Community, but a dispute between Argentina and the CONTRACTING PARTIES. The matter was resolved as the EEC recognized Argentina's claim.³⁴⁶

Negotiations under Article XXVIII have also been referred to as a possible resolution in the case of non-violation nullification or impairment: see the reference to Article XXVIII in the findings of the 1992 Report of the Members of the Original Oilseeds Panel on "Follow-up on the Panel Report 'EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins'", at page 683 above.

14. Article XXXVII

See the reference to consultations under Article XXXVII in paragraph 11 of the 1966 Procedures and at page 674 above.

³⁴²*Ibid.*, 37S/260-261, paras. 5.17-5.20.

³⁴³C/M/101, p. 7.

³⁴⁴C/M/101, p. 8.

³⁴⁵C/M/102, p. 4.

³⁴⁶C/M/260, p. 31.

C. RELATIONSHIP BETWEEN ARTICLE XXIII AND OTHER AGREEMENTS

1. WTO Agreement

On 8 December 1994, the Preparatory Committee, meeting on the occasion of the Implementation Conference, adopted a Decision on “Transitional Co-existence of the GATT 1947 and the WTO Agreement”, which provides *inter alia*:

“1. The contracting parties that are Members of the WTO may, notwithstanding the provisions of the GATT 1947,

“(a) accord to products originating in or destined for a Member of the WTO the benefits to be accorded to such products solely as a result of concessions, commitments or other obligations assumed under the WTO Agreement without according such benefits to products originating in or destined for a contracting party that has not yet become a Member of the WTO; and

“(b) maintain or adopt any measure consistent with the provisions of the WTO Agreement.

“2. The provisions of Article XXIII of the GATT 1947 shall not apply:

“(a) to disputes brought against a contracting party which is a Member of the WTO if the dispute concerns a measure that is identified as a specific measure at issue in a request for the establishment of a panel made in accordance with Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes in Annex 2 of the WTO Agreement and the dispute settlement proceedings following that request are being pursued or are completed; and

“(b) in respect of measures covered by paragraph 1 above.”³⁴⁷

See also the material at the end of the chapter on Article VI *supra* on transitional decisions adopted on 8 December 1994 by the Committee on Anti-Dumping Practices, and the Committee on Subsidies and Countervailing Measures.

2. Tokyo Round Agreements

The dispute settlement provisions of the agreements on non-tariff barriers to trade negotiated in the Tokyo Round are not uniform and do not adopt a consistent approach to the interface between recourse to dispute settlement under these Agreements and recourse to Article XXIII of the General Agreement, nor to the applicability to disputes under these Agreements of procedures applying to disputes under Article XXIII.

Concerning the relationship between rights under these agreements and rights under the General Agreement, the Decision of 28 November 1979 on “Action by the CONTRACTING PARTIES on the Multilateral Trade Negotiations” provides, *inter alia*, that

“The CONTRACTING PARTIES note that as a result of the Multilateral Trade Negotiations, a number of Agreements covering certain non-tariff measures and trade in Bovine Meat and Dairy Products have been drawn up. They further note that these Agreements will go into effect as between the parties to these Agreements as from 1 January 1980 or 1 January 1981 as may be the case and for other parties as they accede to these Agreements.

“The CONTRACTING PARTIES also note that existing rights and benefits under the GATT of contracting parties not being parties to these Agreements, including those derived from Article I, are not affected by these Agreements.”³⁴⁸

³⁴⁷PC/12, L/7583, paras. 1-2.

³⁴⁸L/4905, 26S/201, paras. 2-3.

The 1985 Report of the Working Group on “MTN Agreements and Arrangements” includes the general observation that “Any contracting party which felt that an MTN agreement was implemented in a way contrary to the General Agreement could bring a complaint under Article XXIII of the General Agreement”.³⁴⁹

(1) *Use of Article XXIII procedures in disputes under the Tokyo Round agreements regarding obligations under those agreements*

Some of the Tokyo Round agreements provide for the application in disputes thereunder *mutatis mutandis* of the dispute settlement procedures practised under Article XXIII. The Agreement on Import Licensing Procedures contains a general reference to this effect in paragraph 2 of its Article 4:

“Consultations and the settlement of disputes with respect to any matter affecting the operation of this Agreement, shall be subject to the procedures of Articles XXII and XXIII of the GATT.”

The reference to Article XXIII in Article 8:8 of the Agreement on Trade in Civil Aircraft is confined to specific disputes related to that Agreement:

“Signatories agree that, with respect to any dispute related to a matter covered by this Agreement, but not covered by other instruments multilaterally negotiated under the auspices of the GATT, the provisions of Articles XXII and XXIII of the General Agreement and the provisions of the Understanding related to Notification, Consultation, Dispute Settlement and Surveillance shall be applied, *mutatis mutandis*, by the Signatories and the Committee for the purposes of seeking settlement of such dispute. These procedures shall also be applied for the settlement of any dispute related to a matter covered by this Agreement and by another instrument multilaterally negotiated under the auspices of the GATT, should the parties to the dispute so agree.”

Article 15:7 of the Agreement on Implementation of Article VI provides:

“Further to paragraphs 1-6 the settlement of disputes shall *mutatis mutandis* be governed by the provisions of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance. Panel members shall have relevant experience and be selected from Parties not parties to the dispute.”

(2) *Assignment of priority to dispute settlement under the Tokyo Round Agreements relative to recourse to Article XXIII*

Certain of the Tokyo Round agreements give priority to recourse to dispute settlement under these agreements when a dispute is between contracting parties to the GATT which are also parties to the agreement in question.

The Agreement on Implementation of Article VII, which relates to customs valuation, provides in Article 20.11:

“If a dispute arises between Parties relating to rights and obligations under this Agreement, Parties should complete the dispute settlement procedures under this Agreement before availing themselves of any rights which they have under the GATT, including invoking Article XXIII thereof.”

At the November 1983 meeting of the Committee on Customs Valuation a statement was made concerning the significance of these references where a party to a Tokyo Round Agreement is not a GATT contracting party: see at page 644 above.

Article 14.23 of the Agreement on Technical Barriers to Trade also provides that

“If disputes arise between Parties relating to rights and obligations of this Agreement, Parties should complete the dispute settlement procedures under this Agreement before availing themselves of any rights which they have under the GATT ...”.

³⁴⁹L/5832/Rev.1, p. 2, para. 4.

Similarly, a footnote to Article 15 of the Agreement on Implementation of Article VI, which relates to anti-dumping practices, provides as follows:

“If disputes arise between Parties relating to rights and obligations under this Agreement, Parties should complete the dispute settlement procedures under this Agreement before availing themselves of any rights which they have under the GATT”.

See the discussion at the October 1988 meeting of the Committee on Anti-Dumping Practices, on the request of Japan for conciliation under Article 15:3 of the Agreement concerning EEC Council Regulation (EEC) No. 1761/87 and its application in particular cases; on the EC's opposition to this request because the Council had already established a panel under Article XXIII on the measures in question; and on the interpretation of this footnote.³⁵⁰

The Agreement on Government Procurement and the Agreement on Interpretation and Application of Articles VI, XVI and XXIII do not explicitly regulate the relationship between their dispute settlement provisions and those of the General Agreement.

In Council discussion of Brazil's request for a panel on “United States - Denial of Most-favoured-nation Treatment as to Imports of Non-rubber Footwear from Brazil”, in relation to a measure concerning which Brazil had earlier pursued dispute settlement under the Agreement on Interpretation and Application of Articles VI, XVI and XXIII, the representative of Brazil stated that

“a contracting party could not be prevented from seeking a remedy before the GATT Council because it had also sought protection of its interests under a particular Code ... this would mean accepting that the Code Committees somehow bound the Council and the contracting parties, many of which were not signatories to the Codes. ... To lend further support to his arguments, he quoted from a letter of 11 April 1979 sent by the Chairman of the Tokyo Round sub-group on subsidies and countervailing measures to a certain number of negotiators, as follows: ‘The provisions of the Agreement on Subsidies and Countervailing Measures interpret and apply the provisions of the GATT in Article XXIII as among signatories to the Agreement with respect to disputes concerning subsidies and countervailing measures under the GATT and in this connection will be used by these signatories to resolve any such dispute. However, delegations pointed out that in their view rights and obligations of the contracting parties under Article XXIII of the GATT are not limited thereby.’ He recalled that several other Tokyo Round Codes contained similar provisions under which parties were to complete the dispute settlement procedure under the respective Codes before availing themselves of any rights under the General Agreement”.³⁵¹

(3) *Interpretation of Tokyo Round agreements in disputes under the General Agreement*

Article 14.23 of the Agreement on Technical Barriers to Trade further provides that “... Parties recognize that, in any case so referred to the CONTRACTING PARTIES, any finding, recommendation or ruling pursuant to Article 14, paragraphs 9 to 18 may be taken into account by the CONTRACTING PARTIES, to the extent they relate to matters involving equivalent rights and obligations under the General Agreement. When Parties resort to GATT Article XXIII, a determination under that Article shall be based on GATT provisions only”.

In November 1980, India sought recourse to the procedures of Article XXIII:2 and requested the establishment of a panel to examine the United States' imposition of countervailing duties on industrial fasteners imported from India without applying the injury criterion while extending this benefit to other contracting parties. This action had been taken by the United States after invoking Article 19:9 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII (“Subsidies Code”). The representative of the United States stated, *inter alia*, “that his delegation could not agree to the establishment of a GATT panel to examine those issues that related to interpretation of Code provisions. Nevertheless, it was still prepared to agree to the establishment of a panel under Article XXIII:2 but only to deal with problems related to rights and obligations

³⁵⁰ ADP/M/24, p. 21-27. The measures were examined in the Panel Report on “EEC - Regulation on Imports of Parts and Components”, L/6657, adopted 16 May 1990, 37S/132.

³⁵¹ C/M/248, p. 15.

under provisions of the General Agreement”.³⁵² A panel was established under Article XXIII to examine the matter “under the relevant GATT provisions” but the proceedings were terminated as a result of a bilateral settlement.³⁵³

In 1987, the United States and India held joint consultations under Article XXIII:1 and Article 4:2 of the Agreement on Import Licensing Procedures, concerning quantitative restrictions on imports of almonds maintained by India and their operation. A panel was established under each agreement, with different panelists for each panel. However, the complaint was withdrawn in June 1988.³⁵⁴

In the panel proceeding on “EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins” the EEC argued that as between the parties that signed it, the Agreement on Interpretation and Application of Articles VI, XVI and XXIII created a expectation as to the criteria that would be used to judge a complaint of non-violation nullification or impairment of tariff concessions. The Panel Report adopted in 1990 provides:

“The Panel was established to make findings ‘in the light of the relevant GATT provisions’; it therefore does not have the mandate to propose interpretations of the provisions of the Subsidies Code which the Community invokes to justify its position. However, the following may be noted in this respect. ... The Panel noted that the purpose of the Subsidies Code is, according to its preamble, ‘to apply fully and interpret’ provisions of the General Agreement. In the view of the Panel this speaks in favour of interpreting Article 8:4 in conformity with the decisions of the CONTRACTING PARTIES rather than, as the Community suggests, revising these decisions in the light of a particular interpretation of a Code accepted by a portion of the contracting parties”.³⁵⁵

See also material starting at page 730 on the scope of the “relevant GATT provisions” interpreted by panels.

4) *Relationship between suspension authorized under Article XXIII:2 and measures authorized under Tokyo Round agreements*

The Agreement on Interpretation and Application of Articles VI, XVI and XXIII provides in Article 18:9:

“The Committee shall consider the panel report as soon as possible and, taking into account the findings contained therein, may make recommendations to the parties with a view to resolving the dispute. If the Committee’s recommendations are not followed within a reasonable period, the Committee may authorize appropriate countermeasures (including withdrawal of GATT concessions or obligations) taking into account the nature and degree of the adverse effect found to exist.”

See also a Secretariat Note of 1983 on “Negotiating History of Article 18:9 and the Treatment of Reports of Working Parties and Panels under Article XXIII of the General Agreement”.³⁵⁶

The Agreement on Implementation of Article VI does not provide for panel recommendations nor for suspension of obligations or concessions: as noted above, Article 15:7 provides that “Further to paragraphs 1-6 the settlement of disputes shall *mutatis mutandis* be governed by the provisions of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance”. On 5 May 1980, the Committee on Anti-Dumping Practices decided, *inter alia*, that

“... paragraph 7 of Article 15 of the Agreement, is to be interpreted to mean that the measures which may be authorized by the Committee on Anti-Dumping Practices for the purpose of the Agreement may include all such measures as can be authorized under Articles XXII and XXIII of the General Agreement”.³⁵⁷

³⁵²C/M/144.

³⁵³Report of the “Panel on United States Countervailing Duties”, L/5192, adopted on 3 November 1981, 28S/113.

³⁵⁴See discussion of complaints at C/M/211-213, establishment of each panel at C/M/215, LIC/M/19; notice of withdrawal in C/154/Add.1, LIC/15.

³⁵⁵L/6627, adopted on 25 January 1990, 37S/131.

³⁵⁶SCM/W/48, dated 11 May 1983.

3. Arrangements on textile trade

In July 1972, Israel referred its complaint relating to the United Kingdom's import quotas on cotton textiles from Israel to the CONTRACTING PARTIES under Article XXIII:2 of the General Agreement. Israel considered the restrictions to be "clearly contrary to the provisions of the Long-Term Arrangement Regarding International Trade in Cotton Textiles and of the General Agreement". The representative of the United Kingdom took the view that "Articles 7:3 and 8(b) of the Long Term Arrangement clearly envisaged that divergence of views should first be referred to the Cotton Textiles Committee" and that "the criteria set forth by the Long-Term Arrangement for the reference of such disputes to the CONTRACTING PARTIES were, therefore, not met".³⁵⁸ In a later Council meeting he also stated that a "Panel would be placed in a difficult position before the matter was examined according to the provisions of Article 7 of the Long-Term Arrangement, since it would have no authority to interpret the Long-Term Arrangement. Considerations like these justified the contention by the United Kingdom that the correct procedure would be to use Article 7 of the Long-Term Arrangement in the first instance. This arrangement would be quicker than setting up a panel since the Cotton Textiles Committee already existed and could be convened in a special session at any time". The representative of the United States "shared the view of the United Kingdom that to refer the matter to the Cotton Textiles Committee would not lead to delays. However, the procedure under the Long-Term Arrangement was not mandatory, contrary to the provisions of Article XXIII. He therefore felt that if Israel insisted on invoking the provisions of Article XXIII the United States delegation should support the setting up of a panel".³⁵⁹ The Council agreed to establish a panel, the report of which was adopted on 5 February 1973.³⁶⁰

The Arrangement Regarding International Trade in Textiles (MFA), which entered into force on 1 January 1974, provides in paragraphs 4 and 5 of Article 11:

"In the absence of any mutually agreed solution in bilateral negotiations or consultations between participating countries provided for in this Arrangement, the Textiles Surveillance Body at the request of either party, and following a thorough and prompt consideration of the matter, shall make recommendations to the parties concerned.

"The Textiles Surveillance Body shall, at the request of any participating country, review promptly any particular measures or arrangements which that country considers to be detrimental to its interests where consultations between it and the participating countries directly concerned have failed to produce a satisfactory solution. It shall make recommendations as appropriate to the participating country or countries concerned".

However, paragraph 6 of Article 1 provides that "The provisions of this Arrangement shall not affect the rights and obligations of the participating countries under the GATT". Accordingly, paragraphs 9 and 10 of Article 11 provide:

"If, following recommendations by the Textiles Surveillance Body, problems continue to exist between the parties, these may be brought before the Textiles Committee or before the GATT Council through the normal GATT procedures".

"Any recommendations and observations of the Textiles Surveillance Body would be taken into account should the matters related to such recommendations and observations subsequently be brought before the CONTRACTING PARTIES to the GATT, particularly under the procedures of Article XXIII of the GATT."³⁶¹

In the December 1982 meeting of the Textiles Committee, the representative of Brazil referred to the 1982 Ministerial Declaration provisions on dispute settlement and stated that "although such a decision was not addressed to the TSB, it had, in his view, a bearing on the work of the TSB and on the way it would operate".³⁶²

³⁵⁷ADP/2, 27S/16, 18, para. 2. See also text circulated at the request of a number of delegations, MTN/NTM/W/232/Add.2 dated 11 April 1979.

³⁵⁸C/M/79, p. 15-16.

³⁵⁹C/M/81, p. 15.

³⁶⁰20S/237.

³⁶¹21S/14.

³⁶²COM.TEX/31, p. 8.

Paragraphs 5 and 23 of the Conclusions of the Textiles Committee Adopted on 22 December 1981, which are attached to the Protocol Extending the Arrangement Regarding International Trade in Textiles dated 22 December 1981, provide:

“5. It was agreed that any serious problems of textile trade falling within the purview of the Arrangement should be resolved through consultations and negotiations conducted under the relevant provisions thereof.”

“23. It was felt that in order to ensure the proper functioning of the MFA, all participants should refrain from taking measures on textiles covered by the MFA, outside the provisions therein, before exhausting all the relief measures provided in the MFA.”³⁶³

Paragraph 23 was repeated as paragraph 26 of the Conclusions of the Textiles Committee Adopted on 31 July 1986, which are attached to the Protocol Extending the Arrangement Regarding International Trade in Textiles dated 31 July 1986.³⁶⁴

The relation between recourse to Article XXIII and dispute settlement carried out by the Textiles Surveillance Body (TSB) under the MFA was discussed at the February 1993 Council meeting in connection with a request for “good offices” by Brazil concerning United States restrictions on wool suits from Brazil. At that time the Director-General noted that “it was the right of any contracting party to request the activation of any dispute settlement procedure, including the procedures relating to the Director-General’s good offices”.³⁶⁵

4. Other multilateral agreements

Article VIII of the International Convention to Facilitate the Importation of Commercial Samples and Advertising Material, which was drawn up at the Sixth and Seventh Sessions of the CONTRACTING PARTIES, provides that

“... Any dispute which is not settled by negotiation shall be referred to a person or body agreed between the Contracting Parties in dispute, provided that if they are unable to reach agreement, any of these Contracting Parties may request the President of the International Court of Justice to nominate an arbitrator.

“The decision of any person or body appointed under paragraph 2 of this article shall be binding on the Contracting Parties concerned.”³⁶⁶

The 1952 Working Party Report on this Convention notes with respect to Article VIII of the Convention: “The Working Party draws attention to the fact that under the terms of this Article it would be possible, and indeed appropriate, for two contracting parties to refer a dispute between them to the CONTRACTING PARTIES for settlement”.³⁶⁷

5. General international law

In November 1974 the German Federal Government and four German Länder imposed a ban on direct landings of fresh fish by Icelandic trawlers in German ports, after the arrest of a German trawler by Icelandic authorities in disputed waters off the coast of Iceland. The German representative stated that in the light of a previous judgement of the International Court of Justice on the Icelandic fishery zone, and prior attempts at peaceful settlement of the dispute, this limited and temporary measure pending the continuation of negotiations was “a justified counter-measure fully in line with the general rules and principles of international law ... if the ban on direct landings was justified as a counter-measure under generally recognized rules of international law it could not be illegal under the GATT”. The representative of Iceland stated that its extension of its exclusive economic zone was not contrary to international law and “even if the extension of the fishery limits in question

³⁶³L/5276, 28S/3, 8.

³⁶⁴L/6030, 33S/7, 14.

³⁶⁵C/M/261, p. 15.

³⁶⁶221 UNTS 255, entered into force on 20 November 1955. As of 25 February 1994 the Convention had 6 signatories and 58 parties; see L/7411 and see further material on the Convention under Article VIII.

³⁶⁷G/33, adopted on 7 November 1952, 1S/94, 98, para. 24.

was contrary to international law, the measures which had been taken against Iceland constituted a breach of obligations under the General Agreement which was a law in itself".³⁶⁸

6. Referral of matters to the International Court of Justice

During the Third Session in 1949, Cuba requested that the CONTRACTING PARTIES declare reduction of m.f.n. duty rates by the United States to be invalid under GATT unless the prior and express consent of Cuba were obtained, in view of the effect of reduction of m.f.n. duty rates on margins of preference for Cuba guaranteed under a bilateral agreement with the United States. In response to the suggestion of Cuba that the CONTRACTING PARTIES submit the legal aspects in dispute to an international court, the Chairman noted that "he wished to explain that the CONTRACTING PARTIES were not an organization authorized by the United Nations to request advisory opinions from the International Court of Justice. Advisory opinions from the Court may only be sought by the United Nations and by specialized agencies authorized to do so by the Assembly of the United Nations". Following up on this comment, the Chairman later clarified that

"There was nothing in the General Agreement preventing reference to the Court. However, the CONTRACTING PARTIES acting jointly were precluded from presenting a case by the Statute of the Court itself. Article XXV of the Agreement provides for joint action by the CONTRACTING PARTIES and [the Chairman] interpreted the words 'with a view to facilitating the operation and furthering the objectives of this Agreement', in paragraph 1, as enabling the CONTRACTING PARTIES acting jointly to interpret the Agreement whenever they saw fit. It was open to any government disagreeing with an interpretation to take the dispute which had given rise to such an interpretation to the International Court, although neither a government nor the CONTRACTING PARTIES acting jointly could take a ruling of the CONTRACTING PARTIES to the Court".³⁶⁹

In discussions at the Nineteenth Session in 1961 concerning the interpretation of Article XXIV:5(a) in examination of the common external tariff of the EEC, the Executive Secretary said "where there had been a basic disagreement between parties to an international agreement as to the interpretation of one of its basic provisions ... it would be appropriate for the organization to refer the matter to the International Court of Justice for an advisory opinion, but this faculty was only available to certain international organizations, namely those which directly depended on the United Nations. ... the decision of the CONTRACTING PARTIES on this point ... was that it was within the functions of the CONTRACTING PARTIES, acting jointly under Article XXV, to interpret the Agreement whenever they saw fit. It would be open for any government which disagreed with an interpretation to take the dispute which had given rise to the interpretation to the International Court of Justice, although neither a government nor the CONTRACTING PARTIES acting jointly could take a ruling of the CONTRACTING PARTIES to the Court".³⁷⁰

7. Bilateral agreements

During the Third Session in 1949, Cuba requested that the CONTRACTING PARTIES declare reduction of m.f.n. duty rates by the United States to be invalid under GATT unless the prior and express consent of Cuba were obtained, in view of the effect that such a reduction of m.f.n. duty rates would have on the margins of preference for Cuba which had been guaranteed under a prior bilateral trade agreement with the United States. The Chairman noted during the discussion that "although the bilateral agreement between the United States and Cuba was outside the purview of the CONTRACTING PARTIES, since it was included in the statement [of Cuba] it could be referred to by delegations but could not be taken into consideration in reaching a decision. Any decision must be reached in the light of the provisions of the General Agreement itself".³⁷¹ A Decision on "Margins of Preference" was adopted on 9 August 1949, providing, *inter alia*:

"The determination of rights and obligations between governments arising under a bilateral agreement is not a matter within the competence of the CONTRACTING PARTIES¹...

³⁶⁸C/M/103, p. 16; see, however, the Panel Decision on "United States - Prohibition of Imports of Tuna and Tuna Products from Canada", L/5198, adopted on 22 February 1982, 29S/91 (prohibition of tuna imports following seizures of tuna boats in fishing jurisdiction dispute; justification claimed under GATT Article XX(g)).

³⁶⁹GATT/CP.3/SR.37, statements by Chairman at p. 2, p. 5.

³⁷⁰SR.19/7, p. 88.

³⁷¹GATT/CP.3/SR.37 p. 1-2.

“This decision does not preclude the possibility of resort to Article XXIII”.³⁷²

This Decision was subject to the following footnote:

“¹This Decision by its terms clearly refers only to the determination of the rights and obligations as between the parties to the bilateral agreement and arising from the agreement. It is, however, within the competence of the CONTRACTING PARTIES to determine whether action under such a bilateral agreement would or would not conflict with the provisions of the General Agreement”.

When this Decision and its footnote were voted on, the question was asked whether such a decision would preclude the jurisdiction of the CONTRACTING PARTIES even in a case in which such a jurisdiction had been foreseen in a bilateral treaty; the Chairman replied that “obviously a bilateral treaty which made reference to the CONTRACTING PARTIES would entitle the CONTRACTING PARTIES to take note of such an agreement”.³⁷³

The 1950 Report of the Working Party on “The Use of Quantitative Restrictions for Protective and Commercial Purposes” notes *inter alia* that “misuse of import restrictions might appropriately provide a basis for recourse to the procedures laid down in the Agreement for the settlement of disputes. Moreover, it was not particularly relevant to the Agreement whether such practices were determined unilaterally or in the course of bilateral negotiations”.³⁷⁴

In a Note by the Executive Secretary of 1961 on “Questions Relating to Bilateral Agreements, Discrimination and Variable Taxes”³⁷⁵ it was confirmed that a bilateral agreement providing for quotas may entail a violation of Articles XI and/or XIII with regard to other contracting parties.

The 1982 Report of the “Panel on Vitamins” also considered the legal implications of a bilateral Understanding concluded between the EEC and the United States relating to the conversion of tariff rates on Vitamin B12, and concluded “that the United States has not infringed its commitment under the General Agreement or under the ASP Chemical Products Understanding of 2 March 1979”.³⁷⁶

The 1990 Award of the Arbitrator on “Canada/European Communities Article XXVIII Rights”³⁷⁷ dealt with the issue of Canada’s rights with respect to ordinary and quality wheat dating from the Article XXIV:6 negotiations Canada concluded with the Community on 29 March 1962 and the quality and ordinary wheat agreements concluded between the parties on the same day. After the conclusion of negotiations and of two bilateral agreements on wheat under Article XXIV:6 the question of their relationship to GATT arose and in particular “whether Canada may bring a claim based on a bilateral agreement under the multilateral procedures of the GATT”. On this question the arbitrator found that

“In principle a claim based on a bilateral agreement cannot be brought under the multilateral dispute settlement procedures of the GATT. An exception is warranted in this case given the close connection of this particular bilateral agreement with the GATT, the fact that the Agreement is consistent with the objectives of the GATT, and that both parties joined in requesting recourse to the GATT arbitration procedures”.³⁷⁸

The 1991 Report of the Working Party on the “Free-Trade Agreement between Canada and the United States” records that its members were concerned about possible conflict between the bilateral dispute settlement procedure under this free-trade agreement (FTA) and the multilateral dispute settlement procedure under the GATT. They feared this situation would result in either delays in the adoption of panel reports by CONTRACTING PARTIES or in panel reports not being adopted due to contradictory findings in the FTA’s bilateral dispute settlement process and the General Agreement multilateral process. In the view of one member “such obstruction of the proper functioning of the multilateral dispute settlement process was not in accordance with the obligations

³⁷²II/11.

³⁷³GATT/CP.3/SR.38, p. 7.

³⁷⁴GATT/CP.4/33 (Sales No. GATT/1950-3), para. 22.

³⁷⁵L/1636.

³⁷⁶L/5331, adopted on 1 October 1982, 29S/110, 117, para. 22(h).

³⁷⁷DS12/R, 37S/80.

³⁷⁸*Ibid.*, 37S/84.

of parties under the GATT”.³⁷⁹ The representative of the United States “emphasized that the rights and the obligations of the FTA parties under the GATT remained unchanged”.³⁸⁰

D. PANEL PRACTICE UNDER ARTICLE XXIII

1. Choice between working parties or panels

Choice between a panel under Article XXIII:2 and a working party under Article XXIII:2: Article XXIII:2 does not indicate whether disputes should be handled by a working party or by a panel. In the earliest years of the GATT, disputes were handled by working parties³⁸¹, but the practice of referral to a panel of experts was developed beginning in the 1950s. Paragraph 6(ii) of the 1979 Understanding Annex on customary practice provides:

“In the case of dispute, the CONTRACTING PARTIES have established panels (which have been called by different names) or working parties in order to assist them in examining questions raised under Article XXIII:2. Since 1952, panels have become the usual procedure ...”.

In 1982, during Council discussion of the panel request by the United States in its dispute concerning EEC tariff treatment for imports of citrus fruit and products from certain Mediterranean countries, the representative of Spain requested the establishment of a working party instead of a panel to examine this matter. The representative of the United States responded that “paragraph 10 of the Understanding as well as standing GATT practice gave to the complaining party the choice of requesting either a panel or a working party”. A panel was established in this case.³⁸²

Choice between a panel under Article XXIII:2 and a rule-making working party to interpret the General Agreement: At the May 1973 Council meeting, in response to a panel request by the EEC on “United States Tax Legislation (DISC)”, the United States proposed that with reference to this and the three complaints of the United States on income practices maintained by France, Belgium and the Netherlands, “... the problems of these complaints would be better discussed in a rule-making context, such as a working party ... The working party would be charged with the duty of recommending the type of international rules which contracting parties could adopt to govern their income tax practices with respect to export sales. This would give to all interested contracting parties an opportunity to express their views and participate in the formation of such rules, an opportunity that was not adequate in Article XXIII:2 proceedings ...”. The EEC representative confirmed that the Communities preferred a procedure whereby a body of neutral experts would be set up to examine the question.³⁸³ At the July 1973 Council meeting it was confirmed that the Community and the other parties concerned could not agree to the establishment of a general working party. Four panels were then established in these disputes.³⁸⁴

2. Establishment of working parties and panels

Paragraph 10 of the 1979 Understanding states:

“It is agreed that if a contracting party invoking Article XXIII:2 requests the establishment of a panel to assist the CONTRACTING PARTIES to deal with the matter, the CONTRACTING PARTIES would decide on its establishment in accordance with standing practice. It is also agreed that the CONTRACTING PARTIES would similarly decide to establish a working party if were this requested by a contracting party invoking the Article. It is further agreed that such requests would be granted only after the contracting party concerned had had an opportunity to study the complaint and respond to it before the CONTRACTING PARTIES”.

³⁷⁹L/6927, adopted on 12 November 1991, 38S/47, 54, para. 22.

³⁸⁰*Ibid.*, 38S/55, para. 25.

³⁸¹See, e.g., Report of the Working Party on “Brazilian Internal Taxes”, GATT/CP.3/42, adopted on 30 June 1949, II/181. There are a few later instances of use of working parties in disputes: see Report of the Working Party on “Canadian Import Quotas on Eggs”, L/4279, adopted on 17 February 1976, 23S/91.

³⁸²C/M/161, p. 7-8 (discussion), C/M/162, p. 12-15 (panel establishment). See also reference to this dispute at page 753.

³⁸³C/M/87, p. 4, 6.

³⁸⁴C/M/89, p. 10.

In Council discussions in 1974 on the dispute between Canada and the EEC relating to Article XXIV:6 negotiations (see above at page 712), many contracting parties supported the Canadian request for the establishment of a panel under Article XXIII and stated “that every contracting party had the right to seek conciliation in accordance with the relevant procedures of the General Agreement”.³⁸⁵ The Council agreed to establish a panel notwithstanding objections made by the EEC.³⁸⁶

In March 1981 the Council adopted the Director-General’s report on a working party which had discussed with the EEC the possibility of limiting subsidization of sugar, subsequent to the Panel Reports on the complaints of Australia and Brazil on “EC - Refunds of Exports of Sugar”. At that time the Council adopted a compromise text providing for a later review by the Council upon further notification of the EEC sugar regulations.³⁸⁷ At the July 1981 Council meeting, a number of delegations sought to have this review conducted by reconvening the working party. The representative of the United States “sought clarification on the following points: (1) In dealing with matters of a highly technical nature, had it been the practice of the Council to establish working parties? (2) If one or several contracting parties asked for the establishment of a working party, was it in the tradition of GATT to grant such a request? The Chairman replied that it had been the practice of the Council to establish working parties when dealing with matters of a highly technical nature, as well as in some cases with matters of a more general nature. As for the establishment of a working party, he stated that this was closely linked to the issue of the terms of reference for that working party”.³⁸⁸ In the same discussion at the July 1981 Council meeting the representative of Australia, referring to paragraph 10 of the 1979 Understanding, “noted that ... the principle was clear: The CONTRACTING PARTIES would decide to establish a working party if this were requested by a contracting party. This view was supported by past GATT practice”.³⁸⁹ “The representative of India endorsed the Australian view and said that it would set a very bad precedent if the Council decided not to set up a working party when a serious request for doing so had been made. He stressed that this would have a particularly adverse impact for contracting parties not possessing retaliatory power”. At its September 1981 meeting, the Council decided to establish a working party.³⁹⁰

During the Council discussion in 1982 on the United States’ request for a panel to examine its complaint concerning EEC imports of citrus fruits and products, several contracting parties referred to “the general right of a contracting party to a panel ... recognized in the Understanding”³⁹¹ or a “right to the formation of a panel”³⁹² and stated that any contracting party “could request the establishment of a panel and that a panel would be established”.³⁹³ The view was expressed “that a contracting party had the right to a panel upon request, and that it was up to the complaining party to choose whether a panel or working party should be established”.³⁹⁴ The representative of the European Communities “recognized that there were inherent rights for each contracting party to request the establishment of a panel”³⁹⁵ but stated that “the Council could not establish panels automatically on a mechanical basis”. The Council agreed to establish a Panel at its November 1982 meeting.³⁹⁶

In the 1984 Council Discussion on Canada’s request for establishment of a Panel to review the unilateral reduction of the EEC tariff quota on imports of newsprint from Canada, the representative of the European Communities said that “it had been traditional GATT practice since discussion of the legal framework in 1979 not to refuse such a request (for establishment of a panel). The Community would therefore respect the tradition embodied in the 1979 Understanding ...”.³⁹⁷

³⁸⁵C/M/101, p. 10.

³⁸⁶C/M/102, p. 4.

³⁸⁷C/M/146, p. 20-21; discussion of L/5113, Director General’s report to the Council on Article XVI:1 discussions on “EEC - Refunds on Exports of Sugar”, adopted on 10 March 1981, 28S/80.

³⁸⁸C/M/149, p. 6.

³⁸⁹*Ibid.*, p. 8.

³⁹⁰C/M/150, p. 22.

³⁹¹C/M/160, p. 18.

³⁹²*Ibid.*, p. 20.

³⁹³*Ibid.*, p. 19.

³⁹⁴C/M/162, p. 13.

³⁹⁵C/M/160, p. 19.

³⁹⁶C/M/162, p. 15.

³⁹⁷C/M/176, p. 3.

The 1989 Improvements provide in paragraph F(a) as follows.

“... If the complaining party so requests, a decision to establish a panel or working party shall be taken at the latest at the Council meeting following that at which the request first appeared as an item on the Council’s regular agenda, unless at that meeting the Council decides otherwise.*”

The footnote to this sentence provides: “References to the Council, made in this paragraph as well as in the following paragraphs, are without prejudice to the competence of the CONTRACTING PARTIES, for which the Council is empowered to act in accordance with normal GATT practice (BISD 26S/215).”

At the 8-9 February 1989 Council meeting, in discussion of the request of Brazil for a panel under Article XXIII:2 in respect of “United States - Import Restrictions on Certain Products from Brazil”, “The representative of Australia noted that this matter was before the Council for the second time. He said that some form of precedent had been established whereby, although a panel did not have to be established at the first meeting when it was requested, it was customary to accede to the request at the second meeting. Australia therefore supported Brazil’s request”.³⁹⁸ At the 21 February 1989 Council meeting, in consideration of the same panel request, the US representative stated that “in these circumstances, the United States would not join, but would not block, a consensus to establish a panel”. The representative of Brazil “said that it was incumbent on the Chairman to recognize the overwhelming support for Brazil’s request, and on the Council to agree to establish a panel. There was a clear precedent for such action in the 1974 case involving a dispute between Canada and the European Communities”.³⁹⁹ Brazil had taken note that the United States would not block a consensus on this matter, and asked that a panel be established at the present time. The Chairman said that it was his conclusion, based on the discussion at the 8-9 February Council meeting and at the present meeting, that it was the Council’s wish to establish a panel in this matter. He therefore proposed that the Council take note of the statements, agree to establish a panel and authorize him to draw up the terms of reference and to designate the Chairman and members of the Panel in consultation with the parties concerned”.⁴⁰⁰ The Council so agreed.

In 1991 and 1992 the meaning of paragraph F(a) of the 1989 Improvements was discussed by the Council and in informal consultations. Summing up this debate, the Chairman stated at the March 1992 Council meeting concerning the word “otherwise” in this paragraph that “it had been felt that there would be two circumstances in which the Council’s decision would be otherwise: (a) if there was a consensus not to establish a panel at the second Council meeting, and (b) if there was a consensus to postpone consideration of a request for a panel”.⁴⁰¹

3. Composition of panels

(1) *Membership of panels*

The 1979 Understanding provides in paragraphs 11, 12 and 14:

“When a panel is set up, the Director-General, after securing the agreement of the contracting parties concerned, should propose the composition of the panel, of three or five members depending on the case, to the CONTRACTING PARTIES for approval. The members of a panel would preferably be governmental. It is understood that citizens of countries whose governments are parties to the dispute would not be members of the panel concerned with that dispute. The panel should be constituted as promptly as possible and normally not later than thirty days from the decision by the CONTRACTING PARTIES.

“The parties to the dispute would respond within a short period of time, i.e., seven working days, to nominations of panel members by the Director-General and would not oppose nominations except for compelling reasons.

³⁹⁸C/M/228, p. 14. Although the 1989 Improvements were formally adopted only in April 1989, a broad consensus on this decision had already been reached at the Midterm Review of the Uruguay Round held at Montreal in December 1988.

³⁹⁹Reference made to “Canada - Article XXIV:6 negotiations with the European Communities”, C/M/102, page 4.

⁴⁰⁰C/M/229, p. 3.

⁴⁰¹See C/M/250, p. 41-44; C/M/251, p. 42; C/M/252 p. 35-36, summed up at C/M/255, p. 17-18.

“Panel members would serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments would therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and wide spectrum of experience”.⁴⁰²

Paragraph 6(ii) and (iii) of the Annex to the 1979 Understanding provide:

“.... Members of the panel are usually selected from permanent delegations or, less frequently, from the national administrations in the capitals amongst delegates who participate in GATT activities on a regular basis. The practice has been to appoint a member or members from developing countries when a dispute is between a developing and a developed country.

“Members of panels are expected to act impartially without instructions from their governments. In a few cases, in view of the nature and complexity of the matter, the parties concerned have agreed to designate non-government experts. Nominations are proposed to the parties concerned by the GATT secretariat. The composition of panels (three or five members depending on the case) has been agreed upon by the parties concerned and approved by the GATT Council. It is recognized that a broad spectrum of opinion has been beneficial in difficult cases, but that the number of panel members has sometimes delayed the composition of panels, and therefore the process of dispute settlement”.

See also section F(c) of the 1989 Improvements, paragraph (iii) of the 1982 Ministerial Decision and the section on “Formation of Panels” in the 1984 Decision.

(2) *Roster of non-governmental panelists*

Paragraph 13 of the 1979 Understanding provides: “In order to facilitate the constitution of panels, the Director-General should maintain an informal indicative list of governmental and non-governmental persons qualified in the fields of trade relations, economic development, and other matters covered by the General Agreement, and who could be available for serving on panels. For this purpose, each contracting party would be invited to indicate at the beginning of every year to the Director-General the name of one or two persons who would be available for such work”.⁴⁰³

Paragraph (iii) of the 1982 Ministerial Decision provides: “With reference to paragraph 13 of the Understanding, contracting parties will co-operate effectively with the Director-General in making suitably qualified experts available to serve on panels. Where experts are not drawn from Geneva, any expenses, including travel and subsistence allowance, shall be met from the GATT budget”. Paragraphs 1 and 2 of the section of the 1984 Decision on “Formation of Panels” provide that

“Contracting parties should indicate to the Director-General the names of persons they think qualified to serve as panelists, who are not presently affiliated with national administrations but who have a high degree of knowledge of international trade and experience of the GATT. These names should be used to develop a short roster of non-governmental panelists to be agreed upon by the CONTRACTING PARTIES in consultation with the Director-General. The roster should be as representative as possible of contracting parties.

“The Director-General should continue the practice of proposing panels composed preferably of governmental representatives but may also draw as necessary on persons on the approved roster ...”.

Finally, paragraph F(c)3 of the 1989 Improvements provides regarding the Roster: “The roster of non-governmental panelists shall be expanded and improved. To this end, contracting parties may nominate individuals to serve on panels and shall provide relevant information on their nominee’s knowledge of international trade and of the GATT”.

⁴⁰²The footnote to this paragraph provides: “A statement is included in the Annex describing the current practice with respect to inclusion on panels of persons from developing countries.”

⁴⁰³The footnote to this paragraph provides: “The coverage of travel expenses should be considered within the limits of budgetary possibilities.”

Nominations for the Roster were invited in February 1985 and the Roster was approved by the Council in November 1985. The Roster was extended annually for a one-year period in November 1986 through 1989. The Council decided in November 1990 to extend the Roster provisionally for a further period until the conclusion of the Uruguay Round negotiations on dispute settlement rules and procedures.⁴⁰⁴ In June 1994, the Council agreed to extend the roster until the entry into force of the WTO Agreement, and agreed that the roster would henceforth be issued as an unrestricted document.⁴⁰⁵

At the November 1986 Council meeting in discussion on extension of the Roster, "The Director-General noted that the roster had been constituted on the basis of nominations by contracting parties. The Secretariat remained open to any further nominations to increase the number of available panelists ... if at a certain time the Secretariat thought it useful to call on [qualified experts], even if they were not on the roster, this would be proposed".⁴⁰⁶ Nominations for the Roster have been approved from time to time by the Council. An updated Roster list is circulated periodically by the Secretariat.⁴⁰⁷

(3) Completion of panel composition by the Director-General

Paragraph F(c)5 of the 1989 Improvements provides that "If there is no agreement on the members within twenty days from the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the Council, shall form the panel by appointing the panelists whom he considers most appropriate, after consulting both parties. The Director-General shall inform the contracting parties of the composition of the panel thus formed no later than ten days from the date he receives such a request". See also paragraph 3 of the section on "Formation of panels" in the 1984 Decision. As of March 1994 the Director-General had received a request under paragraph F(c)5, and completed the panel thereunder, in three instances: the formation in August 1992 of the Panel in the recourse to Article XXIII:2 by the EEC and the Netherlands on behalf of the Netherlands Antilles concerning "United States - Restrictions on Imports of Tuna Products"⁴⁰⁸, the formation of the Panel in the recourse to Article XXIII:2 by Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela concerning "EEC - Member States' Import Régimes for Bananas"⁴⁰⁹, and the formation of the Panel in the recourse to Article XXIII:2 by Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela concerning "EEC - Import Régime for Bananas".⁴¹⁰

(4) Changes in panel composition

The 1962 Panel Report on the "Uruguayan Recourse to Article XXIII" notes that "The original membership of the Panel ... comprised seven members in addition to the Chairman. Some of these members, owing to practical difficulties (such as transfer of duty station away from Europe, urgent duties elsewhere, etc.) found themselves unable to participate in the work and requested that their names be withdrawn from the Panel. In two cases, the Chairman of the CONTRACTING PARTIES, in accordance with established practice, has appointed a substitute".⁴¹¹

The 1980 Panel Report on "EC - Refunds on Sugar - Complaint by Brazil" notes that as one of the panelists was unable to participate in the work of the Panel until its completion, a substitute was appointed.⁴¹²

In introducing the 1983 Panel Report on "EEC - Subsidies on Export of Pasta Products"⁴¹³ in the Committee on Subsidies and Countervailing Measures, the Panel Chairman recalled that "originally, there were

⁴⁰⁴GATT/AIR/2103 (invitation for nominations for the roster), C/M/191 p. 46-47 (additional invitation by the Director-General), C/M/194 p. 6 (November 1985 approval), L/5906 (initial roster list), C/M/204 p. 26-27 (November 1986 extension), C/M/215 p. 36 (November 1987 extension), C/W/531 and Add. 1-2 (alterations proposed in November 1987), C/M/226 p. 20-21, SR.44/2 (November 1988 extension), C/M/237 p. 4-5, C/W/615, L/6602 (November 1989 extension), C/M/246 p. 22-23 and L/6763 (November 1990 extension).

⁴⁰⁵C/M/273.

⁴⁰⁶C/M/204, p. 26-27.

⁴⁰⁷The Roster list approved at the June 1994 Council appears in L/7493 and includes 67 names; additions to the Roster appear in addenda to L/7493.

⁴⁰⁸DS29/4, dated 25 August 1992, para. 1.3.

⁴⁰⁹DS32/10; see also DS32/R.

⁴¹⁰DS38/9, dated 16 July 1993; see also DS38/R.

⁴¹¹L/1923, adopted on 14 November 1962, 11S/94, 96, para. 5.

⁴¹²L/5011, adopted on 10 November 1980, 27S/69, 70, para. 1.5.

⁴¹³SCM/43.

five panelists who together constituted the Panel. One resigned during the course of the examination. With the agreement of the parties, the Panel concluded its work with four panelists".⁴¹⁴

(5) *Reconvening of a panel or working party*

When, during the July 1981 Council meeting, the question was raised of whether the Working Party on "European Communities - Refunds on Exports of Sugar" could be reconvened to resume its earlier discussions, even though its report⁴¹⁵ had been adopted on 10 March 1981, the Chairman of the Council responded

"that the existence of a working party was related to its terms of reference. In normal GATT practice, when a working party fulfilled its mandate, it ceased to exist when the Council adopted its report. However, when adopting a report, the Council could nevertheless decide to continue the existence of a working party with new or modified terms of reference. He recalled that, in the instance under discussion, the Director-General had been invited to organize discussions in a working party and to submit a report to the Council within a stated time period, which had been accomplished. He said that while the Council might not be able to revive a defunct working party in the strictly legal sense, clearly it could decide to establish a new working party with similar or identical terms of reference".⁴¹⁶

See also discussion of this matter above at page 722.

In 1991, a Panel was established in response to the request of the United States on "Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies". By agreement between the parties, the composition of the Panel was the same as that of a different Panel which in 1988 examined a complaint of the EC relating to practices of Canadian provincial marketing agencies for alcoholic beverages.⁴¹⁷

The 1992 Report of the Members of the Original Oilseeds Panel on "Follow-up on the Panel Report 'EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins'" includes "Introductory Comments" delivered by the Chairman of this body at the first meeting with the parties on 3-4 February 1992, which provide as follows concerning the nature of this body:

"... what I have referred to as 'this body', or as 'the Reconvened Members of the original Oilseeds Panel', is not the original Panel. That is clear since we have a different mandate. On the other hand we have a specific mandate from the CONTRACTING PARTIES and are required to exercise the functions of a Panel in the examination of certain matters and in making findings. As a practical matter it is therefore our intention to conduct these proceedings as a Panel on the basis of the established working practices and procedures that are designed to protect the interests of all parties concerned.

"Accordingly, if for convenience or other reasons we refer to ourselves as the Panel or the Reconvened Panel, I would trust that, in the light of my comments, this is understood to mean the members of the original Oilseeds Panel reconvened for the purposes decided by the CONTRACTING PARTIES in the context of the follow-up on the Report of the original Panel".⁴¹⁸

See also the material on proceedings to examine implementation of particular recommendations, starting at page 687.

⁴¹⁴SCM/M/18, p. 1.

⁴¹⁵L/5113, adopted on 10 March 1981, 28S/80.

⁴¹⁶C/M/149, p. 5.

⁴¹⁷DS17/R, adopted on 18 February 1992, para. 1.4.

⁴¹⁸DS28/R, dated 31 March 1992, Annex B, paras. 6-7.

4. Determination of terms of reference

(1) *Standard terms of reference*

In establishing a Panel, the Council usually authorizes the Chairman of the Council, in consultation with the contracting parties concerned, to decide on appropriate terms of reference and to designate the Panel members. The Chairman then subsequently informs the Council of the terms of reference and of the composition of the Panel, and the Council takes note of this information.⁴¹⁹ The 1979 Understanding Annex on customary practice notes in its paragraph 6(ii):

“... The terms of reference are discussed and approved by the Council. Normally, these terms of reference are ‘to examine the matter and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or rulings provided for in paragraph 2 of Article XXIII’. When a contracting party having recourse to Article XXIII:2 raised questions relating to the suspension of concessions or other obligations, the terms of reference were to examine the matter in accordance with the provisions of Article XXIII:2”.⁴²⁰

The 1982 Ministerial Decision provides in paragraph (v) that:

“The terms of reference of a panel should be formulated so as to permit a clear finding with respect to any contravention of GATT provisions and/or on the question of nullification and impairment of benefits. In terms of paragraph 16 of the Understanding, and after reviewing the facts of the case, the applicability of GATT provisions and the arguments advanced, the panel should come to such a finding”.⁴²¹

During the special meeting of the Council on 19 October 1988 on review of developments in the trading system the Director-General noted that “in almost all recent cases, standard terms of reference had been agreed. He said that if the terms of reference were narrowed, there was the risk of curtailing the complaining party’s right to a full examination of its case. If the terms of reference were expanded, the risk was that panels would be drawn into issues that fell outside the scope of Article XXIII. He therefore welcomed the trend towards using standard terms of reference”.⁴²²

The 1989 Improvements provide, in paragraphs 1 and 2 of section F(b):

“Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within twenty days from the establishment of the panel:

‘To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by (name of the contracting party) in document L/... and make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2’.

“In establishing a panel, the Council may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties subject to the provisions of the preceding paragraph. The terms of reference thus drawn up shall be circulated to all contracting parties. If other than standard terms of reference are agreed upon, any contracting party may raise any point relating thereto in the Council”.

Since entry into effect of the 1989 Improvements, there has been no instance in which the parties to a dispute have agreed to other than standard terms of reference, although there have been instances in which the parties have agreed on understandings regarding the manner in which the panel would carry out its work.⁴²³

⁴¹⁹See, e.g., C/M/148, p. 12; C/M/149, p. 15; C/M/150, p. 24.

⁴²⁰26S/217, para.6(ii).

⁴²¹29S/9, 14, para.(v).

⁴²²C/M/225, p.2.

⁴²³See understanding between the parties cited in the Panel Report on “Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes”. DS10/R, adopted on 7 November 1990, 37S/200, 201, para. 3, also recorded in C/M/241.

See also the material below at pages 734-737 concerning the interpretation by panels of the scope of their terms of reference.

(2) *Special terms of reference*

In a number of instances before the entry into effect of the 1989 Improvements, the terms of reference of panels were specified in more detail, and were also at times accompanied by understandings on the manner in which the panel would carry out its work. See, for instance, the terms of reference and accompanying understanding in the 1985 Panel Report on “Canada - Measures Affecting the Sale of Gold Coins”⁴²⁴, the terms of reference in the 1986 Panel Report on “United States - Trade Measures Affecting Nicaragua”⁴²⁵, the terms of reference and accompanying understanding recorded in the 1985 Panel Report on “EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean”⁴²⁶ and the understanding recorded in the 1989 Panel Report on “Norway - Restrictions on Imports of Apples and Pears”.⁴²⁷

5. Procedures for multiple complainants

Where two panel proceedings have taken place at or around the same time concerning the same measures, it has occurred that the same panelists have served on both panels. For example, the same panelists served on the 1979 Panel on the complaint brought by Australia on “European Communities - Refunds on Exports of Sugar” and the 1980 Panel in the complaint brought by Brazil (which was initially an interested third party in the Australian case) on “European Communities - Refunds on Exports of Sugar - Complaint by Brazil”.⁴²⁸ Two out of three panelists were the same in the 1979 Panel on “Japanese Measures on Imports of Leather” and the 1980 Panel on “Japan’s Measures on Imports of Leather”.⁴²⁹

At its meeting of 4 February 1987 the Council dealt with requests for panels by Canada and the European Economic Community under Article XXIII:2 concerning the United States’ Superfund taxes on petroleum and petroleum products and on imported chemical derivatives, and a request by Mexico for the good offices of the Director-General under the 1966 Procedures (see page 765 below) concerning solely the Superfund tax on petroleum and petroleum products. The representative of the European Communities said “that a procedural solution should be found so that a single panel could deal with the three complaints, on the understanding that the Panel would look at the specific details of each complaint”. Agreement on terms of reference was subject to the following understanding on the organization of the Panel’s work:

“1. 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.

“2. The written submissions by each of the complainants will be made available to the other complainants and each complainant will have the right to be present when one of the other complainants presents its views to the Panel.”⁴³⁰

The Panel submitted a single Report in which the findings on each of the two tax measures in question were presented separately.⁴³¹

At the Council meeting of May 1988, when, in response to requests by Australia and the United States, two panels were established concerning Korea’s beef import restrictions, it was decided that the Council Chairman would consult with the two Panels and with the Secretariat concerning the appropriate administrative

⁴²⁴C/M/185.

⁴²⁵L/6053 (unadopted), dated 13 October 1986; for terms of reference, see page 706 above.

⁴²⁶C/M/168, p. 5; L/5776, Report of the Panel (unadopted), para. 1.5; see also Council discussion at C/M/162, p. 12.

⁴²⁷L/6474, adopted on 22 June 1989, 36S/307.

⁴²⁸L/4833, adopted on 6 November 1979, 26S/290, and L/5011, adopted on 10 November 1980, 27S/69.

⁴²⁹L/4789, adopted on 6 November 1979, 26S/320 (complaint by the United States); and L/5042, adopted on 10 November 1980, 27S/118 (complaint by Canada).

⁴³⁰C/M/206, p. 13, 34S/137.

⁴³¹L/6175, adopted on 17 June 1987, 34S/136.

arrangements; in consultations among the parties it was agreed that both Panels would have the same composition. A panel on the same import restrictions of Korea was established at the September 1988 Council meeting in response to a request by New Zealand, and it was agreed in consultations that it would have the same composition as well. The applicant party in each proceeding provided a submission as an interested third party in the other two proceedings. The Panels each submitted a separate report with essentially identical findings.⁴³²

At the Council meeting of May 1988, a panel was established concerning EEC restrictions on imports of dessert apples in response to a complaint by Chile. The Panel composition was notified to contracting parties on 5 August 1988. At the September Council meeting a panel was established in response to the complaint of the United States concerning the same restrictions. In October 1988 the members of the first Panel were designated as the members of the second Panel. The Panels submitted separate reports; where the issues argued were the same, the findings were the same.⁴³³

Paragraph F(d) of the 1989 Improvements on "Procedures for Multiple Complainants" provides:

"1. Where more than one contracting party requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all parties concerned. A single panel should be established to examine such complaints whenever feasible.

"2. The single panel will organize its examination and present its findings to the Council so that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel will submit separate reports on the dispute concerned. The written submissions by each of the complainants will be made available to the other complainants, and each complainant will have the right to be present when one of the other complainants presents its view to the panel.

"3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized."

On 11 March 1992, the EEC requested consultations under Article XXIII:1 on U.S. restrictions on importation of certain tuna products, and on 5 June 1992 the EEC requested a panel. On 3 July the Netherlands, acting on behalf of the Netherlands Antilles, asked for consultations concerning the same restrictions; the consultations were held on 13 July, the following day the Netherlands asked to be joined as co-complainant in a panel to be established pursuant to the EEC's request, and on 14 July the Council agreed to establish a panel with the EEC and the Netherlands as co-complainants.⁴³⁴

The Panel on "EEC-Member States' Import Regimes for Bananas" was established in 1993 in response to a complaint by Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela.⁴³⁵ The Panel on "EEC - Restrictions on Imports of Bananas" was established later in 1993 in response to a complaint by the same five contracting parties.⁴³⁶

At the Forty-ninth Session in January 1994, a panel was established concerning "United States - Measures Affecting the Importation and Internal Sale and Use of Tobacco", pursuant to a complaint under Article XXIII:2 brought by Brazil, Canada, Chile, Colombia, El Salvador, Guatemala, Thailand and Zimbabwe. At its meeting on 22-23 February 1994, the Council agreed that Argentina's complaint concerning the same measures also be examined by the same panel. The terms of reference were amended to read as follows: "To examine, in the light of the relevant provisions of the General Agreement, the matter referred to the CONTRACTING PARTIES by Brazil,

⁴³²See paragraph 4 of each of these Panel Reports, all adopted on 7 November 1989: L/6503, 36S/269 (United States); L/6504, 36S/202 (Australia); L/6505, 36S/234 (New Zealand).

⁴³³See Panel Reports, both adopted on 22 June 1989, L/6491, 36S/93 (Chile), L/6513, 36S/135 (United States).

⁴³⁴DS29/1 (EEC consultation request); DS33/1 (Netherlands consultation request); DS29/2, DS29/3 (EEC and Netherlands panel requests); C/M/258, p. 28-31; DS29/R (panel report, unadopted, dated 16 June 1994).

⁴³⁵DS32/R (unadopted), dated 3 June 1993.

⁴³⁶DS38/R (unadopted), dated 11 February 1994.

Chile, Colombia, El Salvador, Guatemala, Thailand and Zimbabwe in document DS44/5 and Corr.1, by Canada in document DS44/6 and Corr. 1 and by Argentina in document DS44/8, 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.”⁴³⁷

6. Scope of panel proceeding

(1) *Scope of “the relevant GATT provisions”*

The 1979 Understanding notes in paragraph 16 that “The function of panels is to assist the CONTRACTING PARTIES in discharging their responsibilities under Article XXIII:2.” Paragraph 3 of the Annex thereto further notes that “The function of a panel has normally been to review the facts of a case and the applicability of GATT provisions and to arrive at an objective assessment of these matters”. The standard terms of reference for a panel provided in paragraph F(b) of the 1989 Improvements are “To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES ... and make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2”.

(a) *Provisions of Protocol of Provisional Application*

A number of Panels have interpreted the provisions of the Protocol of Provisional Application. See the chapter on the Protocol in this Index.

(b) *Provisions in Protocols of accession*

Provisions in Protocols of accession have been interpreted by panels and working parties on various occasions. The 1957 Working Party report on “Import Restrictions of the Federal Republic of Germany”⁴³⁸ examined the obligations of Germany under the Torquay Protocol. The 1962 Panel Report on “Uruguayan Recourse to Article XXIII” includes an examination of the claims of three contracting parties that certain measures were permitted under their respective Protocols of Accession.⁴³⁹ Also, during the 1962 examination of residual import restrictions, two contracting parties stated that they considered that certain restrictions they applied to certain agricultural products were covered by their respective Protocols of Accession.⁴⁴⁰ The provisions of the Protocol of Accession of Thailand were interpreted in the 1990 Panel Report on “Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes”.⁴⁴¹

(c) *Provisions of decisions of the CONTRACTING PARTIES under Article XXV:1 or Article XXV:5*

The Decision on “Differential and More Favourable Treatment, Reciprocity and Full Participation of Developing Countries” (the “Enabling Clause”), which is a decision of the CONTRACTING PARTIES under Article XXV:1, was interpreted as a “relevant GATT provision” by the Panel Report on “United States - Customs User Fee”⁴⁴², the Panel Report on “United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil”⁴⁴³ and the unadopted 1993 Panel Report on “EEC - Member States’ Import Régimes for Bananas”.⁴⁴⁴

Panels and Working Parties have interpreted the terms of waiver decisions under Article XXV:5 on numerous occasions. See the material above at page 709 on the relationship between Article XXIII and Article XXV:5, and the material under Article XXV:5 in this Index.

⁴³⁷DS44/R, adopted on 4 October 1994; DS44/9/Rev.1 (revised terms of reference).

⁴³⁸L/768, adopted on 30 November 1957, 6S/55, 60, para. 12.

⁴³⁹L/1923, adopted on 16 November 1962, 11S/95, 102-148; countries included Denmark (mixing regulation on bread grains), Federal Republic of Germany (import permits and quotas on meat and edible oils), and Italy (State trading on wheat and wheat flour).

⁴⁴⁰L/1769: Italy (restrictions on wheat and meslin, wheat flour, bananas and tobacco), and Sweden (various measures in meat, dairy, grains, sugar and fish sectors).

⁴⁴¹DS10/R, adopted on 7 November 1990, 37S/200; see 37S/226-227, paras. 82-83.

⁴⁴²L/6264, adopted on 2 February 1988, 35S/245, 289-290, para. 122.

⁴⁴³DS18/R, adopted on 19 June 1992, 39S/128, 152-153, paras. 6.14-6.17.

⁴⁴⁴DS32/R, dated 3 June 1993, para. 363.

(d) Past panel reports

The 1989 Panel Reports on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile” and “EEC - Restrictions on Imports of Apples - Complaint by the United States” note in relation to the treatment of an earlier panel report:

“... In considering the facts and arguments relating to Article XI in particular, the Panel took note of the fact that a previous Panel, in 1980, had reported on a complaint involving the same product and the same parties as the present matter and a similar set of GATT issues. ... The Panel construed its terms of reference to mean that it was authorized to examine the matter referred to it by [Chile/the United States] in the light of all relevant provisions of the General Agreement and those related to its interpretation and implementation. It would take into account the 1980 Panel report and the legitimate expectations created by the adoption of this report, but also other GATT practices and Panel reports adopted by the CONTRACTING PARTIES and the particular circumstances of this complaint. The Panel, therefore, did not feel it was legally bound by all the details and legal reasoning of the 1980 Panel report”.⁴⁴⁵

See also the discussion of precedent below at pages 755-759.

(e) Provisions of bilateral agreements

Concerning invocation of bilateral agreements in disputes under Article XXIII, see at page 719.

(f) Provisions of general international law other than the General Agreement; estoppel

The Panel on “United States - Measures Affecting Imports of Softwood Lumber from Canada” examined the United States’ defense that a measure was a countervailing duty undertaking.

“The Panel considered that, for purposes of determining whether the MOU was covered by Article 4:5(a) of the Agreement, the key question was whether in concluding the MOU Canada and the United States had intended to act under this provision. In considering this question, the Panel considered the text of the MOU and actions of the parties subsequent to its conclusion.

“The Panel ... concluded that until April 1992, well after the dispute settlement proceeding before this Panel had been initiated, the United States had not referred to the MOU as an undertaking under Article 4:5(a) of the Agreement in its notifications to the Committee on Subsidies and Countervailing Measures. Furthermore, the United States had not treated the MOU as such an undertaking in the Federal Register notice of 5 January 1987 of the termination of the countervailing duty investigation on imports of softwood lumber from Canada. The United States also had not treated the MOU as such an undertaking in the notices of various actions taken under Section 301 of the Trade Act of 1974 with respect to the MOU in December 1986 and January 1987. The Panel further noted that in imposing the interim measures under Section 304 of the Trade Act of 1974, the United States made no reference to the enforcement of a countervailing duty action. The Panel found that these facts were relevant as evidence of the intention of the parties to the MOU with respect to the status of the MOU under the Agreement.

...

“The Panel noted the argument of the United States that a failure to meet procedural requirements with respect to notification could not defeat substantive rights of a signatory under the Agreement. The Panel did not consider, however, that in the present case it was faced with a situation in which the United States had inadvertently ‘failed’ to notify that on 5 January 1987 it had accepted an undertaking with respect to imports of softwood lumber from Canada; rather, the United States, in consistently refraining from notifying the MOU as an undertaking, had treated the conclusion of the MOU and the termination in January 1987 of the countervailing duty investigation on imports of softwood lumber from Canada as an action which did not constitute a countervailing duty action under the Agreement in the form of a

⁴⁴⁵L/6491 and L/6513, both adopted on 22 June 1989, 36S/93 and 36S/135, at 36S/123-124 and 36S/159, paras. 12.1 and 5.1.

termination of proceedings upon the acceptance of an undertaking. The Panel also recalled in this respect its views expressed in paragraph 19 on the characteristics of undertakings under Article 4:5(a) of the Agreement as alternatives to countervailing duties. The Panel's conclusion regarding the lack of evidence of an intention of Canada and the United States to act under Article 4:5(a) of the Agreement was therefore not based only on the lack of notification of the MOU as an undertaking.”⁴⁴⁶

See also at page 718 above.

(g) *Elements other than “the relevant GATT provisions”*

The Panel on “EEC - Quantitative Restrictions against Imports of Certain Products from Hong Kong” in 1983 considered the argument of the EEC that “the Panel could not ignore that the General Agreement was an international agreement which had to be interpreted on the basis of generally accepted principles and practices of international law. An important principle of international law, namely the ‘law-creating force derived from circumstances’ could not be ignored by the Panel, on the sole ground that no GATT article provided for such a principle”.⁴⁴⁷

“The Panel considered the arguments put forward by the European Community regarding the social and economic conditions which prevailed in the various product categories under examination. The European Community did not claim any corresponding GATT provision in justification for these arguments. The Panel was of the opinion that such matters did not come within the purview of Article XI and XIII of the GATT, and in this instance concluded that they lay outside its consideration

“The Panel considered the argument put forward by the European Community that the principle referred to as ‘the law-creating force derived from circumstances’ could be relevant in the absence of law. It found, however, that in the present case such a situation did not exist, and the matter was to be considered strictly in the light of the provisions of the General Agreement

“The Panel further noted that no GATT justification had been advanced for the quantitative restrictions ... and concluded that the relevant provisions of Article XI were not complied with”.⁴⁴⁸

See also the discussion of justification of measures by subsequent practice or acquiescence, and estoppel against the complaining party, in the unadopted panel report of 1993 on “EEC - Member States’ Import Régimes for Bananas”.⁴⁴⁹

The 1984 Panel Report on “Japanese Measures on Imports of Leather” refers to arguments made by Japan in justification of quantitative restrictions on imports:

“... The Panel considered that the special historical, cultural and socio-economic circumstances referred to by Japan could not be taken into account by it in this context since its terms of reference were to examine the matter ‘in the light of the relevant GATT provisions’ and these provisions did not provide such a justification for import restrictions. It noted that a panel report adopted by the CONTRACTING PARTIES in 1983 had, in a similar situation, concluded ‘that [such matters] did not come within the purview of Article XI and XIII of the GATT and ... lay outside its consideration’”.⁴⁵⁰

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” notes that “As regards the vital role the twelve items under consideration played in Japan’s agriculture and regional economies and their underlying social and political background, the Panel - while aware of their significance in the Japanese

⁴⁴⁶SCM/162, adopted on 27 October 1993, paras. 319, 322, 313.

⁴⁴⁷L/5511, adopted on 12 July 1983, 30S/129, 134, para. 15.

⁴⁴⁸*Ibid.*, 30S/138-139, paras. 27, 29, 32.

⁴⁴⁹DS32/R, dated 3 June 1993, paras. 361-363.

⁴⁵⁰L/5623, adopted on 15/16 May 1984, 31S/94, 111, para. 44, referring to Hong Kong dispute cited above.

context - found that previous panels had established that such circumstances could not provide a justification for import restrictions under the General Agreement”.⁴⁵¹

The 1990 Panel Report on “EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins” notes that

“The Panel was established to make findings ‘in the light of the relevant GATT provisions’; it therefore does not have the mandate to propose interpretations of the provisions of the Subsidies Code which the Community invokes to justify its position”.⁴⁵²

In the panel proceeding in 1987 on “United States - Taxes on Petroleum and Certain Imported Substances”, the EC argued that the border tax adjustments involved in the tax on certain imported chemical substances were inconsistent with the Polluter-Pays Principle adopted in the OECD. The Panel report notes that “The mandate of the Panel is to examine the case before it ‘in the light of the relevant GATT provisions’ ... The Panel therefore did not examine the consistency of the revenue provisions of the Superfund Act with the environmental objectives of that Act or with the Polluter-Pays Principle”. The Panel Report also notes the existence of the Group on Environmental Measures and International Trade, and notes that the EC “would thus have a forum available in the GATT in which to pursue the environmental issues which the Panel, because of its limited mandate, could not address”.⁴⁵³ See also the discussion in the unadopted panel report of 1994 on “United States - Restrictions on Imports of Tuna” on the extent to which certain environmental and trade treaties other than the General Agreement are relevant in interpreting the General Agreement.⁴⁵⁴

(2) *Measures as applied versus measures as such*

The 1989 Panel Report on “United States - Section 337 of the Tariff Act of 1930” notes that “The Panel’s terms of reference refer both to the application of Section 337 in general and to its application in the case concerning Certain Aramid Fibre which prompted the European Economic Community to submit its complaint to the CONTRACTING PARTIES. During the course of the Panel’s proceedings, the parties to the Certain Aramid Fibre case reached a settlement ... and thereafter the Community withdrew its request to the Panel to make findings in respect of that case. The Panel therefore limited its examination to Section 337 as such, plus the related Section 337a which the Council clearly intended to be covered by the Panel’s terms of reference since it was the provision applicable in the Certain Aramid Fibre case ...”.⁴⁵⁵

In the 1990 Panel Report on “EEC - Regulation on Imports of Parts and Components” the Panel examined an argument of Japan concerning an anti-circumvention provision in EEC anti-dumping legislation:

“Japan considers not only the measures taken under the anti-circumvention provision but also the provision itself to be violating the EEC’s obligations under the General Agreement. Japan therefore asked the Panel to recommend to the CONTRACTING PARTIES that they request the EEC not only to revoke the measures taken under the provision but also to withdraw the provision itself. The Panel therefore examined whether the mere existence of the anti-circumvention provision is inconsistent with the General Agreement. The Panel noted that the anti-circumvention provision does not mandate the imposition of duties or other measures by the EEC Commission and Council; it merely authorizes the Commission and the Council to take certain actions. Under the provisions of the General Agreement which Japan claims to have been violated by the EEC contracting parties are to avoid certain measures; but these provisions do not establish the obligation to avoid legislation under which the executive authorities may possibly impose such measures. ...

“In the light of the above the Panel found that the mere existence of the anti-circumvention provision in the EEC’s anti-dumping Regulation is not inconsistent with the EEC’s obligations under the General Agreement. Although it would, from the perspective of the overall objectives of the General Agreement, be

⁴⁵¹L/6253, adopted on 2 February 1988, 35S/163, 242, para. 5.4.1.4.

⁴⁵²L/6627, adopted on 25 January 1990, 37S/131.

⁴⁵³L/6175, adopted on 17 June 1987, 34S/136, 162, para. 5.2.6.

⁴⁵⁴DS29/R, dated 16 June 1994, paras. 5.18-5.20, 5.33.

⁴⁵⁵L/6439, adopted on 7 November 1989, 36S/345, 382-383, para. 5.1.

desirable if the EEC were to withdraw the anti-circumvention provision, the EEC would meet its obligations under the General Agreement if it were to cease to apply the provision in respect of contracting parties".⁴⁵⁶

In the 1992 Panel Report on "United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil," in examining certain legislation of the United States, "... the Panel ... found that these provisions as such, not merely their application in concrete cases, have to be consistent with Article I:1".⁴⁵⁷

See also under "discretionary legislation" above starting at page 645.

(3) *Matters not raised in consultations, panel request and/or terms of reference*

The 1983 Panel Report on "EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong" notes with respect to a difference of opinion between the parties regarding the inclusion of one item among the product categories under examination by the Panel,

"... The Panel considered that just as the terms of reference must be agreed between the parties prior to the commencement of the Panel's examination, similarly the product coverage must be clearly understood and agreed between the parties to the dispute. The Panel considered that to allow the inclusion of an additional product item about which one party had not been formally advised prior to the commencement of proceedings would be to introduce an element of inequity".⁴⁵⁸

The 1984 Panel Report on "United States - Imports of Sugar from Nicaragua" notes that Nicaragua claimed in the panel proceeding that the United States sugar quota system was contrary to Article XI and not covered by the terms of a waiver granted to the US in 1955.

"... The Panel considered that its terms of reference defined the matter before it as 'the measures taken by the United States concerning imports of sugar from Nicaragua', and referred to document L/5492 in which Nicaragua had asked for consultations under Article XXIII:1 on 'the announcement by the United States Government of the modification regarding the allocation of the sugar import quota to Nicaragua'. The Panel concluded, therefore, that the task assigned to it by the Council was to examine not the United States sugar quota system as such but the reduction in the quota allocated to Nicaragua within that system, and that any consideration of the sugar quota system in the light of Article XI fell outside its terms of reference."⁴⁵⁹

The 1984 Panel Report on "Canada - Administration of the Foreign Investment Review Act" notes in relation to a terms of reference claim by Canada:

"The Panel considered that the examination of undertakings to *manufacture* goods which would be imported otherwise, as requested by the United States ... was not covered by its terms of reference which only refer to 'the *purchase* of goods in Canada and/or the *export* of goods from Canada'. Accordingly the Panel did not examine this question."⁴⁶⁰

The Panel Report on "EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region", which has not been adopted, notes that in this case, the United States challenged the conformity with Article I:1 of tariff preferences on certain citrus products extended under agreements between the EC and certain Mediterranean countries. The US had not made a specific claim of non-violation nullification or impairment in consultations nor in its request for a panel, and stated its claim under Article XXIII:1(b) in response to a question by the Panel.⁴⁶¹

⁴⁵⁶L/6657, adopted on 16 May 1990, 37S/132, 198-199, para. 5.25-5.26.

⁴⁵⁷DS18/R, adopted on 19 June 1992, 39S/128, 152, para. 6.13.

⁴⁵⁸L/5511, adopted on 12 July 1983, 30S/129, 139, para. 30.

⁴⁵⁹L/5607, adopted on 13 March 1984, 31S/67, 73, para. 4.2.

⁴⁶⁰L/5504, adopted on 7 February 1984, 30S/140, 158, para. 5.3.

⁴⁶¹L/5776, dated 7 February 1985 (unadopted), para. 3.33.

“... the Panel proceeded to examine in accordance with Article XXIII:1(b) whether and how a benefit accruing to the US directly or indirectly under Article I:1 had been nullified or impaired as a result of the EEC’s application of tariff preferences on citrus products from certain Mediterranean countries, whether or not these preferences conflicted with the provisions of the General Agreement ... The Panel considered that such an examination was in keeping with its terms of reference to examine the matter in the light of the relevant GATT provisions. The US, in its complaint, had not specified any particular provision of Article XXIII:1, and therefore the matter could also be considered under Article XXIII:1(b) Moreover the US had stated that even if the granting of tariff preferences was consistent with the General Agreement, Article XXIII:1(b) would justify the US complaint that GATT benefits were being nullified or impaired.”⁴⁶²

The 1989 Panel Report examining the complaint of Australia on “United States - Restrictions on Imports of Sugar” notes regarding a terms of reference claim by the United States:

“Australia claimed that the reallocation of a portion of Guyana’s sugar quota to Belize, Jamaica and Trinidad and Tobago in December 1988 was inconsistent with Article XIII:2 of the General Agreement. The United States argued that this matter was not covered by the Panel’s terms of reference because it had arisen after the establishment of the Panel by the Council in September 1988. The Panel considered that it had to interpret its terms of reference not only in the light of the interests of the parties to the dispute, but also in the light of the rights of third contracting parties. The Panel noted that, according to paragraph 15 of the Understanding on Dispute Settlement (BISD 26S/210), ‘any contracting party having a substantial interest in the matter before a Panel, and having notified this to the Council, should have an opportunity to be heard by the panel’. The Panel concluded from this that only those issues which interested third contracting parties could reasonably have expected to be part of the proceedings when the Panel was established by the Council could be considered to be part of the matter referred to the Panel by the Council. The issue raised by Australia involves directly two contracting parties (Jamaica and Trinidad and Tobago); it also has implications for other contracting parties. Since the matter raised by Australia had arisen only after the establishment of the Panel by the Council in September 1988, contracting parties had no reason to expect that the reallocation of the sugar quotas among Caribbean countries would be an issue before the Panel. The Panel therefore decided that this reallocation was not part of its mandate. The Panel however recalled in this context that it had found all restrictions imposed by the United States on the importation of sugar under the authority of the Headnote in the Tariff Schedules of the United States to be inconsistent with the General Agreement independent of the quota allocation to specific countries. It also recalled its finding that Article II:1(b) does not permit contracting parties to qualify their obligations under other provisions of the General Agreement and that this could not justify inconsistencies with any article of the General Agreement, including Article XIII.”⁴⁶³

However, a terms of reference claim was rejected in the 1989 Panel Report on “United States - Section 337 of the Tariff Act of 1930”:

“The United States suggested that the scope of the complaint was confined to matters of legal procedure, and that the issues raised by the Community concerning *in rem* general exclusion orders and the possibility of imported products being subject to simultaneous proceedings under Section 337 and in federal district courts are not matters of procedure. However, the Panel noted that its terms of reference refer without limitation to ‘the different rules applicable under Section 337’ to which imported products are subject. Accordingly, it determined that these issues fall within its terms of reference. The term ‘procedure’ is used hereinafter in a broad sense that encompasses these issues.”⁴⁶⁴

A request by Korea that the Panels on the complaints of Australia, New Zealand and the United States on “Korea - Restrictions on Imports of Beef” rule on the admissibility of claims relating to Article XVIII, on the basis that these claims had been improperly brought under Article XXIII and not under Article XVIII:12(d), was rejected: the reasons given were that Korea was a party to the consensus to set up these panels, the terms of reference referred to the matters referred to the CONTRACTING PARTIES by Australia and the United States

⁴⁶²*Ibid.*, para. 4.25.

⁴⁶³L/6514, adopted on 22 June 1989, 36S/331, 343-344, para. 5.8.

⁴⁶⁴L/6439, adopted on 7 November 1989, 36S/345, 383, para. 5.5.

respectively (which included the claims regarding application of Article XVIII), and “The terms of reference do not give the Panels authority to rule on admissibility of the respective claims.”⁴⁶⁵

The 1992 Panel Report on “United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil” includes an examination and ruling concerning a terms of reference claim.

“The Panel recalled that in their first submissions to the Panel, Brazil and the United States disagreed on the proper scope of the proceeding. In addition to its presentation on Article I:1, Brazil made arguments to the Panel concerning the administration of United States’ countervailing duty laws under Article X and non-violation nullification and impairment under Article XXIII:1(b) and (c). Brazil considered these latter issues to be within the standard terms of reference of the Panel. The United States claimed that these issues had not been raised by Brazil in consultations or in its request for the establishment of a panel. They were therefore outside the terms of reference. The United States did not address these issues on the merits in its submission to the Panel and it requested the Panel to make a ruling on the matter.

“On 18 September 1991, the Panel made the following ruling:

‘Having heard and considered the arguments of Brazil and the United States as to whether or not the Panel should consider presentations on Articles X and XXIII:1(b) and (c), the Panel rules as follows:

‘*Article X.* The Panel notes that its terms of reference are limited to the matters raised by Brazil in its request for the establishment of this Panel, that is document DS18/2. In its request, Brazil referred to the discrimination in the United States’ countervailing duty laws as applied to Brazil, not however to any discrimination resulting from the administration of United States’ countervailing duty laws. The Panel therefore considers that the matter raised by Brazil in its submission relating to Article X:3(a) is not part of its terms of reference. The Panel would like to emphasize however that it is ready to consider any arguments on the issue of discrimination, taking into account its terms of reference.

‘*Article XXIII:1(b) and (c).* The Panel further notes that in its request for a Panel, Brazil claimed that the United States had acted inconsistently with the General Agreement. Brazil did not claim that benefits accruing to it under the General Agreement were nullified or impaired as a result of a measure or situation of the type referred to in Article XXIII:1(b) and (c). The Panel therefore considers that the matters raised by Brazil relating to these provisions were not covered by its terms of reference.’⁴⁶⁶

The 1992 Panel Report on “United States - Measures Affecting Alcoholic and Malt Beverages” includes a ruling by the Panel on preliminary objections by the United States.

- “1. The Panel noted that both parties agreed that the Panel should examine only those practices on which consultations under Article XXIII:1 were held.
- “2. At its meeting on 29-30 May 1991, the Council agreed that the terms of reference of the Panel were to examine ‘the matter referred to the CONTRACTING PARTIES by Canada in document DS23/2’ unless the Parties agreed on other terms of reference. The Panel noted that, as set out in the Note by the Chairman of the Council (DS23/4), the parties agreed that the terms of reference of the Panel should include reference to documents DS23/1 to 3. Document DS23/3 considerably narrows the scope of the complaint outlined in DS23/1 and 2.
- “3. The Panel decided to examine all United States measures specified in document DS23/3 and in the submission, dated 23 July 1991, presented by Canada to the GATT Panel.
- “4. Document DS23/3, page 2, declares that Canada ‘reserves the right to raise any new measure which may come into effect during the Panel’s deliberations’. The Panel considers that its terms of reference

⁴⁶⁵L/6504, L/6505 and L/6503, all adopted on 7 November 1989, 36S/202, 234 and 269, at 203-204, 235-236 and 270, para. 10 in each instance.

⁴⁶⁶DS18/R, adopted on 19 June 1992, 39S/128, 147-148, paras. 6.1-6.2.

do not permit it to examine 'any new measure which may come into effect during the Panel's deliberations'.

- "5. The Panel noted that Canada no longer requests the Panel to make a finding on the labelling practices of certain states."⁴⁶⁷

The 1994 Panel Report on "United States - Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon" includes a lengthy discussion of terms of reference claims raised by the United States:

"The Panel considered ... these objections in the light of the provisions of Article 15:2 through 15:7 of the Agreement concerning consultation, conciliation and panel proceedings. The Panel noted that in each paragraph the drafters of the text had chosen to refer to the subject matter of the dispute in identical terms as 'the matter'. Consultations would be requested under Article 15:2 'with a view to reaching a mutually satisfactory resolution of *the matter*' if a Party considered that such consultations failed to achieve a mutually agreed solution it could refer '*the matter*' to the Committee for conciliation; in conciliation, the Committee would meet 'to review the matter'; and if no mutually agreed solution emerged, a panel had to be established 'to examine *the matter*' if any party to the dispute so requested. This choice of words reflected, in the view of the Panel, the decision to establish a three-step process of settlement of a dispute between Parties concerning a single 'matter' and the individual claims of which a matter is composed, in which panel examination of a matter would be preceded by consultations concerning that same matter and conciliation concerning that same matter.

"The Panel further observed that at the consultation phase, the parties to a dispute were required to consult and thereby provide at least an opportunity for reaching a mutually satisfactory resolution of the matter in dispute. At the conciliation phase, during the Committee's review of the matter, the parties to the dispute were required to go further and 'make their best efforts to reach a mutually satisfactory solution throughout the period of conciliation.' The Panel therefore considered that the Agreement provided that before a party to a dispute could request a panel concerning a matter, the parties to the dispute had to have been given an opportunity to reach a mutually satisfactory resolution of the matter. This condition would not be meaningful unless the matter had been raised in consultations and conciliation.

"The Panel noted that Paragraph 4 of the Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance, which applies *mutatis mutandis* to disputes under the Agreement by virtue of Article 15:7 of the Agreement, provided that 'Any requests for consultations should include the reasons therefor'. The Panel however considered that whereas the greatest degree of precision could be expected in the definition of specific claims in a panel request, the complaining Party could not be expected to define its specific claims with the same degree of precision at the time of its request for consultations.

"With reference to conciliation, the Panel further noted the provisions of Footnote 15 to Article 15:3, that 'the Committee may draw Parties' attention to those cases in which, in its view, there are no reasonable bases supporting the allegations made'. The Panel also noted that Article 15:5 referred to a 'detailed examination by the Committee under paragraph 3'. The Panel considered that these provisions implied that the conciliation process envisaged was one which would examine legal claims and their bases and in which each member of the Committee would be able to express its views on these legal issues. Such a process would not be possible unless the request for conciliation identified the matter and the claims composing it. Furthermore, the requirement to make best efforts 'throughout' the conciliation period to reach a mutually satisfactory solution to the matter could not be fulfilled unless the matter had been identified at the start of the conciliation period. The Panel therefore concluded that a matter, including each claim composing that matter, could not be examined by a panel under the Agreement unless that same matter and claim had been referred to the Committee for conciliation in accordance with Article 15:3.

"The Panel then examined the relation between the scope of the matter before it and the terms of reference. The Panel considered that terms of reference served two purposes: definition of the scope of a panel proceeding, and provision of notice to the defending Party and other Parties that could be affected by

⁴⁶⁷DS23/R, adopted on 19 June 1992, 39S/206, 227-228, para. 3.5.

the panel decision and the outcome of the dispute. The notice function of terms of reference was particularly important in providing the basis for each Party to determine how its interests might be affected and whether it would wish to exercise its right to participate in a dispute as an interested third party. The Panel observed that terms of reference often were standard terms of reference, as in the present dispute, in which the definition of the matter had been supplied by a written statement prepared entirely by the complaining Party. In the light of these considerations, the Panel concluded that a matter, including each claim composing that matter, could not be examined by a panel under the Agreement unless that same matter was within the scope of, and had been identified in, the written statement or statements referred to or contained in its terms of reference. The Panel further observed that Article 15:5 provided that the Committee ‘shall ... establish’ a panel based on such a written statement, and considered that it could therefore not be assumed that the Committee by establishing this Panel with standard terms of reference had decided that the Panel should examine any claim in the written statement, regardless of whether that claim had been the subject of consultations between the parties and conciliation in the Committee.

“In the view of the Panel the foregoing conclusions were particularly appropriate in view of the nature of disputes concerning antidumping actions, relative to the powers accorded to panels by the Agreement. The requirement to engage in consultations and conciliation served an essential purpose in clarifying the facts and arguments in dispute, and framing the dispute concerning the matter in terms which a panel would be best equipped to resolve.

“In light of the foregoing considerations, the Panel was of the view that, for a claim to be properly before the Panel, it had to be within the Panel’s terms of reference and it had to have been identified during prior stages of the dispute settlement process.”⁴⁶⁸

See also the treatment of terms of reference claims in the unadopted panel report of 1993 on “EEC - Member States’ Import Régimes for Bananas”.⁴⁶⁹

In its report adopted in 1994, the panel on “Brazil - Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community” notes that while before the panel the EEC based a particular claim *inter alia* on Article 6.2 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII, no reference to that provision appeared in paragraph 13 of SCM/155, the panel request. However, Brazil had not argued that the issues raised by the EEC under this provision were not within the scope of the panel’s terms of reference. The panel did analyze the claim in question in relation to Article 6.2.⁴⁷⁰

(4) *Change in the subject matter of a proceeding*

(a) *Change in measures*

The 1962 Panel Report on “Uruguayan Recourse to Article XXIII” notes in paragraph 18 that

“Whilst the Panel was conducting its consultations, the EEC introduced its Regulation on cereals under the common agricultural policy, replacing the measures included in the original submission by Uruguay. The Panel noted the statement by the delegation of Uruguay that those new measures (which are described in COM.II/134) would have a significant impact on Uruguay’s cereals trade. However, since the measures did not form part of Uruguay’s original submission and since they were under consideration by the CONTRACTING PARTIES with the active participation of Uruguay, the Panel considered that it would not be appropriate for it to examine the compatibility or otherwise of the measures applied under that Regulation

⁴⁶⁸ paras. 332-338; see also detailed analysis of Norway’s claims at *ibid.* paras. 339-

⁴⁶⁹ DS32/R, dated 3 June 1993, paras. 324-325.

⁴⁷⁰ SCM/179, adopted on 28 April 1994, paras. 208, 305-322, 348-350.

with the General Agreement. The Panel also noted that the measures applying to certain other products might be replaced shortly with the extension of the application of the common agricultural policy, but in the absence of any definite indication in that regard, the Panel deemed it advisable to treat such measures as they now existed".⁴⁷¹

When the same Panel was reconvened in 1964, its terms of reference on that occasion included the examination of "the question of compatibility with the GATT referred to in paragraphs 16-18" of its 1962 Report. The Report of the reconvened Panel notes that the Panel had advised the Uruguayan delegation "that the Panel would now be in a position to examine any specific cases which the Government of Uruguay wished to present, assuming it could also show at that time that bilateral consultations had been tried unsuccessfully".⁴⁷²

The 1989 Panel Report on "United States - Section 337 of the Tariff Act of 1930" notes that "During the course of the Panel's work, Section 337 was amended by the Omnibus Trade and Competitiveness Act of 1988. The Panel's findings are based on Section 337 as it was at the time that the Panel was established by the Council, in October 1987".⁴⁷³

On 14 July 1992 a panel was established in the dispute brought by the EEC and the Netherlands on behalf of the Netherlands Antilles against the United States concerning U.S. restrictions on imports of tuna. In October and November 1992 the U.S. Congress amended the statutes at issue. In October the EEC and the Netherlands requested a pause in the panel procedures, and the chairman then announced a suspension of the panel's work by agreement between the parties until further notice.⁴⁷⁴ On 18 and 25 November 1992, the EEC and the Netherlands respectively proposed supplementary consultations under Article XXIII:1 on the changes to the United States legislation.⁴⁷⁵ The United States agreed to this request, explicitly reserving the question whether these were supplementary consultations or initial consultations under a new dispute settlement proceeding. These consultations took place on 16 December 1992. As a result of the consultations, the parties to the dispute, without prejudice to the rights of any party to the dispute, reached an understanding specifying the U.S. legislative provisions enacted in October 1992 that could be considered in the course of the Panel proceeding. The Panel agreed with the parties that the amendments could be considered by the Panel.⁴⁷⁶

(b) *Change in legal basis for measures under the General Agreement*

In 1964 the Panel on the "Uruguayan Recourse to Article XXIII" was reconvened for a second time to consider, *inter alia*, new measures applied since it was first reconvened in 1963. The Report of the Panel observed that "... most of the measures [cited by Uruguay in its submission] were not new measures applied since its latest [1963] report, but measures which had already been dealt with in its first report [of 1962]. The one case in which measures previously considered might now be regarded as new is that in which the situation of the country applying the restrictions has subsequently altered, as, for example, by disinvocation of Article XII".⁴⁷⁷

The 1980 Panel Report on "Norway - Restrictions on Imports of Certain Textile Products" notes that after Norway imposed unilateral control measures on Hong Kong textiles effective 1 January 1978, the United Kingdom acting on behalf of Hong Kong and Norway held consultations in May 1978. The United Kingdom (for Hong Kong) requested a panel on 1 June 1978 and the Council decided on 6 June 1978 that its Chairman should establish a panel if no solution were reached by 30 June 1978. On 20 July 1978 Norway informed the CONTRACTING PARTIES that it had decided to invoke Article XIX. At the Council meeting of 24 July 1978 the United Kingdom (for Hong Kong) stated that as a result, the legal basis for its complaint had changed and that it might decide to seek consultations with Norway under Article XIX. The Chairman of the Council thereupon stated that he would not take any further steps toward establishment of a Panel. After further consultations, the

⁴⁷¹L/1923, adopted on 16 November 1962, 11S/95, 100-101, para. 18.

⁴⁷²L/2278, adopted on 3 March 1965, 13S/45, 48, para. 14.

⁴⁷³L/6439, adopted on 7 November 1989, 36S/345, 383, para. 5.2.

⁴⁷⁴DS29/5, dated 16 November 1992.

⁴⁷⁵DS29/6, 29S/7.

⁴⁷⁶DS29/R, unadopted, dated 10 June 1994, para. 1.4.

⁴⁷⁷L/2278, adopted on 3 March 1965, 13S/45, 47, para. 9.

United Kingdom (for Hong Kong) on 13 July 1979 again took recourse to Article XXIII:2 and the Council established a Panel on 25 July 1979.⁴⁷⁸

(c) *Use of updated information concerning the same measures*

The 1978 Panel Report on “Canada - Withdrawal of Tariff Concessions” notes that “The Panel does not consider that full statistics for the applicable base period must be available at the very beginning of the negotiations [under Article XXVIII], provided these data become available later in the negotiations and the latter are not unduly delayed”.⁴⁷⁹ This finding was referred to in the 1980 Panel Report on the complaint brought Australia regarding “EC - Refunds on Exports of Sugar,” in which the Panel examined the issue of share of world export trade in sugar taking into account data for 1978; “... the Panel felt that this year constituted a special case, for the following two reasons: at the time when Australia presented its complaint, the year 1978 had not yet ended and the date for that year were not formally finalized at the time the Panel drew its conclusions; 1978 was also the year in which the International Sugar Agreement, 1977, came into operation. ... Despite these facts the Panel nevertheless felt that the year 1978 should be taken into consideration, be it on the basis of preliminary data noting that this would be in conformity with earlier practice”.⁴⁸⁰ The same approach was taken in the Panel Report of 1980 on “EC - Refunds on Exports of Sugar - Complaint by Brazil,” in which “... the Panel ... noted that Brazil had presented its complaint before final data for 1978 were available and that it would even at the conclusion of its work only have preliminary data for 1979 at its disposal. The Panel nevertheless felt that it was appropriate to include not only 1978, but to the extent possible, also 1979 in its considerations, as the Community export system with respect to sugar had remained the same as in previous years and the effects of the application of the system may have been even more significant than previously. Furthermore, the complaint by Brazil also covered threat of serious prejudice. The Panel therefore felt it appropriate to take into consideration any available information about developments in recent periods and that this would be in conformity with earlier practice”.⁴⁸¹

The three Panel Reports which examined the complaints of Australia, New Zealand and the United States on “Korea - Restrictions on Imports of Beef” indicate that the US and Australian panels were established in April 1988 and the New Zealand panel in September 1988; the panel requests referred to in the terms of reference referred to restrictions imposed under Article XVIII. The Panel’s examination of the application of Article XVIII took into account balance-of-payments data up to the end of 1988 and information provided by the International Monetary Fund on the Korean balance-of-payments situation as of early 1989.⁴⁸²

(5) *Claims not raised by the applicant contracting party*

In the 1980 Panel Report on “Norway - Restrictions on Imports of Certain Textile Products”

“the Panel noted that ... Hong Kong had limited its formal request to a finding on Norway’s Article XIX action. The Panel at the same time noted and consequently based its decision on the statements by Hong Kong that the latter was prepared to assume that Norway had the necessary justification for taking this action and that a finding concerning the exclusion from the quotas of the EEC and EFTA countries was not necessary”.⁴⁸³

The Chairman of the Panel explained that the “Panel, therefore, had not questioned the validity of the action by Norway under Article XIX; and the Panel’s conclusions did not take into account and were without prejudice to any Article XXIV aspects of the case”.⁴⁸⁴

⁴⁷⁸L/4959, adopted on 18 June 1980, 27S/119, 120-121, para. 5.

⁴⁷⁹L/4636, adopted on 17 May 1978, 25S/42, 48, para. 17.

⁴⁸⁰L/4833, adopted on 6 November 1979, 26S/290, 309, para. 4.13. A footnote to this paragraph refers to 25S/48.

⁴⁸¹L/5011, adopted on 10 November 1980, 27S/69, 89, para. 4.8. A footnote to this paragraph refers to panel reports at 25S/48 and 26S/309, para. 4.13.

⁴⁸²L/6504, L/6505 and L/6503, all adopted on 7 November 1989, 36S/202, 234 and 269, at 228, 264-265, and 303-304, paras. 99-101, 115-117, 121-123.

⁴⁸³L/4959, adopted on 18 June 1980, 27S/119, 125, para. 14(a).

⁴⁸⁴C/M/141, p. 4.

In the 1984 Panel Report on “Japanese Measures on Imports of Leather”,

“The Panel noted that some of the delegations which had indicated an interest in the matter before it and which had made statements to the Panel had argued that Japan’s import régime on leather contained discriminatory elements and therefore contravened Article XXIII:1 and 2. The Panel did not make a finding on this matter as it had not been raised by the United States and was not, therefore, within its terms of reference ...”.⁴⁸⁵

The 1984 Panel Report on the “United States Manufacturing Clause” includes the following paragraph:

“The Panel noted that the United States had argued that, even if the Panel were to find nullification or impairment of a benefit accruing to the European Communities under the General Agreement, the circumstances would not be serious enough to justify authorization of a suspension of obligations or concessions under Article XXIII:2, since the European Communities had suffered no economic harm. The Panel decided not to examine this argument, because the complaining party, the European Communities, had not requested the Panel to make findings concerning the authorization of suspension of obligations or concessions under Article XXIII”.⁴⁸⁶

In introducing this Panel Report in the Council, the Chairman of the Panel said, *inter alia*:

“Questions relating to possible compensation, which had been raised in the Council during discussion on setting up the Panel, had not been examined, since the Panel had been established to examine a matter raised by the European Communities, and the Community had asked the Panel during the course of its work not to look into these questions.”⁴⁸⁷

In the 1984 Panel Report on “EEC - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes”, which has not been adopted,

“The Panel noted that the United States had presented its complaint to the Panel as a case of a ‘non-violation’ nullification and impairment. It was the Panel’s understanding that the United States had not contended that the EC production aid system on the four products in question had violated any specific provisions of the General Agreement. The Panel considered that in these circumstances it was not for the Panel to examine the consistency of the EC production aid system with the provisions of the General Agreement. Having noted this the Panel then proceeded to an examination as to whether the EC production aids had nullified or impaired the tariff concessions granted on canned peaches, canned pears, canned fruit cocktail and dried grapes”.⁴⁸⁸

The 1988 Panel Report on “United States Customs User Fee” also notes the argument raised by India which, 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”. The issue was also raised by Australia and Singapore as intervening parties, but not by the applicant parties Canada and the EC, which reserved their rights on the issue and did not object to the Panel dealing with it. The Panel refrained from a formal finding on the issue, in accordance with GATT practice, which it considered sound legal practice, to make findings only on those issues raised by the parties to the dispute.⁴⁸⁹

The 1989 Panel Report on “United States - Restrictions on Imports of Sugar”, concerning a dispute in which Australia was the applicant party, notes concerning a claim made by the EEC:

“The Panel noted that the EEC, in its submission as an interested third party, argued that the restrictions on the importation of sugar were contrary to the terms of the waiver granted in 1955 by the CONTRACTING PARTIES in connection with import restrictions imposed under Section 22 of the United States

⁴⁸⁵L/5623, adopted on 15/16 May 1984, 31S/94, 114, para. 58.

⁴⁸⁶L/5609, adopted on 15/16 May 1984, 31S/74, 91, para. 41.

⁴⁸⁷C/M/176, p. 22.

⁴⁸⁸L/5778, para. 48.

⁴⁸⁹L/6264, adopted on 2 February 1988, 35S/245, 289, para. 121.

Agricultural Adjustment Act (of 1933) as amended (BISD 3S/32). The Panel noted that the matter referred to the CONTRACTING PARTIES by Australia were restrictions maintained under the authority of the Headnote in the Tariff Schedules of the United States, and not restrictions taken under Section 22 ... Therefore the issue raised by the EEC could not be examined by the Panel. The Panel also recalled in this context that the practice has been for panels to make findings only on those issues raised by the parties to the dispute, not on those raised solely by third parties ...".⁴⁹⁰

The EEC claim referred to by this Panel was then made by the EEC in the dispute recorded in the 1990 Panel Report on "United States - Restrictions on the Importation of Sugar and Sugar-containing Products applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions".⁴⁹¹

The 1992 Panel on "United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil" notes that

"... the Panel did not consider it appropriate in the context of this case to address the issues raised in India's third party submission in respect of the non-applicability of the PPA. It was not clear to the Panel how India's arguments respecting the non-applicability of the PPA directly affect Brazil's case before this Panel. GATT practice has been for panels to make findings only on the issues raised by the parties to the dispute.⁴⁹² The Panel believed that this was sound legal practice and should also be followed in the present case. It was of course open to any contracting party which wished to raise this issue to commence consultation and dispute settlement proceedings in its own right under the General Agreement".⁴⁹³

In the 1994 panel report on "United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco", the panel examined a fee charged for inspection of tobacco:

"The Panel ... noted that Article VIII does not apply to taxes within the purview of Article III. The Panel then recalled that no party to the dispute had requested the Panel to examine the consistency of these inspection fees with Article III. Indeed, all parties had argued that the Section 1106(c) inspection fees should be examined in the light of Article VIII. The Panel noted that the consistency of Section 1106(c) could present itself differently under Article III in that the focus of the examination would then be on the inspection fees as internal charges and on whether or not national treatment was accorded in respect of such charges. However, in view of the fact that the parties to the dispute had argued the Section 1106(c) inspection fees in terms of Article VIII, the Panel proceeded to examine this legislative provision under that Article."⁴⁹⁴

Claims advanced by a third party have been considered when the applicant party has explicitly associated them with its claims.⁴⁹⁵

See also the material below at page 745 on treatment of proceedings in the event of partial settlement and withdrawal of some claims by the applicant party.

(6) Defences not raised by the respondent contracting party

In the 1983 Panel Report on "EEC - Quantitative Restrictions against Imports of Certain Products from Hong Kong" the Panel "recognized that situations might exist in which the maintenance of quantitative restrictions would be justified under the relevant GATT provisions. It noted, however, that no such provisions had

⁴⁹⁰L/6514, adopted on 22 June 1989, 36S/331, 344, para. 5.9.

⁴⁹¹L/6631, adopted on 7 November 1990, 37S/228.

⁴⁹²The footnote to this sentence refers to the Panel Report on "United States - Customs User Fee", adopted on 2 February 1988, 35S/245, 290.

⁴⁹³DS18/R, adopted on 19 June 1992, 39S/128, 154, para. 6.19.

⁴⁹⁴DS44/R, adopted on 4 October 1994, para. 117.

⁴⁹⁵See Panel Report on "Japan - Trade in Semi-conductors", L/6309 adopted on 4 May 1988, 35S/116, 123, para. 32 (EEC adoption of additional claims regarding Articles I and XVII:1(c) in Canadian third-party submission; EEC requested that the Panel take these claims into consideration).

been invoked by the European Community in the matter. It decided that in such circumstances it was not for the Panel to establish whether the present measures would be justified under any GATT provision or provisions".⁴⁹⁶

The 1984 Panel Report on "US - Imports of Sugar from Nicaragua" includes the following findings: "The Panel noted that the United States had not invoked any of the exceptions provided for in the General Agreement permitting discriminatory quantitative restrictions contrary to Article XIII. The Panel therefore did not examine whether the reduction in Nicaragua's quota could be justified under any such provision".⁴⁹⁷

In the 1984 Panel Report on "Japanese Measures on Imports of Leather"

"The Panel noted that Article XI:1 prohibits the use of quantitative restrictions. It recognized that situations might exist in which the maintenance of such restrictions would be justified under the relevant GATT provisions. It noted, however, that Japan had not invoked any provision of the General Agreement to justify the maintenance of the import restrictions on leather. The Panel decided that in such circumstances it was not for it to establish whether the present measures would be justified under any GATT provision or provisions ...".⁴⁹⁸

The 1989 Panel Report on "EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile" notes that in this proceeding, Chile argued that, noting the Commission's responsibility for EEC trade policy, and that member States' import licensing systems were determined by EEC legislation, the Commission should be held responsible for ensuring that its member States administered such licensing in accordance with Article X; the EEC stated that it understood Article XXIV:12 to be an exception and that since the Community had not invoked it in the present case, it saw no grounds for the Panel to examine the EEC's obligations thereunder. The Panel examined the licensing systems in question in relation to Article X and did not examine the applicability of Article XXIV:12.⁴⁹⁹

In the 1990 Panel Report on "EEC - Regulation on Imports of Parts and Components"

"... The Panel ... noted that the United States, as an interested third party, had argued that Article VI of the General Agreement provided to a certain extent a legal basis for measures to prevent what it considered to be circumvention of anti-dumping duties. At one point in the proceedings the EEC stated that, if the Panel were to find that the anti-circumvention duties were justifiable under Article VI, 'it would not disagree' with such an approach ... However, the EEC presented no arguments in support of a justification of its measures under Article VI; on the contrary, in the subsequent proceedings the EEC continued to present various arguments to the effect that measures under Article 13:10 were 'necessary' within the meaning of Article XX(d) because Article VI did *not* provide a basis for the application of measures to prevent circumvention of anti-dumping duties ... In conformity with the practice of panels not to examine exceptions under the General Agreement which have not been invoked by the contracting party complained against ... and not to examine issues brought only by third parties ... the Panel decided not to examine whether the anti-circumvention duties could be justified under Article VI of the General Agreement".⁵⁰⁰

(7) *Treatment of proceedings and panel report in the event of a mutually agreed solution*

(a) *Treatment of proceedings and report*

In past disputes it has occurred that a mutually agreed solution to a dispute has been reached during the course of the Panel's work and before it had advised the parties of its conclusions⁵⁰¹ or after the Panel had

⁴⁹⁶L/5511, adopted on 12 July 1983, 30S/129, 138, para. 26.

⁴⁹⁷L/5607, adopted on 13 March 1984, 31S/67, 74, para. 4.4.

⁴⁹⁸L/5623, adopted on 15/16 May 1984, 31S/94, 111, para. 44.

⁴⁹⁹L/6491, adopted on 22 June 1989, 36S/93, 133, para. 12.30; arguments at *ibid.*, 36S/118, paras. 7.1-7.2.

⁵⁰⁰L/6657, adopted on 16 May 1990, 37S/132, 194, para. 5.11; see also EEC comments on this Panel Report at L/6676.

⁵⁰¹See, e.g., Panel Reports on "Japanese Measures on Imports of Leather" (complaint by United States), L/4789, adopted on 6 November 1979, 26S/320, 321, para. 5; "Japan's Measures on Imports of Leather" (complaint by Canada), L/5042, 27S/118; "Japanese Restraints on Imports of Manufactured Tobacco from the United States", L/5140, adopted on 11 June 1981, 28S/100, 102, paras. 11-13; "EEC - Restrictions on Exports of Copper Scrap", DS5/R, adopted on 20 February 1990, 37S/200.

advised the parties of its conclusions informally but before circulation of the final panel report to the contracting parties.⁵⁰² In such cases panels have usually recommended that proceedings under Article XXIII:2 be terminated. While the panel has submitted a report for adoption including information on the nature of the complaint, the establishment, composition and dates of meetings of the panel, the report does not include legal findings or recommendations and has typically included statements similar to the following.

“Since the terms of reference of the Panel were to make such findings as would assist the CONTRACTING PARTIES in making recommendations or rulings in accordance with paragraph 2 of Article XXIII, the Panel draws the attention of the Council to the fact that the parties have arrived at a bilateral solution. Consequently, the Panel considers that it is unnecessary to undertake further investigation of this matter.”⁵⁰³

“The Panel drew the attention of the Council to the fact that agreement between [----] and [----] had been reached and recommends that the proceedings under Article XXIII:2 be terminated.”⁵⁰⁴

The 1982 Panel Report on “United States - Prohibition of Imports of Tuna and Tuna Products from Canada” refers to this practice: “... the Panel noted that according to prevailing GATT practice when a bilateral settlement to a dispute had been found, panels had usually confined their reports to a brief description of the case indicating that a solution had been reached.”⁵⁰⁵ The report in such instances has sometimes also mentioned the withdrawal of the complaint by the applicant contracting party.⁵⁰⁶ If at that point the bilateral solution to the dispute had not yet been implemented, Panel reports have sometimes noted that the disputants have reserved their rights and might re-open the Article XXIII:2 procedure. See, e.g., the 1980 Panel Report on the complaint of Canada regarding “Japan’s Measures on Imports of Leather”:

“The two parties have reserved their rights under the GATT; should the conclusions of the discussions not be put into practice to the satisfaction of either government, it is understood that the matter may be subject to further GATT proceedings. The two parties intend to provide the substance of the agreement reached to other interested delegations upon request.”⁵⁰⁷

Mutually agreed solutions have also occurred after establishment of the panel and before composition of the panel or agreement on terms of reference. In 1988, the complaints of the United States concerning “Japan - Imports of Beef and Citrus Products” and of Australia and New Zealand concerning “Japan - Imports of Beef” were withdrawn in the light of measures agreed by Japan, after panels had been established with respect to the US and Australian complaints, and before the panels were composed.⁵⁰⁸ As the panels had not been composed, they did not submit reports.

In the 1993-94 panel proceeding brought by Chile on EEC - Restrictions on Imports of Apples, Chile requested and was granted a suspension of panel proceedings for bilateral negotiations which resulted in a mutually satisfactory settlement.⁵⁰⁹ In the 1993 panel proceeding on Australia - Imposition of Countervailing

⁵⁰²See Panel Report on “Japan Measures on Imports of Thrown Silk Yarn”, L/4637, adopted on 17 May 1978, 25S/107, 108-109, para. 6-7 (oral presentation of findings by Panel to parties with invitation to advise if a bilateral settlement would be possible by a specified date); Interim and Final Reports of Panel on “United Kingdom - Dollar Area Quotas”, L/3843, L/3891, both adopted on 30 July 1973, 20S/230 and 236, 236-237, paras. 4-6 (presentation of interim panel report recommending that bilateral solution be reached and stating that panel will make recommendations if no such solution reached by specified date).

⁵⁰³See, e.g., Panel Report on “Japan - Measures on Imports of Thrown Silk Yarn”, L/4637, adopted on 17 May 1978, 25S/107, para. 8; Panel Report on “Japan - Measures on Imports of Leather”, L/5042, adopted on 10 November 1980, 27S/118, para. 6; Panel Report on “United Kingdom Import Restrictions on Cotton Textiles”, L/3812, adopted on 5 February 1973, 20S/237, para. 7.

⁵⁰⁴Report of the “Panel on United States Countervailing Duties”, L/5192, adopted on 3 November 1981, 28S/113, para. 6.

⁵⁰⁵L/5198, adopted on 22 February 1982, 29S/91, 106, para. 4.3. A footnote to the sentence cited refers to the Panel Reports on “Japan - Measures on Imports of Thrown Silk Yarn”, 25S/107; “Japanese Measures on Imports of Leather”, 26S/320; “Japanese Restraints on Imports of Manufactured Tobacco from the United States”, L/5140, 28S/100; “EC - United Kingdom Application of EEC Directives to Imports of Poultry from the United States”, L/5155, 28S/90; “Panel on United States Countervailing Duties”, L/5192, 28S/113.

⁵⁰⁶*Ibid.*, para. 5; also Panel Report on “Japanese Restraints on Imports of Manufactured Tobacco from the United States”, L/5140, adopted on 11 June 1981, 28S/100, 102, paras. 12, 13.

⁵⁰⁷L/5042, adopted on 10 November 1980, 27S/118, 119, para. 5.

⁵⁰⁸C/M/223, p. 20-23 (discussion of notifications of Japanese measures and withdrawal of complaints); see also L/6370 (Japanese announcement of market-opening measures), L/6322 and Add.1 (complaint and withdrawal by US), L/6333 and Add.1 (same for Australia), L/6355 and Add.1 (same for New Zealand), C/M/220 p. 3-7 (establishment of panels with respect to US and Australian complaints).

⁵⁰⁹DS39/R; settlement details set out in DS39/4.

Duties on Imports of Glacé Cherries from France and Italy in Application of the Australian Customs Amendment Act 1991, the EEC requested and was granted a suspension of the proceedings, and then withdrew its complaint. The Panel then considered its proceedings to be terminated.⁵¹⁰ The panel proceeding on “United States - Measures Affecting the Export of Pure and Alloy Magnesium from Canada” was also suspended and later withdrawn.⁵¹¹

In the event of partial settlement and withdrawal of some but not all of the claims, the proceeding has continued while taking the partial withdrawal of claims into account. The Panel Report on “United States - Section 337 of the Tariff Act of 1930” notes that “The Panel’s terms of reference refer both to the application of Section 337 in general and to its application in the case concerning Certain Aramid Fibre which prompted the European Economic Community to submit its complaint to the CONTRACTING PARTIES. During the course of the Panel’s proceedings, the parties to the Certain Aramid Fibre case [E.I du Pont de Nemours and Company and Akzo N.V.] reached a settlement ... and thereafter the Community withdrew its request to the Panel to make findings in respect of that case. The Panel therefore limited its examination to Section 337 as such, plus the related Section 337a which the Council clearly intended to be covered by the Panel’s term of reference since it was the provision applicable in the Certain Aramid Fibre case”.⁵¹²

Mutually agreed solutions have also occurred after circulation of the panel report but before its adoption. See the discussion below at page 760 of the treatment of the 1991 Panel Report on “United States - Restrictions on Imports of Tuna”.

See also the material above starting at page 649 concerning measures no longer in effect, and the material at pages 738-740 concerning changes in the subject matter of a dispute.

(b) Transparency concerning settlements

Paragraphs 17 and 19 of the 1979 Understanding provide:

“... Where a bilateral settlement of the matter has been found, the report of the panel may be confined to a brief description of the case and to reporting that a solution has been reached.

“If a mutually satisfactory solution is developed by the parties to a dispute before a panel, any contracting party with an interest in the matter has a right to enquire about and be given appropriate information about that solution in so far as it relates to trade matters”.

See also similar statements in paragraphs 6(v) and (vi) in the 1979 Understanding Annex on customary practice.

The 1989 Improvements provide in paragraph B that “Mutually agreed solutions to matters formally raised under GATT Articles XXII and XXIII, as well as arbitration awards within GATT, must be notified to the Council where any contracting party may raise any point relating thereto”.

7. Panel procedure

Paragraphs 6(iv), (vi) and (vii) of the 1979 Understanding Annex on customary practice provide as follows:

“(iv) Panels set up their own working procedures. The practice for the panels has been to hold two or three formal meetings with the parties concerned. The panel invited the parties to present their views either in writing and/or orally in the presence of each other. The panel can question both parties on any matter which it considers relevant to the dispute. ... Written memoranda submitted to the panel have been considered confidential, but are made available to the parties to the dispute.

⁵¹⁰SCM/178, dated 28 Oct 1993.

⁵¹¹SCM/174, dated 9 August 1993.

⁵¹²L/6439, adopted on 7 November 1989, 36S/345, 382-383, para. 5.1; see also *ibid.* at 36S/353-354, para. 2.9 on the private party settlement.

- “(vi) The reports of panels have been drafted in the absence of the parties in the light of the information and the statements made.
- “(vii) To encourage development of mutually satisfactory solutions between the parties and with a view to obtaining their comments, each panel has normally first submitted the descriptive part of its report to the parties concerned, and also their conclusions, or an outline thereof, a reasonable period of time before they have been circulated to the CONTRACTING PARTIES.”

Paragraphs F(f)1-2 of the 1989 Improvements provide that

“1. Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.

“2. Panels shall follow the Suggested Working Procedures found in the July 1985 note of the Office of Legal Affairs unless the members of the panel agree otherwise after consulting the parties to the dispute ...”.

(1) *Time deadlines for panels*

The 1966 Procedures provide for complaints by a less-developed contracting party against a developed contracting party that upon referral to a panel after completion of good offices, “the panel shall, within a period of sixty days from the date the matter was referred to it, submit its findings and recommendations to the CONTRACTING PARTIES or to the Council, for consideration and decision”. See the discussion of this deadline at the March 1993 Council meeting.⁵¹³

See also paragraph 20 of the 1979 Understanding and paragraph 6(ix) of its Annex on customary practice, paragraph (vi) of the 1982 Ministerial Decision, and the section on “Completion of panel work” in the 1984 Decision. Paragraphs F(f)(2) through (6) of the 1989 Improvements provide that

“2. ... After consulting the parties, the panel members shall, as soon as practicable and whenever possible within one week after the composition and terms of reference of the panel have been agreed upon, fix the timetable for the panel process at least until its first substantive meeting.

“3. In determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions.

“4. Each party to the dispute shall deposit its written submissions with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute. The complaining party shall submit its first submission in advance of the responding party's first submission unless the panel decides, in fixing the timetable referred to in the second paragraph of this section and after consultations with the parties to the dispute, that the parties should submit their first submissions simultaneously. When there are sequential arrangements for the deposit of first submissions, the panel shall establish a firm time period for receipt of the responding party's submission. Any subsequent written submissions shall be submitted simultaneously.

“5. In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the time the composition and terms of reference of the panel have been agreed upon to the time when the final report is provided to the parties to the dispute, shall, as a general rule, not exceed six months ...

“6. When the panel considers that it cannot provide its report within six months, or within three months in cases of urgency, it shall inform the Council in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case should the period from the establishment of the panel to the submission of the report to the contracting parties exceed nine months”.

⁵¹³C/M/262, p. 18-23.

As of March 1994 there had been two instances in which the Council was informed of reasons for delay under this provision.⁵¹⁴

(2) Urgent cases

The 1962 Panel Report on “Exports of Potatoes to Canada”, adopted on 16 November 1962, examined the introduction on 16 October 1962 of “values for duty” (and therefore an additional charge) under the Canadian Customs Act, on imports of potatoes into Western Canada. Similar measures had been taken once before in the previous year and withdrawn at the end of the marketing season.

“The Canadian delegation stated that a representation had been received from the United States regarding the value for potatoes only a few days before the session of the CONTRACTING PARTIES. ... The Panel noted that the United States Government had made representations to the Canadian Government when action in respect of potatoes had been taken for the first time in 1961. It noted further that when action had been taken on 16 October 1962, i.e. in the week preceding the present session of the CONTRACTING PARTIES, the United States Government had again made representations to the Canadian Government, but at the same time had referred the question to the CONTRACTING PARTIES at very short notice. The Panel noted the United States’ explanation that, because of the seasonal character of such action, the present session offered the only opportunity for consideration of the matter by the CONTRACTING PARTIES.”⁵¹⁵

The Panel found that the measure was inconsistent with Article II; the report notes that the Panel did not consider the question of whether the circumstances were “serious enough”, in view of the circumstances and because trade statistics were not available.⁵¹⁶

Paragraph 20 of the 1979 Understanding provides on this subject: “... In cases of urgency the panel would be called upon to deliver its findings within a period normally of three months from the time the panel was established”.

In 1985, in connection with the United States request for establishment of a panel under Article XXIII:2 on leather footwear to apply the findings of the 1984 Report of the “Panel on Japanese Measures on Imports of Leather”, the United States also requested that the panel proceeding be conducted on an expedited basis as provided under paragraph 20 of the 1979 Understanding, and that, in the light of the narrow scope of such a panel’s inquiry, the panel deliver its findings not later than three months from the date of its establishment.⁵¹⁷

The 1989 Improvements provide, in paragraph F(f)(5), that “In cases of urgency, including those relating to perishable goods, the panel shall aim to provide its report to the parties within three months”.

Requests have been made under these “urgency” provisions in connection with the 1993 panel request by Colombia, Costa Rica, Guatemala, El Salvador and Venezuela in their dispute concerning the EEC import régime for bananas, a 1993 request by Chile for consultations on EEC restrictions on imports of apples, and a 1994 request by Argentina for Article XXIII:1 consultations on EEC countervailing charges on lemons.⁵¹⁸

(3) Confidentiality and privacy of proceedings

Paragraph 6(viii) of the 1979 Understanding Annex on customary practice provides that “... The opinions expressed by the panel members on the matter are anonymous and the panel deliberations are secret.” Paragraph (i) of the 1982 Ministerial Decision provides, with reference to the good offices procedures provided therein, that

⁵¹⁴DS23/5, Panel on “United States - Measures affecting Alcoholic and Malt Beverages”, dated 27 February 1992 (citing large number of measures examined and lack of agreement between parties on factual aspects); statement of Council Chairman at October 1993 Council meeting relaying communication from the Panel in the dispute brought by the EC and the Netherlands on “United States - Restrictions on Imports of Tuna”, C/M/267, p. 20 (suspension of proceedings was not counted against the six-month deadline).

⁵¹⁵L/1927, 11S/88, 91-92, paras. 10-11.

⁵¹⁶*Ibid.*, 11S/93-94, paras. 18-20.

⁵¹⁷C/M/191, p. 39.

⁵¹⁸DS38/6, DS39/1, and DS45/2 respectively.

“... Conciliation proceedings, and in particular positions taken by the parties to the dispute during consultations, shall be confidential ...”.

(4) *Role of Secretariat*

Paragraph 6(iv) of the 1979 Understanding Annex on customary practice notes that “Panels may seek advice or assistance from the secretariat in its capacity as guardian of the General Agreement, especially on historical or procedural aspects. The secretariat provides the secretary and technical services for panels”. Paragraph (iv) of the 1982 Ministerial Decision provides that “The secretariat of GATT has the responsibility of assisting the panel, especially on the legal, historical and procedural aspects of the matters dealt with”. See also the reference in paragraph H.1 of the 1989 Improvements that “the Secretariat assists contracting parties in respect of dispute settlement at their request” and to provision of technical assistance to developing contracting parties “in a manner ensuring the continued impartiality of the Secretariat”.

8. Sources and treatment of information

(1) *Right of panel to seek information*

Paragraph 15 of the 1979 Understanding provides: “Each panel should have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a State it shall inform the government of that State. Any contracting party should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate ...”. Paragraph 6(iv) of the 1979 Understanding Annex on customary practice notes:

“... The practice for the panels has been to hold two or three formal meetings with the parties concerned. The panel invited the parties to present their views either in writing and/or orally in the presence of each other. The panel can question both parties on any matter which it considers relevant to the dispute. ... Panels often consult with and seek information from any relevant source they deem appropriate and they sometimes consult experts to obtain their technical opinion on certain aspects of the matter”.

(2) *Use of experts*

The “Good Offices Report by the Personal Representative of the Director-General on the Dispute between the EC and Japan Concerning Certain Pricing and Trading Practices for Copper in Japan” of 1988 notes that an independent expert on the copper market was hired in this dispute in accordance with an understanding between the two parties. “As a first step the Director-General was asked to establish the factual situation. To this end an independent expert, Mr. Martin Thompson, was retained by the parties. His study was completed in October 1988, and was submitted to and commented on by the parties. It has been of great help in preparing this report”.⁵¹⁹ The Personal Representative also met with the parties.

The 1990 Panel Report on “Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes” notes that on the basis of a Memorandum of Understanding between the parties and in pursuance of Thailand’s request, the Panel asked the World Health Organization (WHO) to present its conclusions on technical aspects of the case, such as the health effects of cigarette use and consumption, and on related issues for which the WHO was competent; the parties to the dispute also commented on the submission of the WHO.⁵²⁰

See also references at page 689 concerning consultation with other intergovernmental organizations.

See also Article 14.8-14.13 and Annex 2 of the Agreement on Technical Barriers to Trade, and Article 20.2-20.5 and paragraph 5 of Annex III of the Agreement on Implementation of Article VII.

⁵¹⁹L/6456, 36S/199, 200-201, para. 2.

⁵²⁰DS10/R, adopted on 7 November 1990, 37S/200, 216-220, paras. 50-62.

(3) *Presumptions and burden of proof*

(a) *Burden of production of information regarding consistency with the General Agreement*

The Panel Report on “Uruguayan Recourse to Article XXIII” notes as follows concerning the procedures used by that Panel:

“In a number of cases, the contracting party concerned maintained (a) that certain measures applied by it were consistent with the provisions of GATT, or (b) that the measures, while not consistent with the provisions of the General Agreement, were permitted under the terms of the Protocol of Provisional Application, the Annecy Protocol or the Torquay Protocol on account of their being applied pursuant to ‘existing legislation’. In most of these cases, the contention was not questioned by the Uruguayan delegation. For practical purposes, the Panel has taken the position that in cases where the contention has not been challenged and is not contradicted by the available records of the CONTRACTING PARTIES, it would be beyond its competence to examine whether the contention was or was not justified”.⁵²¹

The 1992 Panel Report on “Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies” examined the facts concerning the conditions imposed by each of these agencies (“liquor boards”) for listing imported beer for sale - facts which were contested between the parties.

“The Panel noted that the United States had claimed that the listing and delisting practices which had been found to be inconsistent with Canada’s obligations under Article XI of the General Agreement by the Panel that had examined these practices in 1988 at the request of the EEC, had not been fully eliminated by Canada ... Canada claimed that this issue had been fully settled by its 1988 agreement with the EC, which was being applied on a most-favoured-nation basis, and that all the provincial liquor boards acted in accordance with the principles of non-discrimination set out in this agreement

“The Panel noted that, with the exception of the listing and delisting practices in Ontario, the parties did not agree on the listing and delisting practices actually pursued by the liquor boards. The Panel also noted that the United States had, on 17 July 1991, specifically requested the Panel not to prolong its proceedings. The Panel therefore decided not to schedule another meeting with the parties to permit the United States to submit further evidence on this issue. For these reasons, the Panel had to *conclude* that, with the exception of the listing and delisting practices in Ontario, the United States had not substantiated its claim that Canada still maintained listing and delisting practices inconsistent with Article XI of the General Agreement”.⁵²²

See also the finding in the 1994 Panel Report on “United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco” that “the evidence did not support the complainants’ claim that the DMA’s penalty provisions were separate taxes or charges within the meaning of Article III:2.”⁵²³

(b) *Presumption of prima facie nullification or impairment*

See the material starting at page 655 concerning *prima facie* nullification or impairment.

In respect of certain trade measures such as import permit requirements, mixing regulations, quotas and maximum or minimum price systems, the Panel in the Uruguayan Recourse to Article XXIII considered “that insofar as it has not been established that these measures are being applied consistently with the provisions of the General Agreement or are permitted by the terms of the protocol under which [name of contracting party concerned] applies the GATT, it has to proceed on the assumption that their maintenance can nullify or impair the benefits accruing to Uruguay under the Agreement”.⁵²⁴

⁵²¹L/1923, adopted on 16 November 1962, 11S/95, 100, para. 16.

⁵²²DS17/R, adopted on 18 February 1992, 39S/27, 74-75, paras. 5.2-5.3.

⁵²³DS44/R, adopted on 4 October 1994, para. 82.

⁵²⁴L/1923, adopted on 16 November 1962, 11S/95, 105, 108, 123, 127, 130, 136, 138, 141.

(c) *Burden of proof regarding exceptions and narrow interpretation of exceptions*

Statements have been made in panel and working party reports regarding the burden of coming forward with evidence that the requirements of a claimed exception have been met, in relation to Articles VI, XI:2(c) and XX and the Protocol of Provisional Application. For more context, see references to the cases cited in this Index under the provision concerned.

Article VI: The 1955 Panel Report on “Swedish Anti-Dumping Duties” examined a Swedish Decree imposing a basic price scheme under which an anti-dumping duty was levied on imports of nylon stockings whenever the invoice price was lower than a minimum price fixed by the Swedish Government. As regards the burden of proof of facts justifying the imposition of anti-dumping duties, the Panel Report notes that “... it was clear from the wording of Article VI that no anti-dumping duties should be levied unless certain facts had been established. As this represented an obligation of the contracting party imposing such duties, it would be reasonable to expect that that contracting party should establish the existence of these facts when its action is challenged”.⁵²⁵ The 1989 Panel Report on “United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada” notes that “the Panel found that Article VI:3, as an exception to basic principles of the General Agreement, had to be interpreted narrowly and that it was up to the United States, as the party invoking the exception, to demonstrate that it had met the requirements of Article VI:3”.⁵²⁶

Article XI:2(c): The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” notes that the Panel “considered ... that the burden of providing the evidence that all the requirements of Article XI:2(c)(i), including the proportionality requirement, had been met must remain fully with the contracting party invoking that provision”.⁵²⁷ See also a similar reference in the 1989 Panel Report on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile”.⁵²⁸ In the 1989 Panel Report on “Canada - Import Restrictions on Ice Cream and Yoghurt”.⁵²⁹

“The Panel recalled that it had previously been concluded that a contracting party invoking an exception to the General Agreement bore the burden of proving that it had met all of the conditions of that exception.”⁵³⁰ It also noted, as had previous panels, that exceptions were to be interpreted narrowly and considered that this argued against flexible interpretation of Article XI:2(c)(i).⁵³¹ The Panel was aware that the requirements of Article XI:2(c)(i) for invoking an exception to the general prohibition on quantitative restrictions made this provision extremely difficult to comply with in practice.⁵³² However, any change in the burden of proof could have consequences equivalent to amending Article XI, seriously affecting the balance of tariff concessions negotiated among contracting parties, and was therefore outside the scope of the Panel’s mandate”.⁵³³

Article XX: The 1984 Panel Report on “Canada - Administration of the Foreign Investment Review Act” notes that “Since Article XX(d) is an exception to the General Agreement it is up to Canada, as the party invoking the exception, to demonstrate that the purchase undertakings are necessary to secure compliance with the Foreign Investment Review Act”.⁵³⁴ The 1989 Panel Report on “United States - Section 337 of the Tariff Act of 1930” provides that “... it is up to the contracting party seeking to justify measures under Article XX(d) to demonstrate that those measures are ‘necessary’ within the meaning of that provision”.⁵³⁵ The 1991 Panel Report

⁵²⁵L/328, adopted on 26 February 1955, 3S/81, 85-86, para. 15.

⁵²⁶DS7/R, adopted on 11 July 1991, 38S/30, 44, para. 4.4.

⁵²⁷L/6253, adopted on 2 February 1988, 35S/163, 227, para. 5.1.3.7.

⁵²⁸L/6491, adopted on 22 June 1989, 36S/93, 124, para. 12.3

⁵²⁹L/6568, adopted on 5 December 1989, 36S/68.

⁵³⁰The footnote to this sentence refers to: Panel Report on “Canada - Administration of the Foreign Investment Review Act”, 30S/140, 164, para. 5.20; Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”, 35S/163, 227, para. 5.1.3.7; Panel Report on “European Economic Community - Restrictions on Imports of Dessert Apples - Complaint by Chile”, 36S/93, 124, para. 12.3.

⁵³¹The footnote to this sentence refers to, e.g. Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”, L/6253, 35S/163, 226-27, para. 5.1.3.7, and Panel Report on “EEC - Restrictions on Imports of Apples - Complaint by the United States”, L/6513, 36S/135, 164, para. 5.13.

⁵³²The footnote to this sentence refers to, e.g., the Panel Report on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile”, L/6491.

⁵³³36S/84-85, para. 59.

⁵³⁴L/5504, adopted on 7 February 1984, 30S/140, 64, para. 5.20.

⁵³⁵L/6439, adopted on 7 November 1989, 36S/345, 393, para. 5.27.

on “United States - Restrictions on Imports of Tuna”, which has not been adopted, notes that “... previous panels had established that Article XX is a limited and conditional exception from obligations under other provisions of the General Agreement, and not a positive rule establishing obligations in itself.”⁵³⁶ Therefore, the practice of panels has been to interpret Article XX narrowly, to place the burden on the party invoking Article XX to justify its invocation,⁵³⁷ and not to examine Article XX exceptions unless invoked.⁵³⁸ In the 1992 Panel Report on “United States - Measures Affecting Alcoholic and Malt Beverages”, “... The Panel ... noted the practice of the CONTRACTING PARTIES of interpreting these Article XX exceptions narrowly, placing the burden on the party invoking an exception to justify its use.”⁵³⁹

Protocol of Provisional Application: The 1957 Working Party Report on “Import Restrictions of the Federal Republic of Germany” notes the view of a number of delegations that “Should the Federal Government seek to maintain its claim that the Marketing Laws in fact require the maintenance of restrictions inconsistent with GATT provisions, the German delegation should produce the text of the Laws and particulars of the parliamentary discussions and explanatory material relating to the legislation in question to bear out its contention.”⁵⁴⁰ The 1992 Panel Report on “United States - Measures affecting Alcoholic and Malt Beverages”, in examining a US claim under the “existing legislation” clause of the Protocol of Provisional Application, “noted that the United States, as the party invoking the PPA, has the burden of demonstrating its applicability in the instant case.”⁵⁴¹

Reference to interpretation of exceptions was also made in the 1992 Panel Report under the Agreement on Government Procurement concerning “Norway - Procurement of Toll Collection Equipment for the City of Trondheim” which provides regarding the provisions on single tendering in Article V:16: “The Panel agreed with the view that Article V:16 must be regarded as an exceptions provision containing, as made clear in the last sentence of Article V:1, a finite list of the circumstances under which Parties could deviate from the basic rules requiring open or selective tendering. Since Article V:16(e) was an exceptions provision, its scope had to be interpreted narrowly and it would be up to Norway, as the Party invoking the provision, to demonstrate the conformity of its actions with the provision.”⁵⁴²

(d) *Arguments in the alternative*

The 1991 Panel Report on “United States - Restrictions on Imports of Tuna”, which has not been adopted, includes the following finding regarding the presentation of arguments to a panel concerning both the positive prescriptions of the General Agreement and the exceptions in Article XX:

“The Panel noted that the United States had argued that its direct embargo under the MMPA could be justified under Article XX(b) or Article XX(g), and that Mexico had argued that a contracting party could not simultaneously argue that a measure is compatible with the general rules of the General Agreement and invoke Article XX for that measure. ... the Panel considered that a party to a dispute could argue in the alternative that Article XX might apply, without this argument constituting *ipso facto* an admission that the measures in question would otherwise be inconsistent with the General Agreement. Indeed, the efficient operation of the dispute settlement process required that such arguments in the alternative be possible.”⁵⁴³

⁵³⁶Note 38 to DS21/R refers to the Panel Report on “United States - Section 337 of the Tariff Act of 1930”, adopted 7 November 1989, 36S/345, 385, para. 5.9.

⁵³⁷Note 39 to DS21/R refers to the Panel reports on “Canada - Administration of the Foreign Investment Review Act”, adopted 7 February 1984, 30S/140, 164, para. 5.20; and “United States - Section 337 of the Tariff Act of 1930”, adopted 7 November 1989, 36S/345, 393 para. 5.27. “

⁵³⁸DS21/R (unadopted), 39S/155, 197, para. 5.22. Note 40 to this sentence in DS21/R refers to *e.g.*, the panel report on ‘EEC - Regulation of Parts and Components’, L/6657, adopted 16 May 1990, 37S/132, para. 5.11.

⁵³⁹DS23/R, adopted on 19 June 1992, 39S/206, 282, para. 5.41.

⁵⁴⁰L/768, adopted on 30 November 1957, 6S/55, 61, para. 13.

⁵⁴¹DS23/R, adopted 19 June 1992, 39S/206, 284, para. 5.44.

⁵⁴²GPR/DS.2/R, adopted on 13 May 1992, para. 4.5.

⁵⁴³DS21/R (unadopted), 39S/155, 197, para. 5.22.

(4) *Protection of confidential information*

Paragraph 15 of the 1979 Understanding provides: "... Confidential information which is provided should not be revealed without formal authorization from the contracting party providing the information". Paragraph 6(iv) of its Annex on customary practice provides: "... Written memoranda submitted to the panel have been considered confidential, but are made available to the parties to the dispute ...". See also provisions on protection of confidential information submitted to panels in the Tokyo Round agreements.⁵⁴⁴

9. *Participation by third contracting parties not party to the dispute*

Paragraph 15 of the 1979 Understanding provides that "Any contracting party having a substantial interest in the matter before a panel, and having notified this to the Council, should have an opportunity to be heard by the panel ...". Paragraph 6(iv) of the Annex thereto on customary practice notes: "... Panels have also heard the views of any contracting party having a substantial interest in the matter, which is not directly party to the dispute, but which has expressed in the Council a desire to present its views ...".

Section F(e) of the 1989 Improvements provides:

- "1. The interests of the parties to the dispute and those of other contracting parties shall be fully taken into account during the panel process.
- "2. Any third contracting party having a substantial interest in a matter before a panel, and having notified this to the Council, shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.
- "3. At the request of the third contracting party, the panel may grant the third contracting party access to the written submissions of the panel by those parties to the dispute which have agreed to the disclosure of their submission to the third contracting party".

At the December 1972 Council, when the Panel on "United Kingdom - Dollar Area Quotas" was established, it was noted that the panel would wish to hear from representatives of Jamaica, Trinidad and Tobago, and Cuba on this matter.⁵⁴⁵ The 1973 Panel Report in this case notes that besides the parties to the dispute, the Panel heard from and consulted with the delegations of the Commonwealth Caribbean countries and territories and Cuba, and received a submission from Israel.⁵⁴⁶ The 1978 Panel Report on "EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables" notes that "Australia, having requested Article XXIII:1 consultations with the EEC concerning the same measures, submitted a written presentation to the Panel outlining Australia's interest in the matter and supporting the United States allegation that these measures were not in accordance with the Community obligations under the GATT".⁵⁴⁷ These are the first recorded instances of third-party participation in panel proceedings. As noted in the 1989 Improvements, the recent practice has been to present in the panel report a complete record of the panel proceedings, including any third-party arguments.

At the June 1994 Council meeting, the Council agreed to the following practices to be applied in the future with respect to third-party participation in panels:

- "1. Delegations in a position to do so, should indicate their intention to participate as a third party in a panel proceeding at the Council session which establishes the panel. Others who wish to indicate a third party interest should do so within the next ten days.

⁵⁴⁴Agreement on Implementation of Article VI (Article 15:6), Agreement on Implementation of Article VII (Annex III para. 3), Agreement on Technical Barriers to Trade (Annex 3, para. 2), Agreement on Government Procurement (Article VII:9).

⁵⁴⁵C/M/83, p. 4.

⁵⁴⁶L/3843, adopted on 30 July 1973, 20S/230, 231, para. 3; L/3891, adopted on 30 July 1973, 20S/236, 237, para. 4.

⁵⁴⁷L/4687, adopted on 18 October 1978, 25S/68, 69, para. 1.4. The arguments presented by Australia are not recorded in the report.

- “2. Further to paragraph F(e) (3) of the Decision of 12 April 1989 (BISD 36S/61) and to the Decision of 22 February 1994 (L/7416), it is the understanding of the Council that third parties shall receive the submissions of the parties to the dispute to the first meeting of a panel established by the Council.”⁵⁴⁸

In 1983, as part of the agreement on terms of reference for the Panel on “EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region”, an understanding was also agreed which provided, *inter alia*, that “Given the special nature of this matter, in that the tariff treatment which is to be examined by the Panel is an element of Agreements entered into by the European Community with certain Mediterranean countries, it is expected that the Panel ... in setting up its own working procedures, will provide adequate opportunities for these countries to participate in the work of the Panel as appropriate.”⁵⁴⁹

At the Council meeting of 15 April 1987, the following Chairman’s proposal was made for an Understanding related to the terms of reference of the Panel on “Japan - Trade in Semi-conductors”:

“Given the special nature of the matter to be examined by the Panel, which is related to certain aspects of the arrangement between Japan and the United States concerning trade in semi-conductor products (L/6076), it is understood that in setting up its own working procedures, the Panel will provide adequate opportunity for the United States to participate in the work of the Panel as necessary and appropriate”.

The representative of the United States stated that his delegation “could reluctantly agree to the proposed formulation, provided that all contracting parties were clear on one point: ‘adequate opportunity to participate’ had to be interpreted by the Panel in the same way as this phrase was interpreted in an earlier dispute” [the Citrus dispute referred to directly above]. The representative of the EC stated that “it was up to the complaining country to decide on this matter, including what party was being complained against” and that the Community agreed with the interpretation which the United States wished to give to the Chairman’s proposal, including the reference to the earlier dispute.⁵⁵⁰ The representative of Canada “viewed the US request to participate in the Panel as unique and did not want to see such a request become an established practice of the Council without further discussion and agreement among the contracting parties and suggested that this might be done within the Uruguay Round negotiating group on dispute settlement”. The Council agreed to the Chairman’s proposal.⁵⁵¹

During discussion of the dispute concerning “EEC - Member States’ Import Régimes for Bananas” concerning which a Panel was established at the February 1993 Council meeting, a number of banana-exporting countries in the process of accession to GATT requested the right to participate as observers in the work of the Panel. The Chairman pointed out that the right to participate in panel proceedings was reserved for contracting parties.⁵⁵² At the March 1993 Council meeting, the applicant parties in the dispute concerning “EEC - Member States’ Import Régimes for Bananas” noted that the parties to the dispute had agreed *inter alia* that the representatives of the Governments of Cameroon, Côte d’Ivoire, Jamaica, Madagascar and Senegal would be invited to all Panel meetings at which the parties were present, and stated that in view of the specific nature of this agreement, in which the parties had accepted conditions beyond those provided for in GATT dispute settlement procedures, this agreement did not create any obligations which could be invoked as a binding precedent in the future. Certain other delegations questioned this agreement.⁵⁵³

The 1993 Panel Report on “EEC - Member States’ Import Régimes for Bananas”, which has not been adopted, notes that the parties to the dispute had agreed (i) that representatives of the Governments of Cameroon, Côte d’Ivoire, Jamaica, Madagascar and Senegal (which had expressed in the Council their wish to participate) would be invited to all Panel meetings at which the parties were present; (ii) that these contracting

⁵⁴⁸C/COM/3, dated 24 June 1994; C/M/273.

⁵⁴⁹C/M/168, p. 5; L/5776, Report of the Panel (unadopted), para. 1.5; see also Council discussion at C/M/162, p. 13.

⁵⁵⁰C/M/208, p. 14.

⁵⁵¹*Ibid.*, p. 15.

⁵⁵²C/M/261.

⁵⁵³C/M/262, p. 15-16. See also DS38/R, the unadopted 1994 Panel Report on “EEC - Import Régime for Bananas”, on similar issues concerning participation in the panel process.

parties would have to make a submission if they were to attend Panel meetings and that submissions made by such contracting parties should be made in writing, or if made orally, would also be made available in writing; (iii) that the representatives of these contracting parties present at Panel meetings would receive all submissions of the parties; and (iv) that these same contracting parties would be invited by the Panel to speak as appropriate. In light of the above the Panel considered, in the interest of transparency among participants in the Panel process, that it would be reasonable to invite such countries to meetings of the Panel at which the parties were present. The Panel was of the view that this procedure should not be considered a precedent for future panels in light of the very special circumstances of this case. On 5 April 1993, the Panel received a letter from Belize, requesting formally that the Panel suspend its proceedings and with immediate effect request the parties to commence consultations on the issues raised by the complaining parties. Belize also requested that it be admitted as full participant in the Panel proceedings. The Panel informed Belize that the Panel had been established by the GATT Council in accordance with the 1966 Decision, the rules of which obliged the Panel to finish its work and present its findings within 60 days. It was, therefore, not in a position to accept Belize's request for suspension. As concerns the request for full participation in the proceedings, the Panel informed Belize that, on its own, the Panel was not authorized to accept the participation of any country in the Panel process, but that such participation could possibly be agreed between the parties to the dispute. Since the parties were not able to reach such an agreement in the short time available for consultations on this issue before the Panel proceedings commenced, the Panel informed Belize that it could not be admitted as a full participant in the proceedings of the Panel.⁵⁵⁴

Participation of this nature occurred as well in the 1993-94 panel proceeding on "EEC - Import Régime for Bananas". The 1994 Panel Report, which has not been adopted, notes that at the June 1993 Council meeting, representatives of Antigua and Barbuda, Barbados, Belize, Cameroon, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Jamaica, Madagascar, Senegal, St Lucia, St Vincent and the Grenadines, Suriname, Tanzania, Trinidad and Tobago and Uganda expressed their respective governments' wish to participate in the work of the Panel. While the Council took note of these statements, there was no consensus on such participation. Subsequently, the Panel considered, and the Parties agreed that, in the interest of transparency among contracting parties having a substantial interest in the trade of bananas, it would be reasonable to invite such countries to meetings of the Panel. The Panel, therefore, invited the representatives of the governments of Belize, Brazil, Cameroon, Côte d'Ivoire, Dominica, Dominican Republic, Jamaica, Madagascar, the Philippines, St Lucia, St Vincent and the Grenadines and Suriname to the Panel meetings at which the parties were present. Submissions by such contracting parties were to be made in writing, or if made orally, were to be made available in writing. The representatives of these contracting parties present at Panel meetings received all submissions of the parties. These same contracting parties were also invited by the Panel to make oral statements at the Panel meetings. The Panel, however, was of the view that this procedure should not be considered a precedent for future panels.⁵⁵⁵

See also the material above concerning "Arguments not raised by the applicant contracting party" and "defences not raised by the respondent contracting party".

10. Panel reports

Paragraphs 6(v)-(vii) of the 1979 Understanding Annex on customary practice provide that

"... Panel reports have normally set out findings of fact, the applicability of relevant provisions, and the basic rationale behind any findings and recommendations that it has made.

"The reports of panels have been drafted in the absence of the parties in the light of the information and the statements made.

"To encourage development of mutually satisfactory solutions between the parties and with a view to obtaining their comments, each panel has normally first submitted the descriptive part of its report to the

⁵⁵⁴DS32/R (unadopted), dated 3 June 1993, paras. 7-10.

⁵⁵⁵DS38/R, dated 11 June 1994, paras. 7-8.

parties concerned, and also their conclusions, or an outline thereof, a reasonable period of time before they have been circulated to the CONTRACTING PARTIES”.

See also the material starting at page 675 under the heading “the CONTRACTING PARTIES ... shall make appropriate recommendations ... or give a ruling”.

(1) *Dissenting opinions*

Paragraph 6(viii) of the 1979 Understanding Annex on customary practice provides that “... The opinions expressed by the panel members on the matter are anonymous and the panel deliberations are secret”. Only in a very few exceptional cases has a panel report referred to the existence of a dissenting opinion by a member of the Panel.⁵⁵⁶ During the discussion in the Committee on Subsidies and Countervailing Measures of the 1983 Panel Report on “EEC Subsidies on Export of Pasta Products”⁵⁵⁷, which sets out the dissenting opinion of one member of the Panel, it was stated that

“the existence of a dissenting opinion did not alter the Committee’s responsibilities under Articles 18:9 and 13:4 to consider the Panel report as soon as possible and, where the Committee concluded that an export subsidy was being granted in a manner inconsistent with the Code, to make recommendations to resolve the issue. There was nothing in the language of, or customary practice under, the GATT or Code which suggested that only unanimous panel reports could be acted upon”.⁵⁵⁸

(2) *Precedential effect of findings in panel reports with regard to later consideration of the same measures*

Very many panel reports have referred to and followed the interpretations of the General Agreement in other panel reports. However, on occasion panel findings applying legal rules to facts have not been followed.

For instance, the 1978 Panel Report on “EEC - Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables” examined the EEC’s minimum import price and associated additional security system for tomato concentrates, in relation to Article XI:2(c)(i) and (ii), and found, *inter alia*: “The Panel considered that tomato concentrate was perishable because after a certain time it would decline in quality and value. The Panel also considered that tomato concentrate could compete directly with fresh tomatoes insofar as a large number of end-uses were concerned. Therefore, the Panel concluded that tomato concentrate qualified as an ‘agricultural or fisheries product, imported in any form’ within the meaning of Article XI:2(c)”.⁵⁵⁹ However, the 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” found that tomato juice, paste and ketchup were not products with respect to which import restrictions could be maintained under Article XI:2(c).⁵⁶⁰

The 1978 Panel Report on “EEC - Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables” also examined the EEC’s supply management scheme for fresh tomatoes, and noted with respect to the requirements of Article XI:2(c) that “... the intervention system for fresh tomatoes did not qualify as a governmental measure which operated ‘to restrict the quantities of the like domestic product permitted to be marketed or produced’, or ‘to remove a temporary surplus of the like domestic product by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level’, within the meaning of Article XI:2(c)(i) and (ii)”.⁵⁶¹ The 1980 Panel Report on “EEC Restrictions on Imports of Apples from Chile” then found with regard to the EEC domestic supply management scheme on apples that “As regards XI:2(c)(i) ... The Panel considered that the EEC did restrict quantities of apples permitted to be marketed, through its system of intervention purchases by member States and

⁵⁵⁶See Panel Report on “EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables”, L/4687, adopted on 18 October 1978, 25S/68, 99, para. 4.9; 103, para. 4.14; 104, para. 4.16. Each of these paragraphs note the conclusions of the Panel and the contrary conclusions of one of its five members, but the overall conclusions under Article XXIII follow the earlier conclusions of the Panel; see 25S/107, para. 4.22.

⁵⁵⁷SCM/43, unadopted.

⁵⁵⁸SCM/M/18, p. 3.

⁵⁵⁹L/4687, adopted on 18 October 1978, 25S/68, 100, para. 4.10.

⁵⁶⁰L/6253, adopted on 2 February 1988, 35S/163, 240, para. 5.3.12.2.

⁵⁶¹L/4687, adopted on 18 October 1978, 25S/68, 102-103, para. 4.13.

compensation to producer groups for withdrawing apples from the market”.⁵⁶² The 1989 Panel Reports on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile” and “EEC - Restrictions on Imports of Apples - Complaint by the United States” then for a third time examined EEC measures for horticultural crops in relation to Article XI:2(c)(i). These Reports noted as follows:

“... In considering the facts and arguments relating to Article XI in particular, the Panel took note of the fact that a previous Panel, in 1980, had reported on a complaint involving the same product and the same parties as the present matter and a similar set of GATT issues. The Panel noted carefully the arguments of the parties concerning the precedent value of this Panel’s and other previous Panels’ recommendations, and the arguments on the legitimate expectations of contracting parties arising out of the adoption of Panel reports. The Panel construed its terms of reference to mean that it was authorized to examine the matter referred to it by Chile in the light of all relevant provisions of the General Agreement and those related to its interpretation and implementation. It would take into account the 1980 Panel report and the legitimate expectations created by the adoption of this report, but also other GATT practices and Panel reports adopted by the CONTRACTING PARTIES and the particular circumstances of this complaint. The Panel, therefore, did not feel it was legally bound by all the details and legal reasoning of the 1980 Panel report.”⁵⁶³

Both of the 1989 apple Reports also noted that the intervention system for horticultural crops had been examined in 1978 and in 1980 with opposite conclusions as regards consistency with Article XI:2(c). Each of the 1989 apple Reports provided that “While taking careful note of the earlier panel reports, the Panel did not consider they relieved it of the responsibility, under its terms of reference, to carry out its own thorough examination on this important point.”⁵⁶⁴ These Reports then found that “the EEC measures taken under the intervention system for apples did not constitute marketing restrictions of a type which could justify import restrictions under Article XI:2(c)(ii)”.⁵⁶⁵

At the July 1985 Council meeting, the United States requested that the Council, on behalf of the CONTRACTING PARTIES, apply the conclusions of the 1984 Report of the “Panel on Japanese Measures on Imports of Leather” to quantitative restrictions on leather footwear maintained by Japan, since “the same administrative and legal scheme was used to restrict imports of leather footwear as was used for leather”. Other delegations expressed “reservations regarding the proposal that one panel’s recommendation could be applied to another dispute; surely only a panel could determine whether the cases in question were totally identical”. The Council agreed to establishment of a panel under Article XXIII:2.⁵⁶⁶

The 1983 Panel Report on “United States - Imports of Certain Automotive Spring Assemblies” examined claims by Canada regarding an exclusion order issued by the U.S. International Trade Commission (ITC) under Section 337 of the Tariff Act of 1930, including arguments that the exception under Article XX(d) did not justify trade restrictive measures taken pursuant to Section 337 on two grounds: “(1) differential treatment of foreign products involving a separate adjudicating process was not ‘necessary’ to secure compliance with United States patent laws, and (2) the law with which compliance was sought (Section 337) was ‘inconsistent with the provisions of this agreement’, i.e. Article III of the GATT”.⁵⁶⁷ The Panel found that “the exclusion order issued by the ITC under Section 337 of the United States Tariff Act of 1930 was ‘necessary’ in the sense of Article XX(d) to prevent the importation and sale of automotive spring assemblies infringing the patent, thus protecting the patent holder’s rights and securing compliance with United States patent law.”⁵⁶⁸ The Panel Report was adopted “on the understanding that this shall not foreclose future examination of the use of Section 337 to deal with patent infringement cases from the point of view of consistency with Articles III and XX of the General Agreement”.⁵⁶⁹ The 1989 Panel Report on “United States - Section 337 of the Tariff Act of 1930” again examined the use of Section 337 in connection with patent enforcement and found that “the system of

⁵⁶²L/5047, adopted on 10 November 1980, 27S/98, 112, paras. 4.5-4.6.

⁵⁶³L/6491 and L/6513, both adopted on 22 June 1989, 36S/93 and 36S/135, at 36S/123-124 and 36S/159, paras. 12.1 and 5.1.

⁵⁶⁴L/6491 and L/6513, both adopted on 22 June 1989, 36S/93 and 36S/135, at 36S/127 and 36S/162, paras. 12.10 and 5.10.

⁵⁶⁵*Ibid.*, 36S/129, para. 12.17, 36S/165, para. 5.17.

⁵⁶⁶C/M/191, p.37-38, discussing communication from the United States at L/5826.

⁵⁶⁷L/5333, adopted on 26 May 1983, 30S/107, 120, para. 37.

⁵⁶⁸*Ibid.*, 30S/126, paras. 58, 60.

⁵⁶⁹C/M/168, p. 10.

determining allegations of violation of United States patent rights under Section 337 of the United States Tariff Act cannot be justified as necessary within the meaning of Article XX(d) so as to permit an exception to the basic obligation contained in Article III:4 of the General Agreement”.⁵⁷⁰

In discussion at the March 1991 Council meeting of Brazil’s request for a Panel on “United States - Denial of Most-favoured-nation Treatment as to Imports of Non-rubber Footwear from Brazil” the representative of the United States stated “that this matter had already been adjudicated” against Brazil under the Subsidies Code in October 1988 and that “re-adjudication would violate the fundamental jurisprudential principle of *res judicata* - a final decision on a matter constituted an absolute bar to subsequent action thereon”. He also said that “to permit a panel to be established in the present instance would set a bad precedent, namely that if a contracting party lost a panel case, all it needed to do was block adoption and seek a second panel in another forum. He reiterated his Government’s position that the earlier Panel had taken all of Brazil’s arguments into account in reaching its decision, as had been made clear by its Chairman”.⁵⁷¹ The panel was established at the following Council meeting.⁵⁷²

In the panel proceeding in 1992 concerning “Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies”, certain of the measures concerned were measures which the 1988 Panel on “Canada - Import, Distribution and Sale of Alcoholic Drinks by Provincial Marketing Agencies”⁵⁷³ had found were inconsistent with Articles II:4 and XI:1 of the General Agreement, and specifically, discriminatory practices relating to listing, mark-ups and points of sale. The United States requested that, with respect to these practices, the 1992 Panel make its findings and recommendations before considering the status under the General Agreement of the other practices covered by its 1992 complaint, and stated that Canada had not fulfilled its obligation “to take such reasonable measures as may be available to it to ensure observance of the provisions of Articles II and XI of the General Agreement by the provincial liquor boards in Canada”. Canada argued that the United States could not assert rights automatically under the 1988 Panel report since it had not been a complaining party, and that substantial change had occurred since 1988. The Panel Report contains the following Decision of the Panel on this issue.

“The Panel gave careful consideration to the United States’ request for expedited proceedings, i.e. for the Panel to make an immediate determination that benefits accruing to the United States under the General Agreement had been nullified or impaired as a result of the practices maintained by the Canadian provincial marketing agencies and examined by the 1988 Panel. In 1988, the Panel had indeed found that certain provincial practices were contrary to the provisions of the General Agreement. Following its recommendation, the CONTRACTING PARTIES had requested Canada to take ‘such reasonable measures as may be available to it to ensure observance of the provisions of Articles II and XI of the General Agreement by the provincial liquor boards in Canada’. However, as noted in paragraphs 4.21 and 4.25 of the Panel’s report, it had not made a detailed factual analysis of the practices complained against. The present Panel had now been informed by Canada that changes had occurred with respect to most of the matters dealt with by the Panel in 1988. It, therefore, believed that, before it could make the immediate determination sought by the United States, it would have to make this detailed factual analysis before it could consider whether the Government of Canada had, since 1988, taken such reasonable measures as were available to it to have the provincial agencies bring their practices into line with the 1988 Panel’s findings. In other words, it could not proceed on an expedited basis with respect to the measures addressed in the 1988 Panel report. Under these circumstances, it would accede to the request made by the United States, namely to issue findings and recommendations jointly concerning any and all Canadian provincial liquor board practices which were identified in the submissions of the United States.”⁵⁷⁴

⁵⁷⁰L/6439, adopted on 7 November 1989, 36S/345, 393-396, para. 5.35; see further under Article XX.

⁵⁷¹C/M/248, p. 10; reference is to Report of Panel under Committee on Subsidies and Countervailing Measures, on “United States - Countervailing Duties on Non-rubber Footwear from Brazil”, SCM/94, dated 4 October 1989, unadopted.

⁵⁷²C/M/249, p. 23-25.

⁵⁷³L/6304, adopted on 22 March 1988, 35S/37.

⁵⁷⁴DS17/R, adopted on 18 February 1992, 39S/27, 37, para. 3.4.

(3) Legal nature of panel reports and precedential nature of panel interpretation of GATT provisions

The 1979 Understanding provides in paragraph 16 that “The function of panels is to assist the CONTRACTING PARTIES in discharging their responsibilities under Article XXIII:2”. Paragraph 3 of the Annex thereto provides further that “The function of a panel has normally been to review the facts of a case and the applicability of GATT provisions and to arrive at an objective assessment of these matters.” Paragraph (x) of the 1982 Ministerial Decision provides that “It is understood that decisions in this process [of dispute settlement] cannot add to or diminish the rights and obligations provided in the General Agreement”.

In the Review Session Working Party on Organizational and Functional Questions in 1954-55 the text of an Agreement on the Organization for Trade Cooperation was agreed upon. Article 3 of this Agreement on “Functions” provided in part that “no decision or other action of the Assembly or any subsidiary body of the Organization shall have the effect of imposing on any Member any new obligation which the Member has not specifically agreed to undertake”. In this connection, the Report of the Working Party notes that “It was ... agreed that an obligation arising from the operation or interpretation of a specific provision of the General Agreement ... including an interpretation that a particular obligation thereunder had become applicable, would not be the imposition of a ‘new obligation’ within the meaning of this paragraph”.⁵⁷⁵ See also generally the material under Article XXV:1 on interpretation of the General Agreement.

In Council discussion in 1981 on the Panel Report on “Spain - Measures concerning Domestic Sale of Soyabean Oil,” the United States representative stated that “There was ... [an] aspect to any panel report that was perhaps more important than the resolution of a particular dispute: panel reports, explicitly and of necessity, interpreted Articles of the General Agreement. He said that when the Council adopted a report, those interpretations became GATT law. His delegation could not agree to the adoption of this report because it interpreted important GATT provisions in a manner that would allow protectionist actions contrary to the language, history and tradition of the provisions in question ...”.⁵⁷⁶ This Panel Report was noted and not adopted; see below at page 762.

During the discussion at the February 1984 on the adoption of the Panel Report on “Canada - Administration of the Foreign Investment Review Act”,⁵⁷⁷ the representative of India, supported by the delegations of Brazil, Chile, Pakistan, the Philippines, Colombia, Nicaragua and Peru, stated India’s view “that the Panel’s report could not be taken to provide an opening for the introduction of new themes, such as investments, in the GATT. His delegation also emphasized that the dispute concerned two developed contracting parties. Adoption of the report could not in any way contribute to the evolution of case law applying to less developed contracting parties. The Panel’s report had acknowledged in its paragraph 5.2 that in disputes involving less developed contracting parties, full account should be taken of the special provisions in the General Agreement and dispensations relating to such countries, such as Article XVIII:C. Thus it was clear that the provisions and arguments invoked against Canada in this case could not be legitimately invoked against less developed contracting parties ...”.⁵⁷⁸

At the February 1988 Council meeting, during consideration of adoption of the Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”,⁵⁷⁹ the representative of the EC, supporting adoption of the report, stated that “The report made clear that the Panel’s findings were limited to the specific measures under examination”.⁵⁸⁰

At the same Council meeting in February 1988, during consideration of adoption of the Panel Report on “United States - Customs User Fee”, the representative of the US, in supporting adoption of the report, stated that “A number of other contracting parties maintained ad valorem user fees, most of which were considerably higher than the US fee. ... As the United States implemented its own conversion to a transaction-based fee system, it would be inquiring into the progress of other countries maintaining ad valorem user fees in bringing

⁵⁷⁵L/329, adopted on 28 February, 5 and 7 March 1955, 3S/231, 235, para. 9(e).

⁵⁷⁶C/M/152, page 8; concerning this matter see further at page 762 below.

⁵⁷⁷L/5504, adopted on 7 February 1984, 30S/140.

⁵⁷⁸C/M/174, p. 16.

⁵⁷⁹L/6253, adopted on 2 February 1988, 35S/163 (adoption date appearing in BISD is incorrect).

⁵⁸⁰C/M/217, p. 20.

these fee systems into conformity with Article VIII of the General Agreement as interpreted by this Panel report. His delegation hoped and expected that formal GATT dispute settlement procedures would not be necessary".⁵⁸¹ The representative of Hong Kong, which had appeared as a third party in the panel proceeding supporting the use of systematic devices for the collection of user fees whether on a flat rate or an ad valorem basis, "noted that the scope of the report was limited to the GATT consistency of the US customs user fee and that the findings should be interpreted in that light".⁵⁸² In Council discussions in 1991 on the implementation of this Panel Report, the representative of the United States stated "that its customs user fee had been revised to address the Panel's findings and recommendations ... and ... met the criteria of Article VIII ... The United States also hoped that other contracting parties currently applying customs fees substantially identical to the US fee, as it had been prior to the changes mentioned, would also alter their own fees to bring them into conformity with Article VIII".⁵⁸³

At the October 1989 Council meeting, the representative of Korea stated that his government could not agree at that time to adoption of the Panel reports on the complaints of Australia, New Zealand and the United States on "Republic of Korea - Restrictions on Imports of Beef" because these reports "were not limited to Korea's beef import régime only, but would, once adopted, constitute a precedent with regard to the invocation of Article XVIII:B by a number of developing contracting parties".⁵⁸⁴

A request for consultations in 1989 by the EEC concerning "Chile - Internal Taxes on Spirits" states that "The Government of Chile levies an additional sales tax of 70% on imported whisky, compared with the rate of 25% for pisco. In the view of the European Communities this situation constitutes a breach of Chile's obligations under Article III:2 ... Whisky and pisco, while they may not be 'like products', are directly competitive or substitutable products, and in this connection the panel on Japanese customs duties, taxes etc. on alcoholic drinks (L/6216) has made very clear findings and constitutes a precedent applicable in the present instance to Chilean taxation of spirits".⁵⁸⁵

See also the material at page 760 on treatment of the 1991 Panel Report on "United States - Restrictions on Imports of Tuna". See also the material above concerning "recommendations" under Article XXIII:2.

(4) Consideration and action on panel reports

(a) Consideration of panel reports

The 1979 Understanding provides in paragraph 21 that "Reports of panels and working parties should be given prompt consideration by the CONTRACTING PARTIES. The CONTRACTING PARTIES should take appropriate action on reports of panels and working parties within a reasonable period of time. If the case is one brought by a less-developed contracting party, such action should be taken in a specially convened meeting, if necessary". Paragraph (vii) of the 1982 Ministerial Decision provides that "Reports of panels should be given prompt consideration by the CONTRACTING PARTIES. Where a decision on the findings contained in a report calls for a ruling or recommendation by the Council, the Council may allow the contracting party concerned a reasonable specified time to indicate what action it proposes to take with a view to the satisfactory settlement of the matter, before making any recommendation or ruling on the basis of the report". Paragraph G of the 1989 Improvements provides:

"1. In order to provide sufficient time for the members of the Council to consider panel reports, the reports shall not be considered for adoption by the Council until thirty days after they have been issued to the contracting parties.

⁵⁸¹C/M/217, p. 15.

⁵⁸²*Ibid.*, p. 16.

⁵⁸³C/M/248, p. 8. See also L/6741 (US notification of "a revision of the U.S. customs user fee, in response to the panel report adopted on February 2, 1988).

⁵⁸⁴C/M/236.

⁵⁸⁵DS9/1, communication dated 31 October 1989.

“2. Contracting parties having objections to panel reports shall give written reasons to explain their objections for circulation at least ten days prior to the Council meeting at which the panel report will be considered.

“3. The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the Council, and their views shall be fully recorded ...

“4. The period from the request under Article XXII:1 or Article XXIII:1 until the Council takes a decision on the panel report shall not, unless agreed to by the parties, exceed fifteen months. The provisions of this paragraph shall not affect the provisions of paragraph 6 of Section F(f)”.

The Panel Report in the recourse by Mexico to Article XXIII:2 on “United States - Restrictions on Imports of Tuna” was circulated on 3 September 1991. The parties to the dispute then requested that the report not be placed on the agenda of the next or subsequent Council meetings. At the February 1992 Council meeting, many contracting parties nevertheless made statements supporting adoption of this Panel Report.⁵⁸⁶ At the March 1992 Council meeting, at which the Report was on the agenda at the request of the EC, the two parties to the dispute discussed measures taken by them toward a solution of the dispute through a bilateral agreement to limit incidental dolphin mortality in tuna fishing in the Eastern Tropical Pacific Ocean. The representative of the United States

“noted that this was the first time that a contracting party not party to a dispute had called for adoption of a panel report by placing it on the Council’s agenda. The United States believed that this was not appropriate and that it would fundamentally change the customary role of third parties in the GATT dispute settlement process. In fact, in the United States’ view, there was no basis in the GATT for such a request. It was perhaps important to note that according to past practice under the GATT, a panel report served only to define, for purposes of the particular dispute, the obligations of the contracting parties that were parties to the dispute. Prior to the adoption of the April 1989 improvements to the GATT dispute settlement rules and procedures, the United States had sought to put forward the position that, upon adoption, panel reports should be treated as a binding interpretation of GATT rules binding upon and applying to all contracting parties. That proposal had been vigorously opposed by many contracting parties, not least of which was the Community, which had maintained that adoption of a report did not constitute a legal precedent and that panel reports had no precedential value with respect to non-parties In the absence of such an understanding among contracting parties, he would note that, in the United States’ view, this report was not on the agenda of the Council for adoption at the present meeting, and that there would be no support from his delegation for adoption”.⁵⁸⁷

The EC representative said in response that “the purpose of the debate at the present meeting had not been to define whether or not a third party had the right to request adoption of a panel report, and that the Community was not asking to innovate in this sense. Indeed, the reason why the Community had had recourse to its own Article XXIII:1 proceedings was precisely because this was an area where there was perhaps some doubt”.⁵⁸⁸

In discussion at the June 1992 Council meeting of the EC’s request for a panel with regard to “United States - Restrictions on Imports of Tuna - Recourse by the EC”, “the Chairman reminded Council members that the adoption of the Panel report on Mexico’s complaint was not the subject of discussion under this agenda item. That report had been discussed at earlier Council meetings and it was clear that as long as the two parties concerned did not want that report to be adopted, it could not be so done”.⁵⁸⁹

⁵⁸⁶C/M/254, p. 21-35

⁵⁸⁷C/M/255, p. 13.

⁵⁸⁸*Ibid.*

⁵⁸⁹C/M/257, p. 34.

(b) Procedure for adoption of panel reports

The Decision of the CONTRACTING PARTIES establishing the Council in 1960 provided that the Council would “consider matters arising between sessions of the CONTRACTING PARTIES which require urgent attention, and to report thereon to the CONTRACTING PARTIES with recommendations as to any action which might appropriately be taken by them at the next regular session. ...”. Accordingly, from 1960 until 1968, decisions on matters under Article XXIII:2, including the adoption of panel reports, were made by the CONTRACTING PARTIES, acting on recommendations agreed by the Council.⁵⁹⁰ In 1968 the CONTRACTING PARTIES agreed to expand the Council’s authority to cover “all matters of concern to the CONTRACTING PARTIES other than final decisions under paragraph 5 of Article XXV”.⁵⁹¹ Since that time, panel reports have been adopted by the Council (acting for the CONTRACTING PARTIES) or have been adopted at the annual Session of the CONTRACTING PARTIES when this would afford more timely action. A general footnote to paragraph F of the 1989 Improvements notes that references to the Council in sections F through I thereof “are without prejudice to the competence of the CONTRACTING PARTIES, for which the Council is empowered to act in accordance with normal GATT practice”.

At the March 1981 Council meeting, in concluding the debate on adoption of the Director-General’s report on working party discussions between the CONTRACTING PARTIES and the European Communities under Article XVI:1 of the possibility of limiting EEC subsidization of sugar exports, and on a draft decision proposed by Australia, the Council Chairman noted that

“in matters of this kind the Council normally proceeded on the basis of consensus. In his view, consensus was understood in GATT to mean that no delegation maintained its objections to a text or attempted to prevent its adoption. He felt that such a consensus did not presently exist in the Council on this matter. He noted that the ten contracting parties in the European Communities were not in agreement with the draft decision as presented by Australia. At the same time, however, he was also very conscious of the weight of opinion expressed by the delegations which had supported either the Australian text as such or its general sense; and he concluded that there was a general desire to arrive at a decision at this meeting. ...”⁵⁹²

A compromise text was adopted providing for a later review by the Council upon further notification of the EEC sugar regulations.⁵⁹³ See also references to this matter above at pages 722 and 726.

In Council discussion in 1982 on the follow-up on the Panel Report on “United States Tax Legislation (DISC)”, which was adopted in December 1981, the representative of Canada “stated that it was not GATT practice to allow a contracting party maintaining an offending measure to block a Council recommendation addressed to it”. This statement was supported by the EC representative who said “that in GATT practice it was not usual that one contracting party should block a Council recommendation calling for it to come into line with the provisions of the General Agreement”.⁵⁹⁴

Paragraph (x) of the 1982 Ministerial Decision provides that “The CONTRACTING PARTIES reaffirmed that consensus will continue to be the traditional method of resolving disputes; however, they agreed that obstruction in the process of dispute settlement shall be avoided”.⁵⁹⁵ Paragraph G(3) of the 1989 Improvements provides: “... The practice of adopting panel reports by consensus shall be continued, without prejudice to the GATT provisions on decision-making which remain applicable. However, the delaying of the process of dispute settlement shall be avoided”. See also the material on consensus and decisionmaking by the Council and the CONTRACTING PARTIES, in the chapter of this Index on Institutions.

⁵⁹⁰See, e.g., reference to adoption by the CONTRACTING PARTIES of Panel reports, and recommendations made by the CONTRACTING PARTIES to contracting parties, on “Exports of Potatoes to Canada”, “French Import Restrictions”, and “Uruguayan Recourse to Article XXIII”, at 11S/55-56; each of these decisions expressly authorizes the Council to deal with certain follow-up issues.

⁵⁹¹SR.25/9, p. 176-177.

⁵⁹²C/M/146, p. 20.

⁵⁹³*Ibid.*, p. 20-21.

⁵⁹⁴C/M/160, p. 5, 8.

⁵⁹⁵The footnote to this sentence provides: “This does not prejudice the provisions on decision making in the General Agreement.”

(c) *Adoption of panel reports subject to conditions*

At the Forty-third Session of the CONTRACTING PARTIES in December 1987, in connection with consideration of the Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”⁵⁹⁶, the representative of Japan noted his government’s strong objections to some parts of the Panel Report, and stated that “Since 12 different items were at issue, it would not have been unnatural to set up 12 separate panels. There was no logical need to treat the 12 items in one set ... Japan could accept adoption of the Panel Reports except the parts concerning certain dairy products and starch, and state-trading”.⁵⁹⁷ Nine other delegations spoke supporting adoption of the report in its entirety. The US representative stated that “Legally, GATT treated panel reports as units; parties could not pick and choose which findings to accept. Partial adoption of a report was unprecedented in GATT. The dispute settlement process would be meaningless if the defendant could pick and choose for adoption only the favourable parts of a panel’s report”.⁵⁹⁸

At the next Council meeting, on 2 February 1988, the representative of Japan noted that “Regrettably, many contracting parties had opposed Japan’s position on the grounds that partial adoption of a panel report should not be established as a precedent ... As a contracting party, Japan fully recognized the importance of assuring the effective functioning of dispute settlement procedures, the basic structure of which was conciliatory rather than adjudicatory in nature. Japan recognized the importance of expeditious adoption of the report in its entirety in order to ensure the effective functioning of dispute settlement procedures. He said that, therefore, Japan would not oppose a consensus to adopt the report in its entirety at the present meeting, provided the Council took note of and put on record his statement in its entirety”.⁵⁹⁹ The representative of Uruguay stated that “... acceptance of the report as a whole implied acceptance of all elements contained in it, particularly the conclusions, which Uruguay hoped would be respected in accordance with the provisions of the General Agreement”.⁶⁰⁰ The report was adopted.

In some instances a panel report has been adopted subject to an understanding. For instance, the four Panel Reports on “Income Tax Practices Maintained by France”, “Income Tax Practices Maintained by Belgium”, “Income Tax Practices Maintained by the Netherlands”, and “United States Tax Legislation (DISC)” were adopted in 1982 subject to an understanding regarding interpretation of the findings; adoption was followed by a Chairman’s statement.⁶⁰¹ The Panel Report on “United States - Imports of Certain Automotive Spring Assemblies” was adopted in 1983 subject to an understanding that its adoption “shall not foreclose future examination of the use of Section 337 to deal with patent infringement cases from the point of view of consistency with Articles III and XX of the General Agreement”.⁶⁰² Section 337 was later examined by the Panel on “United States - Section 337 of the Tariff Act of 1930”, the report of which was adopted in 1989.

(d) *Action on a panel report other than adoption*

In 1981, the Council considered the Panel Report on “Spain - Measures concerning Domestic Sale of Soyabean Oil”. The representative of the United States said that his government, “while disappointed with the result in this case, was not asking the Council to undertake a new examination of the particular Spanish measures that were at issue, not was it asking the Council to make findings or recommendations to Spain in this proceeding ... this was not a case where a party was seeking to block adoption of a report against its own practices. In the view of his authorities, adoption of the Report could contribute nothing more to the settlement of that particular dispute, but would only establish damaging precedents for the interpretation of GATT provisions. The United States believed that the Council should take note of the Panel Report and of the comments made, including the written comments previously submitted”.⁶⁰³ In the ensuing discussion many contracting parties criticized the legal findings and conclusions in the Panel Report and their implications for

⁵⁹⁶L/6253, adopted on 2 February 1988, 35S/163.

⁵⁹⁷SR.43/4, p. 2.

⁵⁹⁸*Ibid.*, p. 7.

⁵⁹⁹C/M/217, p. 17; statement of Japan also appears in C/W/538.

⁶⁰⁰*Ibid.*, p. 21.

⁶⁰¹Reports at L/4423, 23S/114; L/4424, 23S/127; L/4425, 23S/137; L/4422, 23S/98; adoption at C/M/154 p. 5-9; understanding and Chairman’s statement in L/5271.

⁶⁰²L/5333, adopted on 26 May 1983, C/M/168, p. 10-12.

⁶⁰³C/M/152, p. 8-10.

future interpretation of Article III. At the end of the debate the Council took note of the Panel Report and of the statements made by the parties and in the Council.⁶⁰⁴

During this debate, “the Chairman of the Council said that, generally speaking, panel reports had been adopted, although there were five exceptions to this practice, the Council having adopted one report in principle and having taken note of four other reports. Generally speaking, it was for the Council itself to decide in each case how to proceed”.⁶⁰⁵

At the May 1990 Council meeting, in discussion of the Panel Report on “United States - Restrictions on the Importation of Sugar and Sugar-containing Products Applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions”⁶⁰⁶ the EEC suggested that the Council take note of the Panel report, including its conclusions. The Special Adviser to the Director-General, in response to an inquiry by the EEC, stated that “to his knowledge there had been only one such precedent where the Council had taken note of a panel report, and that this had involved a dispute between the United States and Spain regarding certain Spanish regulations concerning vegetable oil.”⁶⁰⁷ The United States had not agreed to adoption of the report and its opinion had been shared by many other contracting parties”. The representative of the United States stated that “his own delegation’s research had shown that 24 contracting parties in [the Soyabean Oil] case had expressed fundamental disagreement with the Panel’s reasoning and had therefore urged that the Council do no more than note the report. In the present dispute, it was clear that 23 other contracting parties had not joined the Community in questioning the report and arguing that it not be adopted; nor had ten, or even five -- in fact, none had done so”.⁶⁰⁸ The report was adopted on 7 November 1990.

11. Disputes involving developing contracting parties

Paragraph 5 of the 1979 Understanding provides that “During consultations, contracting parties should give special attention to the problems of less-developed contracting parties”. Paragraph 6(ii) of the 1979 Understanding Annex on customary practice provides that “The practice has been to appoint a [panel] member or members from developing countries when the dispute is between a developing and a developed country”.

Concerning disputes in which a developing contracting party is the applicant party and a developed country is the respondent party, see the 1966 Procedures and paragraph 8 of the 1979 Understanding regarding availability of the good offices of the Director-General in such disputes if requested by the developing contracting party.

Concerning disputes involving measures taken by developing contracting parties, see paragraph F(f)7 of the 1989 Improvements providing extension of time periods for consultations and requiring that sufficient time be provided in examining complaints against such contracting parties for them to prepare and present argumentation.

Paragraph H.1 of the 1989 Improvements provides that “While the Secretariat assists contracting parties in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing contracting parties. To this end, the Secretariat shall make available a qualified legal expert within the Technical Co-operation Division to any developing contracting party which so requests. This expert shall assist the developing contracting party in a manner ensuring the continued impartiality of the Secretariat”.

See also paragraphs 21 and 23 of the 1979 Understanding concerning action by the CONTRACTING PARTIES on reports of panels and working parties, and paragraph I.4 of the 1989 Improvements.

⁶⁰⁴L/5142, dated 17 June 1981, noted by the Council on 3 November 1981; C/M/152, p. 7-19.

⁶⁰⁵C/M/152, p. 13.

⁶⁰⁶L/6631, adopted on 7 November 1990, 37S/228.

⁶⁰⁷Spain - Measures concerning domestic sale of soyabean oil (L/5142 + Corr.1). For Council discussion and action on this report, see C/M/149, 151 and 152.

⁶⁰⁸C/M/241

E. SPECIAL PROCEDURES FOR SETTLEMENT OF DISPUTES UNDER THE GATT

1. 1966 Decision on Procedures to be followed in consultations between a less-developed and a developed contracting party

(1) *Background and interpretation*

The text of the 1966 Procedures appears above at page 641.

The 1966 Procedures emerged from proposals first put forward in the Committee on the Legal and Institutional Framework of GATT during the negotiation of Part IV of the General Agreement. After the conclusion of negotiations on Part IV, the Committee on Trade and Development was established and was given the task of pursuing outstanding proposals for the amendment of Article XXIII, in the light of Part IV, to take account of difficulties experienced by less-developed countries in using that Article. These discussions took place in 1965-66 in the Committee's Ad Hoc Working Group on Legal Amendments, and are summarized in the Committee's 1966 Report.⁶⁰⁹ The 1966 Report notes that the decision text "embodied the agreement reached in the Committee on procedures for more speedy and efficient use of the provisions of Article XXIII by less-developed contracting parties".⁶¹⁰ The Report also records that "The Committee agreed that the phrase 'shall consider what measures' in paragraph 10 of the Decision 'is intended to mean that the CONTRACTING PARTIES shall consider the matter with a view to finding appropriate solution'.⁶¹¹ In this connection, the Report also notes that the Chairman of the Committee, in presenting the draft decision to the CONTRACTING PARTIES for adoption, asked to be placed on record the following understanding regarding its adoption:

"1. In consultations to be carried out by the Director-General under paragraph 3 of the draft decision, the Director-General would, in addition to the entities mentioned, be free to consult such experts as he considered would assist him in studying the facts and in finding solutions.

"2. With respect to paragraph 6 of the draft decision, the CONTRACTING PARTIES may provide more particular terms of reference for any such panel in order to assist them to assess the relative impact of the measures complained of on the economies of the contracting parties concerned and to consider the adequacy of any measures which those contracting parties would be prepared to take to remedy the situation. In establishing such particular terms of reference, the CONTRACTING PARTIES or the Council should bear in mind the desirability of having such panels appraise, in particular, the following elements:

"(a) the damage incurred through the incidence of the measures complained of upon the export earnings of the export earnings and economic effort of the less-developed contracting party;

"(b) the compensatory or remedial measures which the contracting party whose measures are complained of would be prepared to take to make good the damage inflicted by their application;

"(c) the effects of such measures as the injured contracting party would be prepared to take in relation to the contracting party whose measures have nullified or impaired the benefits deriving from the General Agreement which the former contracting party is entitled to expect."⁶¹²

In this connection see also paragraphs 21 and 23 of the 1979 Understanding and paragraph I.4 of the 1989 Improvements.

Paragraph 7 of the 1979 Understanding provides that "The CONTRACTING PARTIES reaffirm that the customary practice includes the procedures for the settlement of disputes between developed and less-developed countries adopted by the CONTRACTING PARTIES in 1966 ... and that these remain available to less-developed

⁶⁰⁹L/2614, adopted on 5 April 1966, 14S/129, 139-140, paras. 41-47; see also interim report of the Ad Hoc Group, COM.TD/F/4; and first report of the Committee, L/2410, adopted on 25 March 1965, 13S/77, 83-84, paras. 27-32.

⁶¹⁰*Ibid.*, 14S/140, para. 44.

⁶¹¹*Ibid.*, 14S/140, para. 47.

⁶¹²*Ibid.*, 14S/140-141, at footnote 2.

contracting parties wishing to use them". Paragraph 2 of its Annex on customary practice describes the 1966 Procedures. Paragraph 4 of the 1989 Improvements provides that "All the points set out in this Decision shall be applied without prejudice to any provision on special and differential treatment for developing contracting parties in the existing instruments on dispute settlement including the CONTRACTING PARTIES' Decision of 5 April 1966".

The applicability of the 1966 Procedures was discussed at the March 1993 meeting of the Council.⁶¹³

(2) *Invocations of good offices under 1966 Procedures*

Paragraphs 1 through 3 of the 1966 Procedures, which provide for "good offices" by the Director-General, have been invoked in the following instances.

- In May 1978, after bilateral consultations between Chile and the EEC relating to EEC refunds on exports of malted barley did not arrive at a mutually satisfactory solution, "the matter was referred by Chile to the Director-General under the Decision of 5 April 1966 so that, acting in an *ex officio* capacity, the Director-General might use his good offices with a view to facilitating a solution".⁶¹⁴
- In 1979, India invoked the 1966 Procedures with regard to Japanese import restrictions on leather. The parties agreed to a mutually satisfactory solution in bilateral consultations initiated by the GATT Secretariat.
- In 1986, Mexico requested consultations with the United States under Article XXIII:1 concerning taxes on petroleum levied under the Superfund Amendments and Reauthorization Act of 1986; the matter was referred to the Director-General on 13 January 1987, a panel was established on 4 February 1987 which consolidated the complaints of Mexico, Canada and the EC, and the panel submitted a report to the parties to the dispute on 27 May 1987.⁶¹⁵
- In November 1987, Brazil requested consultations with the United States concerning the disruption of trade caused by an announcement of intended tariff increases on imports from Brazil and prohibitions of imports of certain computers from Brazil. In December 1987 Brazil requested the good offices of the Director-General.⁶¹⁶
- In September 1992, Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela requested the good offices of the Director-General "in order to facilitate a satisfactory solution to the dispute over measures to restrict the import of bananas currently applied by some member States of the EC". These measures had been the subject of consultations under Article XXII:1.⁶¹⁷ At the beginning of December 1992 the Director-General suggested, and the parties agreed, that the formal good offices procedure be suspended until 15 January 1993, during which time the Director-General would pursue informal consultations. However, the informal consultations were terminated on 13 January 1993 and the two-month period for their completion started running again as of 14 January, and terminated on 10 February 1993.⁶¹⁸
- At the February 1993 Council meeting, Brazil requested the good offices of the Director-General in relation to its dispute with the United States concerning the application of a bilateral textile agreement concluded under the Arrangement Regarding International Trade in Textiles.⁶¹⁹

⁶¹³C/M/262, p. 18-23.

⁶¹⁴C/M/125. The complaint was withdrawn following consultations between the two parties with the participation of secretariat representatives; see L/5623, para. 38.

⁶¹⁵L/6093 (request for consultations), L/6114 (referral), Panel Report on "United States - Taxes on Petroleum and Certain Imported Substances", L/6175, adopted on 17 June 1987, 34S/136.

⁶¹⁶L/6274 dated 27 November 1987 (Article XXIII:1 request), L/6274/Add.1 (request for good offices).

⁶¹⁷DS32/3. See also DS32/8.

⁶¹⁸SR.48/2; C/M/261, p. 34.

⁶¹⁹C/M/261, p. 11-16; see also C/M/262, p. 5-6.

See also paragraph 8 of and paragraph 2 of the Annex to the 1979 Understanding, and paragraph (i) of the 1982 Ministerial Decision.

(3) Application of paragraphs 4 and 5 of the 1966 Procedures

Paragraphs 4 and 5 of the 1966 Procedures, which provide for submission of a report by the Director-General to the Council and appointment of a panel of experts, were invoked for the first time in February 1993 in connection with the dispute between Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela on the one hand and the EC on the other, concerning restrictions on imports of bananas applied by member States of the EC. The five applicant contracting parties requested the Director-General to refer the matter to the Council.⁶²⁰ In discussion of this matter at the 10 February 1993 meeting of the Council, the Chairman said that although the good offices process would not end until midnight that day, the Director-General was prepared to present his formal report to the Council now, at the request of the Latin American banana-exporting countries.⁶²¹

Upon presentation of the report by the Director-General, the Chairman noted that under paragraph 5 of the 1966 Procedures, the Council had to proceed to establish a panel upon receipt of the Director-General's report. The Council agreed to establish a panel in principle, on the understanding that the sixty-day period for the submission of its findings would only begin once its terms of reference and composition had been agreed, and that this would not be taken as a precedent for the interpretation of the 1966 Procedures. Furthermore, as provided in the 1989 Improvements, the panel would have standard terms of reference unless the parties to the dispute agreed otherwise within the following 20 days. It was noted by one delegation that nothing that was agreed at that meeting would constitute an interpretation of general application regarding the conjunction between the 1989 and 1966 procedures.⁶²² The Panel Report on "EEC - Member States' Import Régimes on Bananas", which has not been adopted, was submitted to the parties to the dispute on 19 May 1993 and was issued on 3 June 1993.⁶²³

2. Good offices and conciliation

The 1966 Procedures refer to referral of certain matters "to the Director-General, so that, acting in an *ex officio* capacity, he may use his good offices with a view to facilitating a solution"; see above. However, "good offices" are available for other disputes as well. Paragraph 8 of the 1979 Understanding provides as follows:

"If a dispute is not resolved through consultations the contracting parties concerned may request an appropriate body or individual to use their good offices with a view to the conciliation of the outstanding differences between the parties. If the unresolved dispute is one in which a less-developed contracting party has brought a complaint against a developed contracting party, the less-developed contracting party may request the good offices of the Director-General who, in carrying out his tasks, may consult with the Chairman of the CONTRACTING PARTIES and the Chairman of the Council".

"Good offices" of the Director-General were resorted to at the July 1982 Council meeting by the United States and the EEC, at the suggestion of a number of other contracting parties, on the occasion of the request by the United States for the establishment of a panel concerning EEC tariff treatment of imports of citrus and citrus products.⁶²⁴ At the October 1982 Council meeting, the Director-General reported that he had met a number of times with the two parties and had made a proposal on the basis of which the two parties might open negotiations, but on the basis of the response to his proposal he had concluded that no purpose would be served to continue the process of good offices, as it did not appear to be possible to conciliate the outstanding differences between the parties.⁶²⁵

⁶²⁰DS32/4.

⁶²¹C/M/261, p. 45; see *ibid.* p. 47 for contents of report.

⁶²²C/M/261, p. 46-48.

⁶²³DS32/R (unadopted), dated 3 June 1993.

⁶²⁴C/M/160, p. 20-22.

⁶²⁵C/M/161, p. 6.

Paragraph (i) of the 1982 Ministerial Decision further provides that

“With reference to paragraph 8 of the Understanding, if a dispute is not resolved through consultations, any party to a dispute may, with the agreement of the other party, seek the good offices of the Director-General or of an individual or group of persons nominated by the Director-General. This conciliatory process would be carried out expeditiously, and the Director-General would inform the Council of the outcome of the conciliatory process. Conciliation proceedings, and in particular positions taken by the parties to the dispute during consultations, shall be confidential, and without prejudice to the rights of either party in any further proceedings under Article XXIII:2. It would remain open at any time during any conciliatory process for either party to the dispute to refer the matter to the CONTRACTING PARTIES”.

In 1988 the Director-General confirmed that the first sentence of this paragraph means that the Director-General may designate a personal representative to conduct good offices.⁶²⁶

At the Forty-third Session in December 1987, the Director-General informed the CONTRACTING PARTIES that the EEC and Japan had jointly requested conciliation by the Director-General under paragraph 8 of the 1979 Understanding in their dispute concerning certain pricing and trading practices for copper in Japan.⁶²⁷ Mr. Gardner Patterson was nominated as the Personal Representative of the Director-General and was assisted in establishing factual information by an independent expert on the copper market. The Good Offices Report by the Personal Representative was circulated to the parties on 16 December 1988 and to contracting parties on 31 January 1988; it provides a number of factual conclusions and (as requested by the parties) an advisory opinion, that the parties resolve the dispute by entering into reciprocal and mutually advantageous negotiations with a view to reduction or elimination of this tariff on an m.f.n. basis, in the context of the Uruguay Round.⁶²⁸

At the special meeting of the Council in October 1988 to review developments in the trading system, the Director-General informed the Council that in April 1988, Canada and the EC had asked him, with reference to paragraph 8 of the 1979 Understanding, to render an advisory opinion on whether a tariff concession granted by Portugal to Canada in 1961 was applicable to wet salted cod. This issue had arisen in tariff negotiations between Canada and the EC under Article XXIV:6. He had agreed on 15 April to render such an opinion and on 15 July had made it available to the two parties concerned.⁶²⁹

Paragraph D of the 1989 Improvements provides as follows:

“1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree. They may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once terminated, the complaining party can then proceed with a request for the establishment of a panel or a working party under Article XXIII:2. When good offices, conciliation or mediation are entered into within sixty days of a request for consultations, the complaining party must allow a period of sixty days from the date of the request for consultations before requesting the establishment of a panel or working party. The complaining party may request a panel or a working party during the sixty days if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.

“2. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel or working party process proceeds.

“3. The Director-General may, acting in an *ex officio* capacity, offer his good offices, conciliation or mediation with the view to assisting contracting parties to settle a dispute”.

⁶²⁶C/M/223, p. 23.

⁶²⁷SR.43/4.

⁶²⁸L/6456, dated 31 January 1989, 36S/199, 201-202.

⁶²⁹C/M/225, p. 2.

3. Arbitration

Paragraph E of the 1989 Improvements provides as follows:

“1. Expeditious arbitration within GATT as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.

“2. Resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all contracting parties sufficiently in advance of the actual commencement of the arbitration process.

“3. Other contracting parties may become party to an arbitration proceeding upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award”.

Paragraph B of the 1989 Improvements provides that “... arbitration awards within GATT ... must be notified to the Council where any contracting party may raise any point relating thereto”.

In March 1990, Canada requested a panel under Article XXIII:2 in respect of Canada's rights related to the export of grains to the EEC arising out of the introduction of the common agricultural policy and two 1962 bilateral agreements on wheat with the EEC.⁶³⁰ On 16 July 1990, Canada and the EC notified that they had agreed to have recourse to arbitration in respect of this dispute on the basis of agreed terms of reference; the terms of reference, the texts of the agreements and the name of the agreed arbitrator (Mr. Gardner Patterson, former Deputy Director-General of GATT) were included in the notification.⁶³¹ The arbitration award was circulated in October 1990. At the November Council meeting, the EC representative stated that “the arbitration proceeding had been a positive experience. The rules of the game of arbitration required that parties to the proceedings agree to abide by the arbitration award; whether the Community liked the results or not, it would abide by the rules”.⁶³²

At the November 1993 meeting of the Committee on Technical Barriers to Trade, the representative of Canada reported that her authorities were seeking to resolve a ban by Mexico on imports of seed potatoes, and noted that in February 1993, Canada and Mexico had agreed to a process whereby the issue had been referred to a third party for binding arbitration; the arbitrator had issued his report in early April, but a number of technical issues remained unresolved.⁶³³

See also references to arbitration under Article XXVIII:3.

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

In the US Draft Charter, the article on consultation in the commercial policy chapter (Article 30) included both provisions on consultation and provisions on nullification or impairment. In the London and New York drafts of the Charter these provisions appeared as two separate paragraphs of Article 35, still in the commercial policy chapter. During discussions in Geneva, it was decided to move the provisions on nullification or impairment to Articles 89 and 90 in Chapter VIII of the Charter, and to expand their scope to cover the entire Charter. The provisions on consultation remained in Article 41.

Article XXIII:1 in the 30 October 1947 text of the General Agreement was identical to Article 89 of the Geneva Draft Charter, except that Article 89 referred to “Members” of the ITO, benefits under the Charter, and attainment of the objectives in Article 1 of the Charter, and Article 89 required that the Members concerned keep the Director-General generally informed of any discussions undertaken. Article XXIII:2 was closely similar to

⁶³⁰DS12/2, dated 23 March 1990.

⁶³¹DS12/3, dated 8 August 1990.

⁶³²C/M/246, p. 25, discussing DS12/R (reprinted at 37S/80).

⁶³³TBT/M/45, para. 63.

Article 90 of the Geneva Draft, except that Article 90 provided for investigation by the Executive Board or the Conference of the ITO, provided for review of Executive Board rulings by a resolution of the Conference of the ITO, and provided for referral of matters to arbitration by the Executive Board with the consent of the Members concerned. Article 91 of the Geneva Draft provided that the Conference or the Executive Board could request advisory opinions from the International Court of Justice regarding legal questions within the scope of the activities of the ITO; it also provided that Conference resolutions under Article 90 and Conference decisions under any other Article would be subject to review by the International Court of Justice through a request by the ITO for an advisory opinion under the Statute of the International Court of Justice. The provisions of Article 91 were not included in the General Agreement at all.

Articles 89-92 of the Geneva Draft Charter was replaced at Havana by Chapter VIII (Articles 92-97) on “Settlement of Differences” in the Havana Charter. The main changes in the Havana Charter were the following:

- (a) The wording of paragraphs 1(a) and 1(b) of Article 89 of the Geneva Draft was substantially changed in Article 93:1 of the Havana Charter.
- (b) The provisions on arbitration were further developed in 2 and 3 of Article 93.
- (c) Paragraph 2 of Article 94 provided a detailed list of possible actions of the Executive Board on having determined whether a nullification or impairment existed.
- (d) Additional procedural provisions were added in the Havana Charter which do not appear in the GATT.

The Charter dispute settlement provisions as modified at Havana were not taken into the General Agreement. The Report of the Sub-Committee on Supersession, which was appointed at the First Session of the CONTRACTING PARTIES to consider Article XXIX, proposed the insertion of Article XXIX:4 providing that if the Charter should cease to be in force after it had entered into force, the provisions of Part II of the General Agreement would again enter into force, and that except for Article XXIII the provisions of Part II would be replaced by the corresponding Charter provisions. The Report of the Sub-Committee notes in explanation that “it is considered that the form in which [this Article] appear[s] in the Charter is not suitable for the General Agreement”.⁶³⁴

In the Review Session of 1954 a number of proposals for amendment of Article XXIII were considered and rejected: see page 690 above. It was agreed that upon entry into force of the Agreement on the Organization for Trade Cooperation (which included dispute settlement provisions in Article 14) Article XXIII would be amended by deleting all but the first sentence⁶³⁵; however, the Agreement never entered into force. Some minor amendments to paragraph 2, suggested by the Legal and Drafting Committee, were also agreed: “concession(s) or other obligation(s)” were substituted for “obligation(s) or concession(s)” in the fourth and fifth sentences, and “Executive Secretary to the CONTRACTING PARTIES” was substituted for “Secretary General of the United Nations” in the fifth sentence, consequential to a change made in the deposit provisions of Article XXVI.⁶³⁶ These amendments were effected through the Protocol Amending the Preamble and Parts II and III, and entered into force 7 October 1957.

Proposals to amend Article XXIII were also considered in 1965-66, but instead it was decided to adopt the 1966 Procedures as a Decision of the CONTRACTING PARTIES; see references to this work in the chapter on Part IV and at pages 683 and 764 above.

⁶³⁴GATT/1/21, p. 3.

⁶³⁵See 3S/251, para. 65.

⁶³⁶W.9/236/Add.3.

IV. RELEVANT DOCUMENTS

London

Other: EPCT/C.V/35

New York

Discussion: EPCT/C.6/29, 40, 81, 90, 105
 Other: EPCT/C.6/80, 104/Rev.1
 EPCT/C.6/W/83

Geneva

Charter articles:

Discussion: EPCT/A/SR/5, 6, 12, 13, 35
 EPCT/A/PV/5, 6, 12, 13, 35
 EPCT/B/SR/18+Corr.1-2, 33
 EPCT/EC/PV.2/22
 Reports: EPCT/139+Corr.1, 159,
 180+Corr.1-9, 186+Corr.1
 Other: EPCT/42
 EPCT/W/64, 161, 163, 168, 170,
 172, 175, 210/Rev.1, 224, 230,
 233, 243, 248, 257, 299, 307

GATT Article XXIII:

Discussion: EPCT/TAC/SR/11, 22
 EPCT/TAC/PV/13 (p. 40), 18 (p.
 42), 28
 Reports: EPCT/135, 189, 196, 212,
 214/Rev.1/Add.1

Havana

Discussion: E/CONF.2/C.6/SR.30
 Reports: E/CONF.2/23 (p. 3), 83
 +Corr.1.

Review Session

Discussion: SR.9/38
 Reports: W.9/164, 198, 215, 236/Add.3
 L/327, 3S/231
 Other: L/273, 275, 276, 292
 W.9/113, 129, 215/Add.1
 Spec/27/55, 37/55, 120/55

V. TABLE OF DISPUTES

Definitions

Title indicates the title of the dispute. Where there is a report reprinted in the Basic Instruments and Selected Documents (BISD) series, the title corresponds to the title of the report in the BISD. Where the report is not reprinted in the BISD, the title corresponds to the title in the document cited. Where no formal title for a dispute is indicated in a GATT document (for instance, in the case of bilateral consultations under Article XXIII:1 referred to in session records), a title has been composed for the purposes of this table from the name of the defendant contracting party and the measure in question.

Applicant indicates the contracting party or parties having invoked Article XXIII.

Consultations indicates the date of the request for consultations and the relevant document reference. The date indicated is the date of the GATT document recording a request for consultations, or if there is no such document, then the date of the meeting at which a request for consultations was made. If a reference to a consultation only appears in minutes of a meeting held after the date that the consultation took place, the date in this column is the date of the consultation, or as a last resort the date of that meeting. In some instances the date of the request is not indicated, either because there is no formal record in a GATT document of consultations having been requested or held; or because consultations were held under Article XXII:1 (see the separate table under Article XXII); or because a claim was brought directly under Article XXIII:2, or under Article XXIII:1(c).

Referral indicates the date of a request for a panel or working party or for a ruling under Article XXIII:2. The date indicated is the date of the GATT document recording the request or the date of the meeting at which the request was made. The date of referral may be the same as the date in the consultations column when the only record of consultations under Article XXIII:1 is a reference in the panel request to the fact that such consultations had been held. The distinction between consultation requests and referrals under Article XXIII:2 is clearest since 1989.

Panel established refers to the date of the decision to establish a panel or working party. *Report circulated* refers to the circulation of the panel or working party report to all contracting parties, and provides references to the original GATT document in question and its republication, if any, in the Basic Instruments and Selected Documents (BISD) series published by the Secretariat. *Report adopted* gives the date of adoption of the report and the document recording the decision. *Other references* are GATT documents referring to the dispute in question which were issued on or after the date of referral to the CONTRACTING PARTIES.

This table has been updated to January 1995. It concerns only disputes under Article XXIII of the GATT 1947 and does not cover disputes under the multilateral agreements negotiated in the Tokyo Round. No disputes have been brought under either the GATT 1947 or the Tokyo Round agreements since entry into force of the WTO Agreement on 1 January 1995. The Legal Affairs Division of the Secretariat maintains a database concerning current and past disputes under the GATT, the Tokyo Round agreements and the WTO Agreement.

Title	Applicant	Consultations	Referral	Panel established	Report circulated	Report adopted	Other references
1. Cuba - Consular taxes	Netherlands	19-Jul-48, CP.2/9	24-Aug-48, CP.2/SR.11			24-Aug-48, II/12	CP.2/SR.11, CP.2/9
2. India - Tax rebates on exports	Pakistan	21-Feb-49, CP.3/6	24-Aug-48, CP.2/SR.11			24-Aug-48, II/12	CP.3/6, SR.19
3. Report of Working Party 7 on the Cuban schedule	United States	9-Sep-48, CP.2/W/13	9-Sep-48, CP.2/W/13	10-Sep-48, CP.2/SR.23	13-Sep-48, CP.2/43	14-Sep-48, CP.2/SR.25	CP.2/SR.22
4. Brazilian internal taxes	France	25-Apr-49, CP.3/SR.9	25-Apr-49, CP.3/SR.9	26-Apr-49, CP.3/SR.10	27-Jun-49, CP.3/42, II/181	30-Jun-49, CP.3/SR.30	CP.3/4; CP.4/SR.20; CP.5/SR.6; CP.5/37, II/186
5. Report of Working Party 8 on Cuban textiles	United States	14-May-49, CP.3/SR.12	14-May-49, CP.3/SR.12	18-May-49, CP.3/SR.13	10-Aug-49, CP.3/82		CP.3/23; CP.3/SR.12, 13
6. United States - Restrictions on exports to Czechoslovakia	Czechoslovakia	30-May-49, CP.3/33	30-May-49, CP.3/33			8-Jun-49, II/28	CP.3/SR.18, 20, 22
7. United States - Margins of preference	Cuba	9-Aug-49, CP.3/SR.38	26-Jul-49, CP.3/59			9-Aug-49, II/11	CP.3/SR.34, 35, 36, 37, 38
8. Australian subsidy on ammonium sulphate	Chile	27-Jul-49, CP.3/61	27-Jul-49, CP.3/61	14-Mar-50, CP.4/SR.15	31-Mar-50, CP.4/39, II/188	3-Apr-50, CP.4/SR.21	CP.4/23; CP.4/SR.15; CP.5/SR.6
9. France - Export restrictions on hides and skins	United States	7-Oct-50, CP.5/I/Rev.1					CP.5/SR.5, CP.5/27
10. France - Quantitative restrictions	Belgium	7-Oct-50, CP.5/I/Rev.1					CP.5/SR.16, 25
11. United Kingdom - Purchase tax exemptions	Netherlands		26-Oct-50, CP.5/12				CP.5/SR.20; CP.6/SR.7; CP.7/SR.5; G/18
12. United States - Withdrawal of a tariff concession under Article XIX	Czechoslovakia	7-Nov-50, CP.5/22	7-Nov-50, CP.5/22	15-Dec-50, CP.5/SR.23	27-Mar-51, CP/106	22-Oct-51, CP.6/SR.19	CP.5/SR.21-23
13. United States - Withdrawal of concessions negotiated with China	Haiti		10-Sep-51, CP/115/Add.2				CP.6/SR.9, CP.6/42
14. Belgium - Family allowances (Allocations familiales)	Norway, Denmark	19-Sep-51, CP.6/25 and Add.1	19-Sep-51, CP.6/25 and Add.1	29-Mar-52, SR.7/11	6-Nov-52, G/32, 1S/59	7-Nov-52, SR.7/14	CP.6/25, CP.6/SR.11, 21, L/187
15. United States - Restrictions on dairy products	Denmark	21-Sep-51, CP.6/28	21-Sep-51, CP.6/28				CP.6/26, 51; SR.7/10, 16; L/19, 59, 61, 433; 1S/31, 32, 62; 2S/28; 3S/46; 4S/31; SR.15/7

Title	Applicant	Consultations	Referral	Panel established	Report circulated	Report adopted	Other references
16. United States - Restrictions on dairy products	Netherlands	19-Sep-51, CP.6/26	28-Oct-52, SR.7/10	19-Sep-51, CP.6/26	7-Nov-52, L/61, 1S/62	8-Nov-52, SR.7/16	CP.6/28 and Add.1, 51; SR.7/16; 1S/31, 32; 2S/28; 3S/46; L/19, 59, 433; 4S/31
17. Belgium - Restrictions on imports from the dollar area	United States	22-Oct-51, CP.6/50	22-Feb-52, IC/7	26-Feb-52, IC/SR.3			SR.7/11
18. Schedule XXV - Greece - Increase of import duties	United Kingdom	3-Sep-52, L/15		17-Oct-52, SR.7/9	30-Oct-52, G/25, 27; 1S/51	3-Nov-52, SR.7/13	1S/23; SR.8/7, G/51
19. Treatment by Germany of imports of sardines	Norway	4-Sep-52, L/16	4-Sep-52, L/16	9-Oct-52, SR.7/7	30-Oct-52, G/26, 1S/53	31-Oct-52, SR.7/12	1S/30, G/52/Add.1
20. Special import taxes instituted by Greece	France	27-Sep-52, L/26	27-Sep-52, L/26	15-Oct-52, SR.7/8	31-Oct-52, G/25, 1S/48	3-Nov-52, SR.7/13	L/88; SR.8/7
21. Pakistan - Licence fee and duty on exports of jute	India	3-Oct-52, L/41	18-Oct-52, SR.7/7				L/41/Add.1, SR.7/7, SR.7/13, IC/SR.7; L/82/ and Add.1
22. United States - Article XIX action on dried figs	Greece		4-Oct-52, L/40				SR.7/7, 11, 15; SR.8/12; SR.9/40; 1S/28; 2S/26, L/284; SR.9/40
23. United States - Article XIX action on dried figs	Turkey		9-Oct-52, L/44				
24. France - Statistical tax on imports and exports	United States	7-Nov-52, L/64					SR.8/7, SR.9/28
25. United States - Import restrictions on filberts	Turkey	13-Aug-53, G/46/Add.3					SR.8/7, SR.8/12
26. Brazil - Compensatory concessions	United States United Kingdom	15-Sep-53, G/46/Add.4					SR.8/7, SR.9/27
27. United States - Export subsidies on oranges	Italy	5-Oct-53, SR.8/12	12-Sep-53, L/122				L/266, SR.9/6, 40, SR.10/1, 3
28. France - Special temporary import tax	Italy	29-Jul-54, L/213	29-Jul-54, L/213			17-Jan-55, SR.9/29, 3S/26	SR.9/28; 4S/20; 5S/27; IC/SR.32; L/366, 406, 412, 585, 622, 643, 657, 671, 708; SR.12/5
29. Swedish anti-dumping duties	Italy	29-Jul-54, L/215, 4-Nov.54, SR.9/7	29-Jul-54, L/215	5-Nov-54, SR.9/7	23-Feb-55, L/328, 3S/81	26-Feb-55, SR.9/37	L/386, 7S/69
30. Turkey - Import taxes and export bonuses	Italy	30-Jul-54, L/214	30-Jul-54, L/214	5-Nov-54, SR.9/7			SR.9/40

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31. Peru - Embargo on imports from Czechoslovakia	Czechoslovakia	4-Oct-54, L/235					SR.9/27
32. Greece - Luxury tax on imports	Italy	5-Oct-54, L/234					SR.9/7, 30
33. West Germany - Import restrictions on coal	United States	11-Oct-54, L/242					SR.9/40, SR.10/1
34. France - Customs stamp tax on imports, increase to 2 per cent	United States	13-Oct-54, L/245					SR.9/28
35. Belgium - Import restrictions on coal	United States	26-Oct-54, L/258					SR.9/42
36. German import duties on starch and potato flour	Benelux	26-Oct-54, L/260	18-Jan-55, SR.9/30	18-Jan-55, SR.9/30	7-Feb-55, W.9/178, 3S/77		SR.9/34
37. France - Customs stamp tax on imports, further increase to 3 per cent	United States	26-Sep-55, L/410	26-Sep-55, L/410			1-Nov-55, SR.10/5	L/569, 720, 1412; SR.10/5; SR.11/4; C/M/4
38. United States - Hawaiian regulations affecting imported eggs	Australia	28-Sep-55, L/411	28-Sep-55, L/411				L/411/Add.1; SR.10/13
39. Italy - Turnover tax on pharmaceutical products	United Kingdom	11-Oct-55, L/421					SR.10/5, 19
40. Italy - Import duties on cheese	Denmark		25-Oct-55, L/417/Add.1				SR.10/20
41. France - Auto taxes	United States	16-Nov-56, SR.11/16	12-Sep-56, L/520	16-Nov-56, SR.11/16			
42. West Germany - Turnover tax on printing	Netherlands	16-Nov-56, SR.11/16	23-Oct-56, L/562				
43. Greece - Increase in bound duties on L.P. phonograph records	West Germany		2-Nov-56, L/575	5-Nov-56, SR.11/12	9-Nov-56, L/580		L/575, 765; SR.11/16; IC/SR.31, 34; SR.12/21
44. United States - Export subsidy on poultry	Denmark	16-Nov-56, SR.11/16	12-Nov-56, L/586				L/586; SR.11/16

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45. Chile - Auto taxes	United States	16-Nov-56, L/599	16-Nov-56, L/599				IC/SR.31; SR.11/18
46. United Kingdom - Export of subsidized eggs	Denmark		24-Apr-57, L/627	24-Apr-57, IC/SR.31			IC/SR.34
47. Italy - Discrimination against imported agricultural machinery	United Kingdom	24-Oct-57, SR.12/5	29-Jul-57, L/649	14-Apr-58, IC/SR.38	15-Jul-58, L/833, 7S/60	23-Oct-58, SR.13/8	L/1294, SR.12/19, SR.13/18; 7S/23; SR.17/5
48. France - Discrimination against imported agricultural machinery	United Kingdom		3-Oct-57, L/695				SR.12/5, 19, 21; IC/SR.41; SR.13/7
49. United States - Article XIX action on spring clothespins	Denmark, Sweden		28-Nov-57, L/758				L/757, SR.12/21; IC/SR.38
50. France - Assistance to exports of wheat and wheat flour	Australia		14-Apr-58, IC/SR.38	14-Apr-58, IC/SR.38	20-Nov-58, L/924, 7S/46	21-Nov-58, SR.13/20	L/1323, SR.13/8
51. Italy - Assistance to exports of flour	Australia		12-Sep-58, L/853	24-Sep-58, IC/SR.41			SR.13/17
52. Italy - Measures in favour of domestic production of ships plates	Austria		9-Oct-58, L/875				SR.13/12; SR.15/17; SR.16/9; SR.17/5; SR.18/4
53. United Kingdom - Increase in margin of preference of ornamental pottery	West Germany		12-Mar-59, IC/SR.44	12-Mar-59, IC/SR.44	19-Mar-59, SECRET/105		SECRET/103
54. Uruguayan recourse to Article XXIII	Uruguay	23-Nov-61, L/1647	23-Nov-61, L/1647	22-Feb-62, C/M/9	15-Nov-62, L/1923, 11S/95	16-Nov-62, SR.20/13	C/M/23; L/1662, 1679, 1739, 2278/Add.1; L/2074; 13S/35; L/2278, 13S/45; SR.22/2
55. United Kingdom - Increase in margin of preferences on bananas	Brazil		9-Dec-61, SR.19/12	22-Feb-62, C/M/9	11-Apr-62, L/1749		C/M/10; SR.20/2
56. France - Import restrictions	United States	3-May-62, L/1899	20-Sep-62, L/1830, 8-Nov-62, L/1899	9-Nov-62, SR.20/8	14-Nov-62, L/1921, 11S/94	14-Nov-62, SR.20/10, 11S/55	SR.20/3; C/M/80; L/3744
57. Exports of potatoes to Canada	United States	9-Nov-62, SR.20/8	9-Nov-62, SR.20/8	9-Nov-62, SR.20/8	16-Nov-62, L/1927, 11S/88	16-Nov-62, SR.20/13, 11S/55	L/1968

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58. US/EEC negotiation on poultry	EEC/US		18-Oct-63, GATT/AIR/352	29-Oct-63, C/M/18	21-Nov-63, L/2088, 12S/65		
59. Italy - Administrative and statistical fees	United States	1-Dec-69, L/3269	1-Dec-69, L/3279				C/M/59
60. Greece - Preferential tariff quotas to the USSR	United States	16-Apr-70, L/3384	16-Apr-70, L/3384				L/3406, 3447, 3387/Corr.1; C/M/62, 63, 65
61. EEC - Emergency action on table apples	Australia	28-Apr-70, C/M/62	28-Apr-70, C/M/62				C/M/63
62. Denmark - Import restrictions on grains	United States	14-Sep-70, L/3436	14-Sep-70, L/3436				C/M/64
63. Jamaica - Margins of preference	United States	18-Sep-70, L/3440	18-Sep-70, L/3440	29-Sep-70, C/M/64	20-Jan-71, L/3485, 18S/183	2-Feb-71, C/M/66	18S/33
64. EEC - Compensatory taxes on imports	United States	30-Jun-72, L/3715	30-Jun-72, L/3715				C/M/79-80
65. United Kingdom - Import restrictions on cotton textiles	Israel	1-Sep-72, L/3741	1-Sep-72, L/3741	25-Oct-72, C/M/79	26-Jan-73, L/3812, 20S/237	5-Feb-73, C/M/84	C/M/80; L/3770
66. France - Import restrictions	United States		12-Sep-72, L/3744				C/M/80
67. United Kingdom - Dollar area quotas	United States	17-Oct-72, L/3753	17-Oct-72, L/3753	19-Dec-72, C/M/83	20-Jul-73, L/3891, 20S/236	30-Jul-73, C/M/89	C/M/89; L/3816, 3843, 3890; 20S/230
68. United States - Income tax legislation	EEC		1-May-73, L/3851	30-Jul-73, C/M/89	12-Nov-76, L/4422, 23S/98	7-Dec-81, C/M/154, 28S/114	C/M/110, 112, 117, 119-120, 122, 124, 145, 149, 151-153, 157, 159-161, 165-166, 168, 180, 183, 185; C/W/384, 392
69. Income tax practices maintained by Belgium	United States		17-May-73, L/3860	30-Jul-73, C/M/89	12-Nov-76, L/4424, 23S/127	7-Dec-81, C/M/154, 28S/114	28S/114; C/98, 98/Add.1, 115; C/M/110, 112, 117, 119-120, 122, 124, 145-146, 148-149, 151-153
70. Income tax practices maintained by France	United States		17-May-73, L/3860	30-Jul-73, C/M/89	12-Nov-76, L/4423, 23S/114	7-Dec-81, C/M/154, 28S/114	28S/114; C/97/Rev.1, C/97/Add.1, C/114; C/M/110, 112, 117, 119-120, 122, 124, 145-146, 148-149, 151-153
71. Income tax practices maintained by the Netherlands	United States		17-May-73, L/3860	30-Jul-73, C/M/89	12-Nov-76, L/4425, 23S/137	7-Dec-81, C/M/154, 28S/114	28S/114; C/99, C/116; C/M/110, 112, 117, 119-120, 122, 124, 145-146, 148-149, 151-153

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72. EEC - Adequacy of compensation in Article XXIV/6 negotiations	Canada		4-Nov-74, L/4107	29-Nov-74, C/M/102			C/M/101, C/W/259, DS12/1, DS/R
73. Canadian import quotas on eggs	United States		10-Sep-75, L/4223	25-Sep-75, C/M/108	12-Dec-75, L/4279, 23S/91	17-Feb-76, C/M/112	L/4207, L/4319
74. EEC - Programme of minimum import prices (MIPS), licences, and surety deposits for certain processed fruits and vegetables	United States	29-Mar-76, L/4321	14-Jun-76, C/M/114	15-Jul-76, C/M/115	4-Oct-78, L/4687, 25S/68	18-Oct-78, C/M/128	L/4322, C/M/113, C/M/117
75. EEC - Licenses and surety deposits on canned peaches and pears	Australia	30-Mar-76, L/4322					L/4321
76. EEC - Measures on animal feed proteins	United States	27-Apr-76, C/M/113	15-Jul-76, C/M/115	17-Sep-76, C/M/116	2-Dec-77, L/4599, 25S/49	14-Mar-78, C/M/124	C/M/113, 119
77. Canada - Withdrawal of tariff concessions	EEC	2-Nov-76, L/4432	2-Nov-76, L/4432	12-Nov-76, C/M/117	28-Apr-78, L/4636, 25S/42	17-May-78, C/M/125	C/M/119, 126-128
78. Japan - Measures on imports of thrown silk yarn	United States	26-Jul-77, L/4530	26-Jul-77, L/4530	26-Jul-77, C/M/122	3-Mar-78, L/4637, 25S/107	17-May-78, C/M/125	C/M/123
79. EEC - export refunds on malted barley	Chile	1-Nov-77, L/4588					C/M/125, SCMM/3, SCMM/9
80. Norway - Restrictions on imports of certain textile products	United Kingdom (for Hong Kong)	17-May-78, C/M/125; 13-Jul-79, L/4815	1-Jun-78, L/4671, 13-Jul-79, L/4815	22-Jun-78, C/M/126, 25-Jul-79, C/M/134	24-Mar-80, L/4959, 27S/119	18-Jun-80, C/M/141	C/M/135, 139, 144, L/4692/Add.12, Add.19
81. Japanese measures on imports of leather	United States	20-Jul-78, L/4691	20-Jul-78, L/4691	18-Oct-78, C/M/128	16-Mar-79, L/4789	6-Nov-79, C/M/135	C/M/127, 132-133, 139
82. EEC - Refunds on exports of sugar	Australia	25-Sep-78, L/4701, 18-Oct-78, C/M/128	27-Sep-78, L/4701	6-Nov-78, C/M/129	25-Oct-79, L/4833, 26S/290	6-Nov-79, C/M/135	C/M/130, 138-139, 143, 144, 148, 150; 28S/80, 29S/82
83. EEC - Refunds on exports of sugar	Brazil	14-Nov-78, L/4722	14-Nov-78, L/4722	27-Nov-78, SR.34/1	7-Oct-80, L/5011, 27S/69	10-Nov-80, C/M/144	C/M/130, 132, 135, 148-150; SR.34/1; 28S/80, 29S/82
84. United States - Application of countervailing duties	EEC	13-Dec-78, L/4745					L/4745/Add.1

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85. EEC - Restrictions on imports of apples from Chile (I)	Chile	19-Jun-79, L/4805	16-Jul-79, L/4816	25-Jul-79, C/M/134	31-Oct-80, L/5047, 27S/98	10-Nov-80, C/M/144	C/M/135, 138; L/4805
86. Japan's measures on imports of leather	Canada	26-Oct-79, L/4856	26-Oct-79, L/4856	16-Nov-79, C/M/136	20-Oct-80, L/5042, 27S/118	10-Nov-80, C/M/144	C/M/135, 139
87. Spain - Measures concerning the domestic sale of soyabean oil	United States	1-Nov-79, L/4859	1-Nov-79, L/4859	29-Jan-80, C/M/138	17-Jun-81, L/5142		C/M/136, 138-139, 152; L/5161, 5188, 5509, 5519
88. Japan - Restrictions on imports of manufactured tobacco from the United States	United States	8-Nov-79, L/4871	8-Nov-79, L/4871	16-Nov-79, C/M/136	15-May-81, L/5140, 28S/100	11-Jun-81, C/M/148	C/M/139
89. United States - Prohibition of imports of tuna and tuna products from Canada	Canada	25-Jan-80, L/4931	25-Jan-80, L/4931	26-Mar-80, C/M/139	22-Dec-81, L/5198, 29S/91	22-Feb-82, C/M/155	C/M/141, 144, 154, 156, 159
90. Spain - Tariff treatment of unroasted coffee	Brazil	29-Feb-80, L/4948	6-May-80, L/4974	18-Jun-80, C/M/141	27-Apr-81, L/5135, 28S/102	11-Jun-81, C/M/148	L/4832, C/M/151; L/5284
91. EEC - Imports of beef from Canada	Canada	26-Mar-80, C/M/139	6-Jun-80, L/4987	18-Jun-80, C/M/141	23-Jan-81, L/5099, 28S/92	10-Mar-81, C/M/146	C/M/143
92. EEC - United Kingdom application of EEC directives to imports of poultry from the United States	United States	8-Aug-80, L/5013	29-Sep-80, L/5033	9-Oct-80, C/M/143	3-Jun-81, L/5155, 28S/90	11-Jun-81, C/M/148	L/5033, C/M/145; L/5040, 5149; TBT/M/3, TBT/M/4
93. Panel on United States countervailing duties	India	29-Sep-80, L/5028	31-Oct-80, L/5062	10-Nov-80, C/M/144	30-Sep-81, L/5192, 28S/113	3-Nov-81, C/M/152	C/M/148; L/5062/Add.1; SCM/20, SCMM/11, SCM/Spec/M/7, SCMM/19
94. EEC - Accession of Greece - Relevance of variable levies to Article XXIV	Australia		10-Mar-81, L/5124				L/5117, C/M/146
95. Panel on vitamins [US duties on Vitamin B12]	EEC	30-Mar-81, L/5129	4-Jun-81, L/5157	11-Jun-81, C/M/148	18-Jun-82, L/5331, 29S/110	1-Oct-82, C/M/161	C/121, C/M/149, 166
96. EEC - Production subsidies on canned fruit	Australia	11-Jun-81, C/M/148					SR.36/1, L/5778
97. United States - Imports of certain automotive spring assemblies	Canada	30-Sep-81, L/5195	3-Nov-81, C/M/152	8-Dec-81, C/M/154	11-Jun-82, L/5333, 30S/107	26-May-83, C/M/168	L/5195 and Add.1, C/M/151, 155, 160-162, 165, 167

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98. EEC - Quantitative restrictions against imports of certain products from Hong Kong	United Kingdom (for Hong Kong)	7-Dec-81, C/M/154	3-Sep-82, L/5362	1-Oct-82, C/M/161	1-Jul-83, L/5511, 30S/129	12-Jul-83, C/M/170	C/M/161, 165, 171, 173-174, 178, 210
99. EEC - Production aids granted on canned peaches, canned pears, canned fruit cocktail and dried grapes	United States	19-Mar-82, L/5306	19-Mar-82, L/5306	31-Mar-82, C/M/156	20-Feb-85, L/5778		C/M/159, 186-188, 190-192, 194-195, C/W/476
100. Canada - Administration of the Foreign Investment Review Act	United States		26-Mar-82, L/5308	31-Mar-82, C/M/156	25-Jun-83, L/5504, 30S/140	7-Feb-84, C/M/174	C/M/162, 168, 171, 173, 194
101. EEC - Sugar regime	Argentina, Australia, Brazil, Colombia, Cuba, Dominican Rep., India, Nicaragua, Peru, Philippines	8-Apr-82, L/5309					L/5309/Add 2-5, C/M/161, 166, SR.39/2
102. EEC - Tariff treatment of citrus products from certain mediterranean countries	United States	18-Jun-82, L/5337	18-Jun-82, L/5337, 1-Oct-82, C/M/161	2-Nov-82, C/M/162	7-Feb-85, L/5776		C/M/170, 186-187, 190; C/M/462, 465; L/5339
103. Finland - Internal regulations having an effect on imports of certain parts of footwear	EEC	28-Sep-82, L/5369	27-Oct-82, L/5394	2-Nov-82, C/M/162			C/M/161; C/124
104. Switzerland - Imports of table grapes	EEC	8-Oct-82, L/5371					L/5364
105. EEC - Import restrictive measures on video tape recorders	Japan	21-Dec-82, L/5427					
106. Panel on Japanese measures on imports of leather	United States	5-Jan-83, L/5440	25-Feb-83, L/5462	20-Apr-83, C/M/167	2-Mar-84, L/5623, 31S/94	15-May-84, C/M/178	C/M/166, 170, 176, 183, 186-187, 190, 191, L/5978
107. United States manufacturing clause	EEC	8-Mar-83, L/5467	8-Mar-83, L/5467	20-Apr-83, C/M/167	1-Mar-84, L/5609, 31S/74	15-May-84, C/M/178	L/5968; C/M/170, 176, 196, 198, 200-201, 210
108. Japan - Nullification and impairment of benefits and impediment to the attainment of GATT objectives	EEC	8-Apr-83, L/5479	8-Apr-83, L/5479				C/M/167

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109. United States - Imports of sugar from Nicaragua	Nicaragua	15-May-83, L/5492	1-Jul-83, L/5513	12-Jul-83, C/M/170	2-Mar-84, L/5607, 31S/67	13-Mar-84, C/M/176	C/M/171, 178, 183, 240
110. United States - Tariff reclassification of machine-threshed tobacco	EEC	30-Sept-83, L/5541					
111. EEC - Panel on newsprint	Canada	12-Jan-84, L/5589	2-Mar-84, L/5628	13-Mar-84, C/M/176	17-Oct-84, L/5680, 31S/114	20-Nov-84, C/M/183	C/127; C/M/178-179
112. Chile - Import measures on certain dairy products	EEC	14-May-84, L/5653					
113. Canada - Measures affecting the sale of gold coins	South Africa	3-Jul-84, L/5662	26-Oct-84, L/5711	20-Nov-84, C/M/183	17-Sep-85, L/5863		C/131, C/139; C/M/185, 192, 194-195, 198, 253
114. New Zealand - Imports of electrical transformers from Finland	Finland	11-Jul-84, C/M/180	21-Sep-84, L/5682	2-Oct-84, C/M/181	19-Jun-85, L/5814, 32S/55	18-Jul-85, C/M/191	C/M/180, 183; C/136
115. EEC - Operation of beef and veal regime	Australia	26-Oct-84, L/5715					C/M/183
116. United States - Prohibition of imports of steel pipe and tube from the EC	EEC	10-Dec-84, L/5747					C/M/184, 185
117. Canada - Import, distribution and sale of alcoholic drinks by provincial marketing authorities	EEC	12-Feb-85, L/5777	12-Feb-85, L/5777	12-Mar-85, C/M/186	5-Feb-88, L/6304, 35S/37	22-Mar-88, C/M/218	C/143; C/M/195, 198, 227, 244-246; C/W/646, DS17/1-10, DS17R
118. United States - Restrictions on imports of certain sugar-containing products	Canada	1-Mar-85, L/5783	1-Mar-85, L/5783	12-Mar-85, C/M/186			L/5787/Add.1, C/M/253
119. Japan - Quantitative restrictions on imports of leather footwear	United States	12-Mar-85, C/M/186	5-Jul-85, L/5826	17-Jul-85, C/M/191			L/5826/Add.1
120. United States - Trade measures affecting Nicaragua	Nicaragua		17-Jul-85, C/M/191	10-Oct-85, C/M/192	13-Oct-86, L/6053		C/137; C/M/196, 204, 208, 212, 234, 240; C/W/475, 524-525; L/5802, 6661

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121. United States - Restrictions on imports of cotton pillowcases and bedsheets	Portugal	2-Sep-85, L/5859					
122. EEC - Ban on importation of skins of certain seal pups and related products	Canada	19-Dec-85, L/5940					
123. United States - Measures on imports of non-beverage ethyl alcohol	Brazil	13-May-86, L/5993					
124. Japan - Restrictions on imports of certain agricultural products	United States	15-Jul-86, C/M/201	20-Aug-86, L/6037	27-Oct-86, C/M/202	18-Nov-87, L/6253, 35S/163	2-Feb-88, C/M/217	C/145; C/M/205, 206, 218-220, 222, 247-253; 258, 260-262, 266, 267; DS25/1-4; L/6370, 6389, 7087; SR.47/2
125. Japan - Restrictions on imports of herring, pollack and surimi	United States	24-Oct-86, L/6070	24-Oct-86, L/6070				C/M/204-207
126. United States - Taxes on petroleum and certain imported substances	Canada	27-Oct-86, C/M/202	20-Jan-87, L/6121	4-Feb-87, C/M/206	5-Jun-87, L/6175, 34S/136	17-Jun-87, C/M/211	C/146; L/6080, 6085; C/M/213, 217-218, 220, 222-224, 226-228, 231-232, 234-237; C/M/540/Add.1; SR.45/2
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127. United States - Customs user fee	Canada	27-Oct-86, C/M/202	20-Feb-87, L/6131	4-Mar-87, C/M/207	25-Nov-87, L/6264, 35S/245	2-Feb-88, C/M/217	C/147; C/M/228, 232, 234, 237, 245, 248; L/6822
	EEC		20-Feb-87, L/6130				
128. Japan - Customs duties, taxes and labelling practices on imported wines and alcoholic beverages	EEC		5-Nov-86, L/6078	4-Feb-87, C/M/206	13-Oct-87, L/6216, 34S/83	10-Nov-87, C/M/215	C/M/204, 205, 217, 206, 218, 228, 230, 264, 266, 276; ; L/6465
129. Canada - Restrictions on exports of uranium	United States	12-Dec-86, L/6104					
130. Japan - Trade in semi-conductors	EEC		20-Feb-87, L/6129	15-Apr-87, C/M/208	24-Mar-88, L/6309, 35S/116	4-May-88, C/M/220	C/149; C/M/209, 226-228, 230, 234

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131. Canada - Measures affecting exports of unprocessed herring and salmon	United States	20-Feb-87, L/6132	20-Feb-87, L/6132	4-Mar-87, C/M/207	20-Nov-87, L/6268, 36S/98	22-Mar-88, C/M/218	C/M/208, 217, 220, 227-228, 232
132. United States - Tax reform legislation for small passenger aircraft	EEC		9-Apr-87, L/6153				C/M/208, 209
133. United States - Unilateral measures on imports of certain Japanese products	Japan	21-Apr-87, L/6159					C/M/211, 213, 215
134. United States - Section 337 of the Tariff Act of 1930	EEC	29-Apr-87, L/6160	3-Jul-87, L/6198	7-Oct-87, C/M/213	16-Jan-89, L/6439, 36S/345	7-Nov-89, C/M/237	C/153, C/M/228, 230-232, 234-236, 248-249, 251, 253, 258; L/6439/Add.1; SR.47/2; SR.48/2
135. India - Import restrictions on almonds	United States	17-Jun-87, C/M/211	3-Jul-87, L/6197				C/154, 154/Add.1; C/M/213, 218; L/C/M/37, L/C/M/19, L/C/14, L/C/15
136. EEC - Enlargement of EEC	Argentina		8-Jul-87, L/6201				C/M/212, 213
137. United States - Section 337 action on cellular mobile telephones	Canada	15-Sep-87, L/6213					
138. EEC - Directive on third-country meat imports	United States	29-Sep-87, L/6218	29-Sep-87, L/6218; 10-Nov-87, C/M/215	3-Dec-87, SR.43/5			C/M/251, L/6128/Add.1, DS20/1-3
139. Canada/Japan: Tariff on imports of spruce, pine, fir, (SPF) dimension lumber	Canada	18-Nov-87, L/6262	11-Mar-88, L/6315	22-Mar-88, C/M/218	26-Apr-89, L/6470, 36S/167	19-Jul-89, C/M/235	L/6528; C/M/222, 232, 234
140. United States - Tariff increase and import prohibition on Brazilian products	Brazil	27-Nov-87, L/6274					L/6274/Add.1
141. Norway - Restrictions on imports of apples and pears	United States	9-Mar-88, L/6311	22-Jan-88, L/6300; 11-Mar-88, L/6311	22-Mar-88, C/M/218	19-Apr-89, L/6474	21-Jun-89, C/M/234	C/M/222, 232, 234, 240, 251; L/6651; DS16/1
142. Sweden - Restrictions on imports of apples and pears	United States		22-Jan-88, L/6300; 22-Apr-88, L/6330; 19-Oct-88, C/M/226				C/M/222; SR.44/2

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143. Republic of Korea - Restrictions on imports of beef	United States	11-Mar-88, L/6316	11-Mar-88, L/6316; 8-Apr-88, C/M/219	4-May-88, C/M/220	24-May-89, L/6503, 36S/268	7-Nov-89, C/M/237	L/6697, 7270; C/M/219, 223-224, 234-236, 238-240, 251, 253, 260, 264
144. Republic of Korea - Restrictions on imports of beef	Australia	22-Mar-88, L/6332, C/M/218	22-Mar-88, L/6332	4-May-88, C/M/220	24-May-89, L/6504, 36S/202	7-Nov-89, C/M/237	L/6697, 7270; C/M/224, 234-236, 238-241, 251, 253, 258, 260-262, 264-265
145. Republic of Korea - Restrictions on imports of beef	New Zealand	27-Apr-88, L/6335	3-Jun-88, L/6354	22-Sep-88, C/M/224	24-May-89, L/6505, 36S/234	7-Nov-89, C/M/237	L/6337, 6354/Add.1, 6395, 6697, 7270; C/M/226, 234-236, 238-241, 243, 251, 253, 258, 260-262, 264-265
146. EEC - Prohibition on imports of almonds by Greece	United States	22-Mar-88, C/M/218	22-Apr-88, L/6327				C/M/220
147. Japan - Restrictions on imports of beef and citrus products	United States	29-Mar-88, L/6322	29-Mar-88, L/6322	4-May-88, C/M/220			C/M/219, 222, 223; L/6322/Add.1
148. Japan - Restrictions on imports of beef	Australia	8-Apr-88, C/M/219	8-Apr-88, L/6333				L/6333/Add.1
149. Japan - Restrictions on imports of beef	New Zealand	2-May-88, L/6340	3-Jun-88, L/6355				L/6354 + Add.1, L/6355/Add.1, C/M/220, 222, 223
150. United States - Quality standards for grapes	Chile	22-Apr-88, L/6324					
151. EEC - Payments and subsidies paid to processors and producers of oilseeds and related animal-feed proteins	United States	22-Apr-88, L/6328	22-Apr-88, L/6328	15-Jun-88, C/M/222	14-Dec-89, L/6627, 37S/86	25-Jan-90, C/M/238	L/6636, 6933; C/166; C/M/220, 224, 249-252, 256-257, 259-264; DS28R, 1-4; W.47/22, SR.47/1
152. EEC - Restrictions on imports of dessert apples - Complaint by Chile	Chile	22-Apr-88, L/6329	3-May-88, L/6329/Add.1	4-May-88, C/M/220	18-Apr-89, L/6491, 36S/93	22-Jun-89, C/M/234	L/6337, L/6339, C/158; C/M/232; C/M/601
153. EEC - Restrictions on imports of apples	New Zealand	27-Apr-88, L/6336	3-Jun-88, L/6357				L/6337
154. EEC - Restrictions on imports of apples - Complaint by the United States	United States	4-May-88, C/M/220	8-Jul-88, L/6371	22-Sep-88, C/M/224	9-Jun-89, L/6513, 36S/135	22-Jun-89, C/M/234	C/M/223, 226

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155. United States - Restrictions on the importation of sugar and sugar-containing products applied under the 1955 Waiver and under the Headnote to the Schedule of tariff concessions	EEC	16-Jun-88, C/M/222	12-Sep-88, L/6393	21-Jun-89, C/M/234	22-Jan-90, L/6631, 37S/228	7-Nov-90, C/M/246	C/M/226-228, 230, 232, 239-241, 243-245
156. United States - Restrictions on imports of sugar	Australia		19-Jul-88, L/6373	22-Sep-88, C/M/224	9-Jun-89, L/6514, 36S/331	22-Jun-89, C/M/234	C/M/223, 227, 238, 241, 245, 251, 253, 258, 260-262; L/6742
157. EEC - Regulation on imports of parts and components	Japan	8-Aug-88, L/6381	7-Oct-88, L/6410	19-Oct-88, C/M/226	22-Mar-90, L/6657, 37S/132	16-May-90, C/M/241	C/165; C/M/240, 253, 258; L/6676; SR 48/2; ADP/39, ADP/MI/24
158. United States - Import restrictions on certain products from Brazil	Brazil	24-Aug-88, L/6386	7-Dec-88, L/6386/Add.1	21-Feb-89, C/M/229			C/M/227, 228, 234; C/169 and Add.1
159. United States - Increase in duty on certain products from the European Community	EEC		28-Nov-88, L/6438				C/M/228-32, 234, SR 45/2
160. United States - Import prohibition on ice cream from Canada	Canada	9-Dec-88, L/6444					
161. Canada - Import restrictions on ice cream and yoghurt	United States		9-Dec-88, L/6445	20-Dec-88, C/M/227	27-Sep-89, L/6568, 36S/68	5-Dec-89, SR 45/2	C/164; C/M/227, 230, 236-237, 243-244, 246-247; L/6694, 6698
162. EEC - Restraints on exports of copper scrap	United States	8-Jun-89, L/6518	8-Jun-89, L/6518	19-Jul-89, C/M/235	5-Feb-90, DS5/R, 37S/200	20-Feb-90, C/M/238	C/M/234; DS5/1, R; SR 45/2
163. United States - Determination under Sections 304 and 305 of the Trade Act of 1974 in respect of the EEC's subsidies for producers and processors of oilseeds and animal-feed proteins	EEC	18-Jul-89, DS2/1					
164. EC - Subsidies for producers and processors of oilseeds	Canada	1-Sep-89, DS3/1					
165. Finland - Restrictions on imports of apples and pears	United States	18-Sep-89, DS1/2					DS1/3

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166. United States - Countervailing duties on fresh, chilled and frozen pork from Canada	Canada	28-Sep-89, DS7/1	27-Oct-89, L/6583	4-Dec-89, SR.45/2	18-Sep-90, DS7/R, 38S/30	11-Jul-91, C/M/251	C/M/239, 246-250; DS7/3; SR.46/1
167. Brazil - Restrictions on the import of certain agricultural and manufactured products	United States	11-Oct-89, DS8/1	12-Jan-90, DS8/2				C/M/251
168. Chile - Internal taxes on spirits	EEC	8-Nov-89, DS9/1					
169. Thailand - Restrictions on importation of and internal taxes on cigarettes	United States	3-Jan-90, DS10/1	8-Feb-90, DS10/2	3-Apr-90, C/M/240	5-Oct-90, DS10/R, 37S/200	7-Nov-90, C/M/246	C/M/241, 246
170. United States - Measures under the Export Enhancement Programme affecting soya-bean exports by Brazil	Brazil	9-Feb-90, DS13/1					
171. EEC - Restrictions and charges on imports of ovine meat	Chile	23-Mar-90, DS15/1					C/M/240
172. Norway - Restrictions on imports of apples and pears	United States	17-May-90, DS16/1					L/6474, L/6651
173. Canada - import, distribution and sale of certain alcoholic drinks by provincial marketing agencies	United States	4-Jul-90, DS17/1	6-Dec-90, DS17/2	6-Feb-91, C/M/247	16-Oct-91, DS17/R	18-Feb-92, C/M/254	C/M/247, 257-259, 266; DS17/3-10; SR.47/1
174. United States - Denial of most-favoured-nation treatment as to non-rubber footwear from Brazil	Brazil	28-Sep-90, DS18/1	1-Mar-91, DS18/2	24-Apr-91, C/M/249	10-Jan-92, DS18/R	19-Jun-92, C/M/257	C/M/254-256, 258-259, 261-267, 272-275; DS18/3-4; GPR/DS1/R; SR.48/2, SR.50/2
175. United States - Restrictions on imports of tuna	Mexico	5-Nov-90, C/M/246	25-Jan-91, DS21/1	6-Feb-91, C/M/247	3-Sep-91, DS21/R		DS21/2, C/M/248, 254-256; SR.48/2
176. EEC - Restrictions on imports of pork and beef under the third country meat directive	United States	8-Nov-90, DS20/1	17-Jun-91, DS20/2				DS20/3, L/6218/Add.1
177. Indonesia - Import restrictions and charges on bound items	United States	8-Feb-91, DS22/1					

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178. United States - Measures affecting alcoholic and malt beverages	Canada	11-Feb-91, DS23/1	12-Apr-91, DS23/2	27-May-91, C/M/250	16-Mar-92, DS23/R	19-Jun-92, C/M/257	C/M/256, 262-268, 272-276; DS23/3-19, SR.48/2, SR.50/2
179. United States - Countervailing duty and anti-dumping actions on salmon	Norway	18-Apr-91, DS24/2					
180. EEC - Measures affecting imports of corn gluten feed	United States	17-Sep-91, DS26/1					
181. EEC - Trade measures taken for non-economic reasons	Yugoslavia	13-Jan-92, DS27/1	10-Feb-92, DS27/2	18-Mar-92, C/M/255			
182. United States - Restrictions on imports of tuna	EEC	20-Mar-92, DS29/1	5-Jun-92, DS29/2	14-Jul-92, C/M/258	10-Jun-94, DS29/R		C/M/257, C/M/274-276; DS29/3-5; DS33/1
	Netherlands	10-Jul-92, D33/1	14-Jul-92, DS29/3				
183. United States - Harbour maintenance fees	EEC	21-Feb-92, DS30/1					
184. United States - Taxes affecting imported automobiles	EEC	20-May-92, DS31/1	12-Mar-93, DS31/2	12-May-93, C/M/263			C/M/262-263; DS31/3-4
185. EEC - Negotiating rights of Argentina in connection with the renegotiation of oilseed concessions by the European Communities	Argentina		18-Sep-92, DS34/1 4-Nov-92, C/M/260				C/M/259-260
186. Argentina - Countervailing duties on dairy products from the EC	EEC	7-Dec-92, DS35/1					
187. Argentina - countervailing duties on canned peaches from Greece	EEC	6-Jan-93, DS36/1					
188. EEC - Member states' import regimes for bananas	Colombia, Costa Rica, Guatemala, Nicaragua, Venezuela		8-Feb-93, DS32/4	10-Feb-93, C/M/261	3-Jun-93, DS32/R		C/M/258, 264-270, 272-276; DS32/1-3, 5-9; SR.48/2

Title	Applicant	Consultations	Referral	Panel established	Report circulated	Report adopted	Other references
189. EEC - Import regime for bananas	Colombia, Costa Rica, Guatemala, Nicaragua, Venezuela		30-Apr-93, DS38/6	12-Jun-93, C/M/264	11-Feb-94, DS38/R		C/M/261-263, 272-276; W.50/22; DS38/1-5, 7, 9-13; DS36/8
190. EEC - Restrictions on imports of apples	Chile	16-Jun-93, C/M/264	21-Jul-93, C/M/265	22-Sep-93, C/M/266	20-Jun-94, DS39/R		C/M/264, DS39/2-3, DS41/2, Spec(93)22
191. EEC - Charges on imports of apples originating in Chile	Chile	29-Jun-93, DS41/1					C/COM/1
192. EEC - Regulations affecting the sale of imported bovine semen in Italy	Canada	16-Jul-93, DS42/1					C/M/276
193. United States - Measures affecting the importation and internal sale of tobacco	Argentina, Brazil, Colombia, El Salvador, Guatemala, Thailand, Zimbabwe	7-Sep-93, DS44/1	7-Dec-93, DS44/5 + Corr.1 (Brazil, Chile, Colombia, El Salvador, Guatemala, Thailand, Zimbabwe); 11-Feb-94, DS44/8 (Argentina)	25-Jan-94, SR.49/1 (Brazil, Canada, Chile, Colombia, El Salvador, Guatemala, Thailand, Zimbabwe); 22-Feb-94, C/M/270 (Argentina added)	12-Aug-94, DS44/R	4-Oct-94, C/M/275	C/M/265-268; DS44/7; DS44/9+Rev.1
	Chile	8-Sep-93, DS44/2					
	Canada	27-Sep-93, DS44/4	25-Jan-94, DS44/6 + Corr.1				
194. EEC - Countervailing charges on lemons	EEC	6-Oct-93, DS44/3					
	Argentina	20-Jun-94, DS45/2					DS45/1
195. United States - Standards for reformulated and conventional gasoline	Venezuela		11-Mar-94, DS47/2; 23-Sept-94, DS47/3	4-Oct-94, C/M/275			DS47/4
196. Poland - Import regime for automobiles originating in the European Communities	India		28-Oct-94, DS40/2 + Add.1	10-Nov-94, C/M/276			DS40/3

PART III

ARTICLE XXIV

TERRITORIAL APPLICATION - FRONTIER TRAFFIC - CUSTOMS UNIONS AND FREE TRADE AREAS

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I. TEXT OF ARTICLE XXIV, INTERPRETATIVE NOTE AD ARTICLE XXIV AND UNDERSTANDING ON THE INTERPRETATION OF ARTICLE XXIV OF THE GATT 1994

Article XXIV

Territorial Application -- Frontier Traffic -- Customs Unions and Free-trade Areas

1. The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application. Each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party; *Provided* that the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application by a single contracting party.

2. For the purposes of this Agreement a customs territory shall be understood to mean any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories.

3. The provisions of this Agreement shall not be construed to prevent:

- (a) Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic;
- (b) Advantages accorded to the trade with the Free Territory of Trieste by countries contiguous to that territory, provided that such advantages are not in conflict with the Treaties of Peace arising out of the Second World War.

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that:

- (a) with respect to a customs union, or an interim agreement leading to the formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;
- (b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement, as the case may be; and
- (c) any interim agreement referred to in sub-paragraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

6. If, in fulfilling the requirements of sub-paragraph 5 (a), a contracting party proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVIII shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already afforded by the reductions brought about in the corresponding duty of the other constituents of the union.

7. (a) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.

(b) If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of sub-paragraph (a), the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.

(c) Any substantial change in the plan or schedule referred to in paragraph 5(c) shall be communicated to the CONTRACTING PARTIES, which may request the contracting parties concerned to consult with them if the change seems likely to jeopardize or delay unduly the formation of the customs union or of the free-trade area.

8. For the purposes of this Agreement:

- (a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that
 - (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,
 - (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;
- (b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

9. The preferences referred to in paragraph 2 of Article 1 shall not be affected by the formation of a customs union or of a free-trade area but may be eliminated or adjusted by means of negotiations with contracting parties affected.* This procedure of negotiations with affected contracting parties shall, in particular, apply to the elimination of preferences required to conform with the provisions of paragraph 8 (a)(i) and paragraph 8 (b).

10. The CONTRACTING PARTIES may by a two-thirds majority approve proposals which do not fully comply with the requirements of paragraphs 5 to 9 inclusive, provided that such proposals lead to the formation of a customs union or a free-trade area in the sense of this Article.

11. Taking into account the exceptional circumstances arising out of the establishment of India and Pakistan as independent States and recognizing the fact that they have long constituted an economic unit, the contracting parties agree that the provisions of this Agreement shall not prevent the two countries from entering into special arrangements with respect to the trade between them, pending the establishment of their mutual trade relations on a definitive basis.*

12. Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory.

Interpretative Note *Ad* Article XXIV from Annex I

Paragraph 9

It is understood that the provisions of Article I would require that, when a product which has been imported into the territory of a member of a customs union or free-trade area at a preferential rate of duty is re-exported to the territory of another member of such union or area, the latter member should collect a duty equal to the difference between the duty already paid and any higher duty that would be payable if the product were being imported directly into its territory.

Paragraph 11

Measures adopted by India and Pakistan in order to carry out definitive trade arrangements between them, once they have been agreed upon, might depart from particular provisions of this Agreement, but these measures would in general be consistent with the objectives of the Agreement.

UNDERSTANDING ON THE INTERPRETATION OF ARTICLE XXIV
OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members,

Having regard to the provisions of Article XXIV of GATT 1994;

Recognizing that customs unions and free trade areas have greatly increased in number and importance since the establishment of GATT 1947 and today cover a significant proportion of world trade;

Recognizing the contribution to the expansion of world trade that may be made by closer integration between the economies of the parties to such agreements;

Recognizing also that such contribution is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded;

Reaffirming that the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Members with such territories; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members;

Convinced also of the need to reinforce the effectiveness of the role of the Council for Trade in Goods in reviewing agreements notified under Article XXIV, by clarifying the criteria and procedures for the assessment of new or enlarged agreements, and improving the transparency of all Article XXIV agreements;

Recognizing the need for a common understanding of the obligations of Members under paragraph 12 of Article XXIV;

Hereby *agree* as follows:

1. Customs unions, free-trade areas, and interim agreements leading to the formation of a customs union or free-trade area, to be consistent with Article XXIV, must satisfy, *inter alia*, the provisions of paragraphs 5, 6, 7 and 8 of that Article.

Article XXIV:5

2. The evaluation under paragraph 5(a) of Article XXIV of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a customs union shall in respect of duties and charges be based upon an overall assessment of weighted average tariff rates and of customs duties collected. This assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff-line basis and in values and quantities, broken down by WTO country of origin. The Secretariat shall compute the weighted average tariff rates and customs duties collected in accordance with the methodology used in the assessment of tariff offers in the Uruguay Round of Multilateral Trade Negotiations. For this purpose, the duties and charges to be taken into consideration shall be the applied rates of duty. It is recognized that for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required.

3. The "reasonable length of time" referred to in paragraph 5(c) of Article XXIV should exceed 10 years only in exceptional cases. In cases where Members parties to an interim agreement believe that 10 years would be insufficient they shall provide a full explanation to the Council for Trade in Goods of the need for a longer period.

Article XXIV:6

4. Paragraph 6 of Article XXIV establishes the procedure to be followed when a Member forming a customs union proposes to increase a bound rate of duty. In this regard Members reaffirm that the procedure set forth in Article XXVIII, as elaborated in the guidelines adopted on 10 November 1980 (BISD 27S/26-28) and in the Understanding on the Interpretation of Article XXVIII of GATT 1994, must be commenced before tariff concessions are modified or withdrawn upon the formation of a customs union or an interim agreement leading to the formation of a customs union.

5. These negotiations will be entered into in good faith with a view to achieving mutually satisfactory compensatory adjustment. In such negotiations, as required by paragraph 6 of Article XXIV, due account shall be taken of reductions of duties on the same tariff line made by other constituents of the customs union upon its formation. Should such reductions not be sufficient to provide the necessary compensatory adjustment, the customs union would offer compensation, which may take the form of reductions of duties on other tariff lines. Such an offer shall be taken into consideration by the Members having negotiating rights in the binding being modified or withdrawn. Should the compensatory adjustment remain unacceptable, negotiations should be continued. Where, despite such efforts, agreement in negotiations on compensatory adjustment under Article XXVIII as elaborated by the Understanding on the Interpretation of Article XXVIII of GATT 1994 cannot be reached within a reasonable period from the initiation of negotiations, the customs union shall, nevertheless, be free to modify or withdraw the concessions; affected Members shall then be free to withdraw substantially equivalent concessions in accordance with Article XXVIII.

6. GATT 1994 imposes no obligation on Members benefiting from a reduction of duties consequent upon the formation of a customs union, or an interim agreement leading to the formation of a customs union, to provide compensatory adjustment to its constituents.

Review of Customs Unions and Free-Trade Areas

7. All notifications made under paragraph 7(a) of Article XXIV shall be examined by a working party in the light of the relevant provisions of GATT 1994 and of paragraph 1 of this Understanding. The working party shall submit a report to the Council for Trade in Goods on its findings in this regard. The Council for Trade in Goods may make such recommendations to Members as it deems appropriate.

8. In regard to interim agreements, the working party may in its report make appropriate recommendations on the proposed time-frame and on measures required to complete the formation of the customs union or free-trade area. It may if necessary provide for further review of the agreement.

9. Members parties to an interim agreement shall notify substantial changes in the plan and schedule included in that agreement to the Council for Trade in Goods and, if so requested, the Council shall examine the changes.

10. Should an interim agreement notified under paragraph 7(a) of Article XXIV not include a plan and schedule, contrary to paragraph 5(c) of Article XXIV, the working party shall in its report recommend such a plan and schedule. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations. Provision shall be made for subsequent review of the implementation of the recommendations.

11. Customs unions and constituents of free-trade areas shall report periodically to the Council for Trade in Goods, as envisaged by the CONTRACTING PARTIES to GATT 1947 in their instruction to the GATT 1947 Council concerning reports on regional agreements (BISD 18S/38), on the operation of the relevant agreement. Any significant changes and/or developments in the agreements should be reported as they occur.

Dispute Settlement

12. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free-trade area.

Article XXIV:12

13. Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.

14. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a Member. When the Dispute Settlement Body has ruled that a provision of GATT 1994 has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.

15. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of GATT 1994 taken within the territory of the former.

II. INTERPRETATION AND APPLICATION OF ARTICLE XXIV

A. SCOPE AND APPLICATION OF ARTICLE XXIV

1. Paragraphs 1 and 2: “customs territory”

Under Article XXIV:1, each separate customs territory on behalf of which the General Agreement is applied is “treated as though it were a contracting party”, and thus the most-favoured-nation clause of Article I:1 and the non-discrimination requirements of Article XIII:1, which apply as between contracting parties, apply as between each separate customs territory even if it is under common sovereignty with another customs territory. For example, the records of the London session of the Preparatory Committee indicate that in 1946 the various territories under French sovereignty in the French Union included some colonies treated as part of the metropolitan customs territory of France, and others which constituted separate customs territories. The historical

preferences accorded within the French Union were provided for under Article I:2 in the case of the latter, by listing them in Annex B of the General Agreement.¹ In 1955, certain territories were deleted from Annex B because on 1 January 1948 they had been raised to the status of French départements and thenceforth formed part of the metropolitan customs territory.² See the discussion below in Section III concerning the background of the provisions in Article XXIV on customs territories. See also the material under Article XIV:3 in this Index.

The records of the Havana Conference indicate that the phrasing of paragraph 1 was changed from “customs territories of the Members” to “metropolitan customs territories of the Members and to any other customs territories in respect of which this Charter has been accepted ...” in order to avoid the implication that the customs territories of colonies were necessarily part of the customs territory of the metropolitan state.³ A proposal to change the definition of “customs territory” in paragraph 2 to substitute “substantially all” for “a substantial part” was rejected.⁴

Paragraph 3 of the accession protocol of Switzerland provides: “For the purposes of the territorial application of this Protocol, the customs territory of Switzerland shall be deemed to include the territory of the Principality of Liechtenstein as long as a customs union treaty with Switzerland is in force.”⁵ On 29 March 1994, Liechtenstein succeeded to contracting party status under Article XXVI:5(c). See also statements concerning the application of the General Agreement with respect to certain customs territories in accession protocols e.g. of Japan⁶, Portugal⁷ and Spain⁸.

In the earlier years of the GATT, the Secretariat periodically issued lists of the countries and territories where the General Agreement was effective, but this practice was abandoned after 1969.⁹ More recent supplements of the BISD list the contracting parties to the GATT and countries where the GATT is applied on a *de facto* basis.

See also material on territorial application of the General Agreement under Article XXVI:5.

2. Paragraph 3: “frontier traffic”

Sub-paragraph 3(a) is worded almost identically to the original United States proposal, which was explained by the US at the London session of the Preparatory Committee as follows:

“Paragraph 2(a) [XXIV:3(a)] referred to facilities for frontier traffic, in cases where a frontier ran through a city etc.; ... The area affected by this provision was usually limited to a distance of 15 kilometres from the frontier.”¹⁰

In discussions during the Geneva session of the Preparatory Committee, “it was agreed that ‘frontier traffic’ should not be defined too narrowly as it varied in each case and that the Organization would have, if necessary, to decide.”¹¹

¹See description at EPCT/C.II/PV/4 p. 18-20.

²Fourth Protocol of Rectifications and Modifications to the Annexes and to the Texts of the Schedules to the General Agreement done 7 March 1955, entered into force 23 January 1959; see also W.9/162. See also discussion of status of territories within French Union as of 1946 at EPCT/C.II/PV/4, p. 18-20.

³E/CONF.2/C.3/87, E/CONF.2/C.3/SR.47, p. 3.

⁴Havana Reports, p. 50; E/CONF.2/C.3/87, E/CONF.2/C.3/SR.44 p. 3-4, E/CONF.2/C.3/SR.47 p. 3.

⁵14S/6, 7-8.

⁶4S/7, para. 1(d) (exception from the application of GATT under certain circumstances for islands referred to in the Treaty of Peace with Japan).

⁷11S/20, 24, para. 11 (acceptance “in respect of all Portugal’s separate customs territories”).

⁸12S/27, 28 para. 3 (acceptance in respect of customs territories listed in Annex B to the Protocol, i.e. (1) Territory in the Peninsula and Balearic Islands, the Canary Islands, Ceuta and Melilla; (2) Ifni and Sahara, (3) Fernando Po and Rio Muni; these territorial units into which the National Territory is divided are considered customs territories for the sole purpose of the General Agreement).

⁹E.g. lists at 7S/12, 10S/7, 12S/5, 14S/1, 16S/3, L/3166+Add.1-2 (1969). A note was added to the list published in 1968 (16S/3) stating that “The names of the territories are those furnished to the secretariat by the governments responsible for the application of the GATT to the trade of the territories and are here listed without prejudice to any disagreement that may exist between contracting parties concerning political sovereignty or concerning the name of a territory”.

¹⁰EPCT/C.II/38, p. 7.

¹¹EPCT/A/SR/42, p. 2.

The Report of a Working Party which examined and redrafted Article 42 of the Charter at the Havana Conference notes that “The proposal of the delegation of Italy requesting exemption from the most-favoured-nation clause for a special regime between Italy and the Free Territory of Trieste, was subsequently altered to refer only to advantages accorded to trade with Trieste by contiguous countries. The Working Party decided it could accept this modified proposal on condition that trade advantages thus accorded were not contrary to the terms of the Italian Peace Treaty”.¹²

The Report of the Sub-Committee of the Havana Conference which examined Articles 16 and 42 of the Havana Charter (corresponding to Articles I and XXIV of the General Agreement) notes as follows: “The Sub-Committee discussed with the delegate of Italy the latter’s proposal to except the special regime existing between the Republic of Italy and the Republic of San Marino and the State of the Vatican City from the provisions of paragraph 1 of Article 16. The Sub-Committee was of the opinion that the special arrangements existing between Italy and these two territories were not contrary to the Charter ...”.¹³

The Decision of 21 June 1951 on the Accession of Germany provides that “The CONTRACTING PARTIES ... agree that, notwithstanding the provisions of Article I of the General Agreement the accession of the Government of the Federal Republic of Germany will not require any modification in the present arrangements for, or status of, intra-German trade in goods originating within Germany”.¹⁴

The Report of the Review Session Working Party on “Schedules and Customs Administration” notes that a proposal by the German delegation to add to Article XXIV:3(a) a reference to “specific frontier zones specially designated by treaty” was unsuccessful because the Working Party considered it unnecessary: “While the CONTRACTING PARTIES would no doubt wish to examine the terms of any particular treaty in the event of a dispute, the Working Party understands that traffic in zones designated in treaties between adjacent countries, designed solely to facilitate clearance at the frontier, would normally be covered by the phrase ‘frontier traffic’”.¹⁵

2. Paragraph 4

Introducing the provision in the proposed charter of the ITO in 1946, one negotiator stated that “customs unions were desirable, provided that they did not cause any disadvantage to outside countries, in comparison with their trade before the customs unions were effected ... this also was a standard clause in all commercial treaties”.¹⁶

Concerning the drafting of paragraph 4, see also under Section III below.

(1) *Relationship between paragraph 4 and paragraphs 5 to 9*

This issue was first discussed in depth during the examination of the Treaty of Rome establishing the European Economic Community. This examination was initially carried out at the Twelfth Session in 1957 by a Committee composed of all contracting parties, which appointed four sub-groups, the interim reports of which appear under the title of “The European Economic Community” in the Sixth Supplement of the BISD.¹⁷ The interim report of the sub-group on “Tariffs and Plan and Schedule” notes that

“There was extensive discussion in the Sub-Group as to the significance to be placed upon paragraph 4 in the examination of the tariff provisions of the Rome Treaty. The representatives of the Governments of the Member States of the European Economic Community stated:

‘The terms of paragraph 4 on the one hand, and paragraphs 5 to 9 on the other hand must be interpreted interdependently. Paragraph 5 of Article XXIV starts with the word ‘accordingly’ which indicates beyond doubt the relationship which exists between these two sets of provisions. The

¹²E/CONF.2/C.2&3/A/14, p. 6 (referring to Italian proposal at E/CONF.2/C.3/6, item 22).

¹³Havana Reports, p. 48, para. 11; see also E/CONF.2/C.2&3/A/14, p. 6-7 and Italian proposal at E/CONF.2/C.3/6, item 22.

¹⁴II/34, para. 1(b). For description of these arrangements and the effect of the unification of Germany, see C/M/244, p. 16-17.

¹⁵L/329, adopted on 26 February 1955, 3S/205, 216, para. 24.

¹⁶EPCT/C.II/38.

¹⁷L/778, adopted on 29 November 1957, 6S/70.

conditions laid down in paragraphs 5 to 9 have the purpose of ensuring that customs unions or the free trade areas are in conformity with the general principle laid down in the second sentence of paragraph 4. In other words, a customs union or a free trade area which fulfil the requirements of the provisions of paragraphs 5 to 9 of Article XXIV would automatically and necessarily satisfy the requirements of paragraph 4 since paragraphs 5 to 9 merely spell out the implications of paragraph 4. This interpretation is confirmed by the records of the preparatory work related to the adoption of the text of the present Article XXIV.

‘The view expressed by certain contracting parties that the terms of paragraph 4 of Article XXIV require the Six to take into consideration the situation of each contracting party is furthermore in contradiction with the provisions of paragraph 5 *et seq.*, particularly with those of paragraphs 5(a) and (b) which deal with the general incidence of tariff rates and commercial regulations.

‘The objective of paragraph 6 is furthermore the maintenance of the rights of the contracting parties acquired by concessions granted to them, a fact which should take care to a large extent of the problem of the countries the trade of which depends on one or a few products.’

“Most members of the Sub-Group were not prepared to accept this interpretation. They believed that paragraph 4 establishes the basic principles which a customs union should apply to be consistent with the objectives of GATT. Where questions arise as to the application of the provisions of paragraphs 5 to 9 in particular cases, such questions should be resolved in a manner consistent with the principles embodied in paragraph 4. Some members of the Sub-Group felt, furthermore, that the CONTRACTING PARTIES would have to verify whether the application of paragraphs 5 to 9 is consistent with the aims of a customs union as defined in paragraph 4. ...”¹⁸

The Understanding on the Interpretation of Article XXIV of the GATT 1994 provides in paragraph 1 thereof that “Customs unions, free-trade areas, and interim agreements leading to the formation of a customs union or free-trade area, to be consistent with Article XXIV, must satisfy, *inter alia*, the provisions of paragraphs 5, 6, 7 and 8 of that Article.”

(2) *Free-trade areas between territories not producing the same products*

The 1966 Working Party Report on “EEC - Association Agreements with African and Malagasy States and Overseas Countries and Territories” notes the statement of one member of the Working Party that “even if a free-trade area arrangement between developed and less-developed countries met all the more specific requirements of Article XXIV, it was unlikely, given that the parties to the Arrangement tended to produce entirely different products, to satisfy the general requirement of paragraph 4 of the Article that free-trade arrangements should be designed to create new trade between the parties and not to divert existing trade.” The representatives of the Community and the Associated States stated that “With regard to the general principle in paragraph 4 ... the precise wording of paragraph 5 ... made it abundantly clear that if the requirements of paragraphs 5 to 9 of Article XXIV were fulfilled, the Agreement was necessarily compatible with the principle set out in paragraph 4.”¹⁹

(3) *“not to raise barriers to the trade of other contracting parties”*

The Report of the Working Party on “Accession of Portugal and Spain to the European Communities” notes that “Some delegations expressed concerns which related to the introduction in Portugal and Spain of new quantitative restrictions some of which were discriminatory and inconsistent with Articles XI, XIII and XXIV:4” and also records the response by the representative of the European Communities that “Article XXIV:4 did not constitute an obligation but an objective and did not preclude members of a customs union from erecting barriers

¹⁸*Ibid.*, 6S/70-71, paras 2-3. For similar statements concerning the relationship between paragraph 4 and paragraphs 5 to 9, see, *e.g.*, Report of the Working Party on “EEC - Association Agreements with African and Malagasy States and Overseas Countries and Territories”, L/2441, 14S/100, 106, para. 14.

¹⁹L/2441, adopted on 4 April 1966, 14S/100, 106, paras. 13-14.

to trade if their overall incidence was less restrictive than the ones which had prevailed before the customs union was established".²⁰

The Report of the Working Party on the "Free-Trade Agreement between Canada and the United States" notes the major concern of members with the provision in this Agreement that the Agreement would take precedence over the General Agreement unless otherwise provided therein. They questioned the possible implications for third parties and for the multilateral trading system. The representative of the United States stated that "In accordance with both paragraphs 4 and 5 of Article XXIV, the Canada-United States Free-Trade Agreement had not raised barriers to third-country trade either directly in the context of the phased-in implementation of the provisions of the Agreement or indirectly as a consequence of its negotiation".²¹ The representative of a group of countries said that "if the FTA was consistent with Article XXIV, it should have trade-creating effects for third parties".²²

4. Paragraph 5

(1) *"as between the territories of contracting parties"*

(a) *Agreements between contracting parties and States or governments other than contracting parties*

During the Havana Conference in 1948, France proposed to form a customs union with Italy, which was not a contracting party to the General Agreement at that time. In response to a proposal by France at the First Session of the CONTRACTING PARTIES, the Special Protocol replaced the original text of Article XXIV by the provisions of the corresponding articles of the Havana Charter. The Special Protocol entered into force on 7 June 1948. The Report of the Sub-Committee on Supersession at the First Session, which drafted the Special Protocol, notes that "The representative of France explained that acceptance of the Protocol by his Government would be contingent upon the agreement of the contracting parties to waive one of the obligations of paragraph 5 so as to enable France to proceed with the formation of a customs union with Italy without first requiring Italy to accede to the General Agreement".²³ The waiver was granted on 20 March 1948 so that the formation of the Franco-Italian customs union could proceed immediately.²⁴

The Working Party Reports of 1960 on "European Free Trade Association - Examination of Stockholm Convention"²⁵ and "Latin American Free Trade Area - Examination of Montevideo Treaty"²⁶ record diverging views as to whether paragraph 5 is applicable also to agreements with States or governments which are not contracting parties to GATT. The Report of the Working Party on "EEC - Agreements of Association with Tunisia and Morocco" contains the following paragraph.

"With regard to the first sentence of paragraph 5, one delegation pointed out that the term 'territories of contracting parties' did not cover the agreements with Tunisia and Morocco, the former having only provisionally acceded while the latter had as yet no relation with GATT. Attention was drawn by this delegation to the Havana Reports on Article 44 of the Charter, and in particular to paragraph 6 which corresponds to paragraph 10 of Article XXIV. It was understood that this paragraph 'will enable the Organization to approve the establishment of customs unions and free-trade areas which include non-members'. This interpretation had been confirmed by a decision in 1956 on the participation of Nicaragua in the Central American Free-Trade Area (BISD 5S/29). The representative of the parties to the agreements recalled that in other previous cases, notably in the cases of EFTA and LAFTA, some participants in those free-trade areas were not at that time contracting parties and some of them were still not. Accordingly, it

²⁰L/6405, adopted on 20 October 1988, 35S/293, 304, para. 19 and 306, para. 22.

²¹L/6927, adopted 12 November 1991, 38S/47, 70, para. 76.

²²*Ibid.*, 38S/58, para. 34.

²³GATT/1/21, p. 1-2, para. 7.

²⁴GATT/1/49, reprinted at GATT/CP.1, p. 27; see also discussion at GATT/1/SR.11 and SR.14, and later documents and discussion at GATT/CP.17 and Add.1, GATT/CP.4/30, GATT/CP.4/SR.17.

²⁵L/1235, adopted 4 June 1960, 9S/70, 86, para. 58.

²⁶L/1364, adopted 18 November 1960, 9S/87, 94, para. 31.

had been shown in practice that the concept ‘territories of contracting parties’ had not been interpreted as restricting the applicability of paragraph 5.”²⁷

The 1985 Panel Report on “EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region”, which has not been adopted, records the argument by the USA “that the procedures of Article XXIV:7(b) applied only to interim agreements among contracting parties and hence not to the agreements concluded with Algeria, Morocco, Tunisia, Jordan and Lebanon, which were not contracting parties. These agreements were rather subject to the procedures of Article XXIV:10 which required a two-thirds majority approval”.²⁸ The Panel findings contain the following paragraph.

“As regards the United States’ contention that a free-trade area including a non-contracting party can only be considered under the provisions of Article XXIV:10 and not under those of Article XXIV:7(b) the Panel noted that the CONTRACTING PARTIES had considered several such cases under the provisions of Article XXIV:7(b) (see EFTA: BISD 9S/20; LAFTA: BISD 9S/21; Arab Common Market: BISD 14S/20; UK/Ireland Free-Trade Area Agreement: BISD 14S/23).”²⁹

See also the discussion of Article XXIV:10 below at page 829.

In this connection see also the unadopted Panel Reports of 1993 on “EEC - Member States’ Import Régimes for Bananas”³⁰ and of 1994 on “EEC - Import Régime for Bananas”.³¹

(b) Free trade areas between independent and dependent territories

The 1966 Working Party Report on “EEC - Association Agreements with African and Malagasy States and Overseas Countries and Territories” notes in its examination of the association between the EEC and certain countries and territories maintaining special relations with France and the Netherlands, that

“Some members of the Working Party felt that Article XXIV of the General Agreement was not meant to provide for free-trade areas between dependent and independent entities; one of these members added that some of the customs territories involved had no autonomy ... The representative of the Community recalled that Article XXIV:8 defines a free-trade area as a group of two or more ‘customs territories’ and the latter are defined in paragraph 2 of Article XXIV as ‘any customs territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories’. He said this was the case with respect to the Associated Countries and Territories”.³²

(c) Free trade areas between developed and developing countries

The 1966 Report of the Working Party on “EEC - Association Agreements with African and Malagasy States and Overseas Countries and Territories” (on the “Yaoundé Convention”) notes the following exchange of views:

“Some members of the Working Party expressed the view that in a free-trade area consisting of industrialized and less-developed countries the industrialized countries should not require reciprocal advantages from their less-developed partners, and, in this connexion, referred to the principles established in the new Part IV of the General Agreement. ... In their view, Article XXIV had never been meant to apply to free-trade areas between developed and less-developed countries ...

²⁷L/3379, adopted on 29 September 1970, 18S/149, 154, para. 16. The reference to the Havana Reports is to the passage quoted on page 829 below.

²⁸L/5776 (unadopted), para. 3.14.

²⁹*Ibid.*, para. 4.9.

³⁰DS32/R, dated 3 June 1993, paras. 365-371.

³¹DS38/R, dated 11 February 1994, para. 163.

³²L/2441, adopted 4 April 1966, 14S/100, 112-113, para. 35.

"In reply ... the representatives of the Community and the Associated States said that the question of reciprocity was not dealt with in Article XXIV, which only required that restrictions on substantially all the trade between the member countries of a customs union or a free-trade area should be removed. Part IV of the General Agreement ... did not aim to modify the provisions of Article XXIV. The only test the CONTRACTING PARTIES could apply to a free-trade area was whether it satisfied the requirements of Article XXIV. ... There was no reason to believe that the authors of Article XXIV had overlooked the possibility of free-trade areas between countries at different stages of development. The CONTRACTING PARTIES had moreover already examined free-trade areas where there had been a great difference between the stages of development of the constituent territories".³³

However, the 1976 Report of the Working Party on "The ACP-EEC Convention of Lomé" notes that "The parties to the Convention considered that the Convention was compatible with their obligations under the General Agreement, in particular the provisions of Articles I:2, XXIV and XXXVI, which had to be considered side by side and in conjunction with one another ... Since the objective of the Convention was to implement actions and measures aimed at improving standards of living and the economic development of less-developed countries, it could not but be in line with the objectives pursued by the GATT, in particular those defined in Part IV".³⁴ See also the material from this report at page 826 below.

(2) "the duties and other regulations of commerce imposed at the institution of any such union/maintained in each of the constituent territories"

(a) Variable levies

During the examination by the Working Party on the "Accession of Greece to the European Communities", Australia requested the establishment of a Panel of experts to determine "whether variable levies constitute 'duties and other regulations of commerce', and by what means the incidence of such measures should be calculated so as to reflect their effect on trade in a range of market circumstances".³⁵ The EEC response stated: "The Community view is that 'duties and other regulations of commerce' in the agricultural sector are unquestionably relevant to any examination of an agreement under Article XXIV:5(a), and we believe no contracting party could hold a contrary view. ... the Community view is that variable levies are covered by the phrase 'duties and other regulations of commerce'".³⁶ One member of the Working Party endorsed this position and stated that "This was a reversal of a position which the EEC had held since the introduction of their variable levy system and was one of the main issues which prevented progress being made in the previous Working Parties on the Rome Treaty and the 1972-73 enlargement".³⁷

(b) Quantitative restrictions

The Report of the Sub-Group at the Twelfth Session which examined the EEC Treaty provisions relating to quantitative restrictions notes:

"Most members of the Sub-Group could not accept the interpretation of the Six of paragraph 5(a). In their view the use of the term 'regulations' in this paragraph and in paragraph 8(a)(ii) does not include quantitative restrictions imposed for balance-of-payments reasons. An examination of the provisions of the Agreement indicates that the term 'regulations' is consistently used to describe such matters as customs procedures, grading and marketing requirements, and similar routine controls in international trade. This interpretation is reinforced by the fact that in 8(a)(i) the term 'regulation' is qualified by the word 'restrictive' in the one instance where Article XXIV specifically refers to the balance-of-payments Articles. Moreover, the term 'regulation' does not appear in the balance-of-payments Articles of the General Agreement. The General Agreement prohibits the use of quantitative restrictions for protective purposes and permits their use only in exceptional circumstances and mainly to deal with balance-of-payments difficulties.

³³L/2441, adopted on 4 April 1966, 14S/100, 106, paras. 13-14.

³⁴L/4369, adopted on 15 July 1976, 23S/46, 53-54, para. 23. See also L/4325, "ACP-EEC Convention of Lomé - Questions and Replies", p. 1-2.

³⁵L/5117.

³⁶L/5124, para. 2.

³⁷L/5453, Report of the Working Party adopted on 9 March 1983, 30S/168, 187, para. 53.

Accordingly the notion that paragraph 5(a) would require that temporary quantitative restrictions should be treated in the same way as normal protective measures such as tariffs in determining the trade relations between countries in a customs union and third countries would be contrary to the basic provisions of the Agreement which preclude the use of quantitative restrictions as an acceptable protective instrument”.³⁸

The 1988 Report of the Working Party on “Accession of Portugal and Spain to the European Communities” notes the view of one member of the Working Party in relation to quantitative restrictions in Spain and Portugal stated to contravene Articles XI and XIII, that “because these measures were GATT-inconsistent they could not be included in the assessment of the incidence of changes in ‘other regulations of commerce’ which had to be carried out under Article XXIV:5(a)” and the view of some members of the Working Party that “measures which were inconsistent with the GATT could not be traded off against the alleged reduction of other barriers and could not be included in the assessment of incidence of changes in ‘other regulations of commerce’ required by Article XXIV:5(a) under which only GATT-consistent measures should be taken into account”.³⁹ The EEC observed in reply that “the Communities agreed that Article XXIV did not provide a waiver from other provisions of the GATT. By the same token, however, the role of the Working Party in this context was to examine the situation in the light of Article XXIV rather than with respect to any other provision such as Articles XI or XIII”.⁴⁰

See also various other Working Party reports on this subject.⁴¹

(c) *“Other regulations of commerce”*

The Report of the Working Party of 1991 on “Free-Trade Agreement between Canada and the United States” notes the statement of the United States representative concerning its customs user fee that “the customs user fee was an ‘other regulation of commerce’ covered under Article XXIV:5(b)” and the statement of another member that “Article XXIV, paragraph 5(b) did not stipulate that one FTA party could waive the application of ‘other regulations of commerce’, such as a customs user fee, with respect to the other party”. In response to a suggestion by one other member that the customs user fee should be more appropriately considered as “other restrictive regulations of commerce” that applied between the two FTA Parties in terms of Article XXIV:8(b), the representative of the United States said that “the customs user fee could not be qualified as ‘restrictive regulation of commerce’ in the way it was presently applied by his country”.⁴²

See also various other Working Party reports on this subject.⁴³

³⁸L/778, adopted on 29 November 1957, 6S/70, 78, para.5.

³⁹L/6405, adopted 19-20 October 1988, 35S/293, 315, 316, paras. 38, 39.

⁴⁰*Ibid.*, 35S/318, para. 45.

⁴¹See the relevant discussion in the Reports of the following Working Parties: European Economic Community, 6S/76-81, paras. 2-13; EFTA, 9S/70, paras. 19-28; EEC-Association of Greece, 11S/149, paras. 14-15; EEC-Association of Morocco, 18S/149, paras. 12-15; EEC-Agreement with Spain, 18S/166, paras. 13, 14; EEC-Association of Malta, 19S/90, paras. 6, 18, 19; EEC-Association with Tanzania, Uganda and Kenya, 19S/97, para. 7; EEC-Agreement with Austria, 20S/145, para. 17; EEC-Agreement with Finland, 21S/76, paras. 15, 16; ACP-EEC Convention of Lomé, 23S/46, paras. 16, 17; EEC-Agreement with Israel, 23S/55, para. 12; Finland-Czechoslovakia, 23S/67, paras. 35, 36; CARICOM, 24S/68, paras. 5, 9, 10; EFTA-Agreement with Spain, 27S/127, paras. 5, 20, 21; Finland-Poland, 27S/136, paras. 37-42; EEC-Accession of Greece, 30S/168, paras. 13, 25-32, 51.

⁴²L/6927, adopted 12 November 1991, 38S/47, 60, para. 40.

⁴³See the relevant discussion in the Reports of the following Working Parties: Equatorial Customs Union and Cameroon, 12S/73, para. 6; EEC-Association of Turkey, 13S/59, paras. 10-14, 19S/102, paras. 9, 12, 14; Finland-Hungary, 22S/47, paras. 24, 26, 24S/107, paras. 36-43; EEC-Accession of Greece, 30S/168, paras. 34, 35, 37, 45, 47, 48, 53, 54; Canada-US FTA, 38S/47, paras. 40, 88.

(d) Rules of origin

The Working Party Reports of 1973 on the EEC Agreements with various countries of the European Free Trade Association each contain similar exchanges of views on rules of origin in the context of a free-trade area agreement.⁴⁴ Each of these reports provides:

“One member of the Working Party said that ... the Agreement was contrary to the General Agreement because the rules of origin would frustrate the purpose of a free-trade area as stated in Article XXIV:4 in that they would frustrate intra-trade in products that could not meet the origin criteria and raise barriers to third-country trade in intermediate products; the requirements of Article XXIV:8(b) for elimination of restrictions on substantially all the trade had not been met because of [*inter alia*] the effects of the rules of origin; the requirement of Article XXIV:5(b) that external restrictions shall not be higher than in the constituent territories had not been met because of the rules of origin ... As well as being restrictive in many substantive provisions, those rules of origin were so complex and cumbersome as to be a barrier to trade in and of themselves; in the absence of compelling reasons to the contrary, manufacturers within the free-trade area would favour origin sources over outside countries merely to be sure of qualifying under the rules of origin. Once trade shifts of that kind took place, the damage to third countries’ exports would be difficult to remedy.”⁴⁵

“In the view of the parties the General Agreement offered no objective measure for evaluating rules of origin. Contracting parties were therefore free, within the framework of Article XXIV and consistent with the objective of establishing a free-trade area, to adopt systems which met their needs and those of third countries. ...”⁴⁶

The 1974 Report of the Working Party on “EEC Agreement with Egypt” notes that some members “found the rules of origin in the present Agreement, like those in similar agreements examined in earlier working parties, almost excruciatingly complex and difficult to explain. It was difficult to imagine why the parties would put themselves to so much trouble to draw up rules that hopefully would not represent increased barriers to third parties’ trade”.⁴⁷

The 1978 Report of the Working Party on “Agreement between the EC and Algeria” notes the view of one member of the Working Party “that the stringent rules of origin provided for in the Agreement would result in components being largely sourced in the EEC, even if that were more expensive for the Algerian manufactures. ... if substantial processing in Algeria were the only guarantee of real development, he asked why an exception had been granted for components produced in the EEC member States”. The spokesman for the EC noted that “while the General Agreement provided for rules of origin, it did not define any criteria in regard to them; like the needs of the parties, they could differ according to the case, consistently with the economic and commercial requirements of each context”.⁴⁸

The 1980 Report of the Working Party on “Agreement between the EFTA Countries and Spain” records the view of some members of the Working Party that “the strict rules of origin in the Agreement would limit the scope of free trade in a manner inconsistent with the requirements of Article XXIV:8(b) and would raise barriers to the trade of third countries contrary to the obligations of Article XXIV:5(c)”. The parties to the Agreement

⁴⁴EEC-Agreements with Austria, 20S/145, paras. 4-6, 10, 22-29, 33, 34, 37; EEC-Agreements with Iceland, 20S/158, paras. 4-6, 10, 26-33, 37, 38, 41; EEC-Agreements with Portugal, 20S/171, paras. 5, 6, 10, 23-30, 34, 35, 38, 24S/73, paras. 19-23; EEC-Agreements with Sweden, 20S/183, paras. 5, 6, 10, 24-31, 35, 36, 39; EEC-Agreements with Switzerland and Liechtenstein, 20S/196, paras. 5, 6, 10, 26-33, 37, 38, 41. See also the briefer but similar discussion in EEC-Agreements with Finland, 21S/76, paras. 6, 21, 22; and EEC-Agreements with Norway, 21S/83, paras. 6, 11, 24-29, 32, 33, 35.

⁴⁵EEC-Agreements with Austria, 20S/145, 147, para. 5; EEC-Agreements with Iceland, 20S/158, 159-160, para. 5; EEC-Agreements with Portugal, 20S/171, 172, para. 5; EEC-Agreements with Sweden, 20S/183, 185, para. 5; EEC-Agreements with Switzerland and Liechtenstein, 20S/196, 197-198, para. 5.

⁴⁶EEC-Agreements with Austria, 20S/145, 155, para. 28; EEC-Agreements with Iceland, 20S/158, 168, para. 32; EEC-Agreements with Portugal, 20S/171, 180, para. 29; EEC-Agreements with Sweden, 20S/183, 193-194, para. 30; EEC-Agreements with Switzerland and Liechtenstein, 20S/196, 206, para. 32.

⁴⁷L/4054, adopted on 19 July 1974, 21S/102, 106, para. 18.

⁴⁸L/4559, adopted on 11 November 1977, 24S/80, 86, paras. 17 and 19.

stated that “rules of origin ... were necessary in a free-trade arrangement. The purpose of the rules was to prevent deflection of trade and not to limit the scope of free trade nor create obstacles to third country exports”.⁴⁹

The 1991 Report of the Working Party on “Free-Trade Agreement between Canada and the United States” notes that “The parties to the FTA recognized that the purpose of rules of origin for goods in a free-trade agreement was solely to determine whether a product was eligible to benefit from preferential treatment under the agreement”.⁵⁰ One member of the Working Party stated that “In operating the provisions of the FTA on rules of origin, parties should bear in mind the provisions of Article XXIV:4 and Article XXIV:5(b), which clearly stipulated that barriers to the trade of other contracting parties with free-trade areas should not be raised and that any new regulations of commerce shall not be more restrictive than those existing prior to the formation of free trade areas. The compatibility of the rules of origin in the FTA with GATT should be examined in the light of these criteria. The representative of Canada said that the discussion of the question of whether rules of origin were one of ‘other regulations of commerce’ in terms of Article XXIV:5(b) had not led to a solution in previous working parties on free trade agreements. Rules of origin for the FTA would operate so as not to have adverse effects on the trade of third parties”.⁵¹

The use of rules of origin in the context of agreements notified under Article XXIV is discussed also in various other Working Party reports.⁵²

(3) “shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories”

(a) “on the whole”

It was stated at the London session of the Preparatory Committee, in response to a question whether the new tariff rate on each product had to be below the average of the rates of the constituent territories prior to the formation of the union, that “The phrase ‘on the whole’... did not mean that an average tariff should be laid down in respect of each individual product, but merely that the whole level of tariffs of a customs union should not be higher than the average overall level of the former constituent territories”.⁵³

(b) “the general incidence”

The text of the Geneva Draft Charter (and the General Agreement as of 30 October 1947) used the words “the average level” in Article XXIV:2(b) instead of the words “the general incidence”. The report of the Sub-Committee at the Havana Conference which considered the Charter provision notes as follows:

“The Sub-Committee recommended that the words ‘average level of the duties’ be replaced by ‘general incidence of the duties’ in paragraph 2(a) of the new Article. It was the intention of the Sub-Committee that this phrase should not require a mathematical average of customs duties but should permit greater flexibility so that the volume of trade may be taken into account”.⁵⁴

⁴⁹L/5045, adopted on 10 November 1980, 27S/127, 135, paras. 27-28.

⁵⁰L/6927, adopted 12 November 1991, 38S/47, 58, para. 35.

⁵¹*Ibid.*, 38S/59, para. 37.

⁵²See the relevant discussion in the Reports of the following Working Parties: EFTA, 9S/70, paras. 4-10; EFTA-Association of Finland, 10S/101, para. 7; EEC-Association with Cyprus, 21S/94, 98, paras. 13-18; EEC-Agreement with Egypt, 25S/114, paras. 11, 12, 24-27, 39; EEC-Agreement with Lebanon, 22S/43, paras. 13, 14, 25S/142, paras. 12, 13, 24-27, 39; ACP-EEC Convention of Lomé, 23S/46, paras. 10-11, 29S/119, para. 21; EEC-Agreement with Israel, 23S/55, paras. 6, 10, 17, 18; EEC-Agreement with Algeria, 24S/80, paras. 8, 18, 19; EEC-Association of Morocco, 24S/88, paras. 8, 19-21, 30; EEC-Association with Tanzania, Uganda and Kenya, 19S/97, paras. 8, 19-21, 29; EEC-Agreement with Jordan, 25S/133, paras. 12, 13, 24-27, 39; EFTA-Agreement with Spain, 27S/127, paras. 25-28; Finland-Poland, 27S/136, paras. 35, 36; EEC-Agreement with Syria, 25S/123, paras. 11-12, 23-26, 38; EEC-Agreement with Yugoslavia, 28S/115, paras. 20, 21, 25; Canada-US FTA, 38S/47, paras. 37, 86.

⁵³EPCT/C.II/38, p. 9, responding to question at *ibid.* p. 7; see also EPCT/C.II/PV/7.

⁵⁴Havana Reports, p. 51, para. 24.

The change was incorporated into Article XXIV; see Section III below.

The Report of the Sub-group at the Twelfth Session which examined the EEC Treaty provisions relating to the establishment of a common tariff notes:

“In considering the basis on which the CONTRACTING PARTIES could best make a judgement with regard to the common tariff in the light of provisions of paragraph 5(a) of Article XXIV, most of the members of the Sub-Group felt that an automatic application of a formula, whether arithmetic average or otherwise, could not be accepted, and agreed that the matter should be approached by examining individual commodities on a country by country basis. Attention was also drawn to the drafting history of paragraph 5(a) of Article XXIV, according to which the term ‘general incidence of the duties’ was used with the intention ‘that this phrase should not require a mathematical average of customs duties but should permit greater flexibility so that the volume of trade may be taken into account’.

“The representatives of the Member States drew attention to the fact that the provisions of Article XXIV do not exclude any method of calculation for the preparation of a common tariff, provided however that the duty rates applied as a result of the establishment of a customs union are not on the whole higher than the general incidence of the duties which they replace. The Member States base their calculation on the arithmetical average method which is strictly in conformity with the provisions of paragraph 5 of Article XXIV. For arriving at a still lower tariff level the Member States furthermore in their calculation use the rates actually applied on 1 January 1957, subject to the exceptions as provided for in Article 19 of the Treaty, and not the legal and contractual rates which the Member States, in their view, would have the right to apply under the provisions of paragraph 5 of Article XXIV. To the same effect the Member States provided ceiling rates for a great number of products which have to be applied even in instances where the arithmetical average would lead to higher rates ... The Member States are not in a position to accept a country-by-country study for the reasons ... given in connexion with the interpretation of paragraph 4 of Article XXIV”.⁵⁵

The 1983 Working Party Report on “Accession of Greece to the European Communities” records the views of the EEC that “Article XXIV:5 of the GATT referred to ‘the general incidence’, viz. the incidence of the trade régime of the enlarged EC on all of their partners”;⁵⁶ and (concerning the methodology for evaluating the incidence of measures) that “Article XXIV:5 required only a generalized, overall judgement on this point”;⁵⁷ and that “Article XXIV:5 dealt with the general incidence of the effects of the creation of a customs union ... particular implications for a contracting party with respect to individual products should be discussed in another forum”.⁵⁸ The Working Party could not agree on the precise methodology for the assessment to be made in terms of Article XXIV:5 and could not agree on whether the duties or regulations of commerce were, on the whole, higher or more restrictive after Greek accession than before.

The 1988 Report of the Working Party on “Accession of Portugal and Spain to the European Communities” records the view of the EC that “Article XXIV:5 only required an examination on the broadest possible basis. The task was general, namely to reach a view on whether the general incidence of customs duties and regulations after enlargement was on the whole more or less restrictive than before. Even if a negative incidence were shown to be the case for certain items, such as when duties were increased or replaced by variable levies, one had to consider whether these effects were not balanced by the effects of other changes in the tariff sector taken as a whole ... In assessing general incidence, one had to avoid too static an analysis and to take into account the trade-creating effects of the establishment or enlargement of a customs union”.⁵⁹ The same Report also notes that one member “could not accept the Communities’ contention that the extension of the tariff of the EC/10 to the EC/12 was compatible with their obligations under Article XXIV:5(a) regardless of the effect on the tariffs of Spain and

⁵⁵L/778, “The European Economic Community”, adopted on 29 November 1957, 6S/70, 71-72, paras. 6-7; reference to EEC views on Article XXIV:4 is to para. 2 of this report, cited above at page 796.

⁵⁶L/5453, adopted 9 March 1983, 30S/168, 179, para. 32.

⁵⁷*Ibid.*, 30S/184, para. 42.

⁵⁸*Ibid.*, 30S/189, para. 56.

⁵⁹L/6405, adopted 20 October 1988, 35S/293, 295-296, para. 6.

Portugal. Article XXIV:5(a) required a comparison with the pre-accession tariffs of the constituent territories and the relative size of those territories was not a relevant factor”.⁶⁰

The Understanding on the Interpretation of Article XXIV of the GATT 1994 provides in paragraph 2 thereof that “The evaluation under paragraph 5(a) of Article XXIV of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a customs union shall in respect of duties and charges be based upon an overall assessment of weighted average tariff rates and of customs duties collected. This assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff-line basis and in values and quantities, broken down by WTO country of origin. The Secretariat shall compute the weighted average tariff rates and customs duties collected in accordance with the methodology used in the assessment of tariff offers in the Uruguay Round of Multilateral Trade Negotiations. For this purpose, the duties and charges to be taken into consideration shall be the applied rates of duty. It is recognized that for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required.”

(c) *“applicable”: use of bound or applied duty rates in comparison of tariff rates*

The Report of the Tariff Negotiations Committee in 1961 charged with examining the common external tariff of the EEC in the light of the provisions of Article XXIV:5(a) noted that its conclusions were “necessarily tentative” since “it was not able to reach agreement on one question which materially affects any attempt to compare tariff rates of the Member States of the EEC before its formation and the Common Tariff, i.e. the question whether, in the case of the former, legal or bound rates on the one hand, or, on the other, rates actually applied should be used”. It further noted:

“The European Economic Community held, on the basis of the text itself of paragraph 5 of Article XXIV, that the expression ‘applicable’ must be read, in contrast to the term ‘imposed’ used elsewhere in Article XXIV, as referring to a rule of law which is applied or capable of being applied, and that it is for each contracting party constituting a customs union or a free-trade area to interpret its own legislation with regard to the duties which should be regarded as being applicable. According to the national legislation of the member States of the EEC the term ‘applicable’ can only refer to conventional (bound) and legal customs duties. Several members of the Working Party, on the other hand, held that ‘applicable’ must in this context mean rates actually applied since the purpose of Article XXIV:5(a) was to prevent the institution of a customs union being used as an opportunity to increase the protective duties actually encountered by exporters. In particular it was held by these delegations that the use as a basis for the computation of the Common Tariff of tariffs which were in fact never levied (i.e. the Italian tariff) did not give a true indication of the protective regime existing before the formation of the customs union”.⁶¹

In discussion of this report the Executive Secretary stated that “the result of any statistical exercise would only support the view, with which he thought there was no disagreement, that the incidence of the Common Tariff was higher than that of the rates actually applied by the Member States at the time of the entry into force of the Treaty of Rome”.⁶² In 1962 a legal opinion was requested of the Executive Secretary. The opinion notes that

“There appears to be very little recorded history on the drafting of paragraph 5(a). ... In the English language texts ... the word ‘applicable’ was used consistently. In the French language texts, on the other hand, there was some alternation between the two expressions ‘applicables’ and ‘en vigueur’; in the Havana Charter and in the General Agreement, in the final French texts drawn up in 1948, the word ‘applicables’ was used, but during the review of the GATT at the Ninth Session in 1955, this was changed (by means of the Protocol of Rectification to the French text) to ‘en vigueur’. Thus drafting history throws no light on the choice of words which were used and no definition of them has been provided.

⁶⁰*Ibid.*, 35S/311, para. 36.

⁶¹L/1479, para. 7; for discussions of this question, see also Session and Council records (SR.18/4, pp. 46-54, C/M/8, SR.19/6-7, pp. 80-90) and the Committee report, adopted on 29 November 1957, on the EEC’s common tariff (6S/70-74).

⁶²C/M/8, p. 6.

"In these circumstances one must explore the probable intentions of those who drafted the provisions of Article XXIV. It is clear, in the light of the general principle set out in paragraph 4 of Article XXIV, that the drafters were seeking to ensure that the creation of a customs union, as an exception to the most-favoured-nation rule, would not in practice lead to a raising of barriers to international trade. ... the words (in paragraph 5(a)) 'shall not on the whole be higher than the general incidence of duties ... applicable in the constituent territories prior to the formation of [a customs] union ...' must be understood as an effort to spell out the implications of paragraph 4 and to satisfy the requirements of that paragraph.

"... the intent of those who drafted the provisions governing the establishment of a common external tariff of a customs union was that the formation of such a union should not, on the whole, result in higher tariff barriers against trade than *existed* previously in the constituent territories of the union.

"Against this background of the purposes and intent of paragraph 5(a) the two different interpretations of the word 'applicable'... should be examined. It seems that the intentions of the drafters are not fully covered by either interpretation, and yet when the two interpretations are reconsidered from the point of view of reasonableness and logic the gap between them narrows. On the one hand, if the word were interpreted in the sense of 'applied' duties, it would be reasonable, in the computation of a common external tariff, to permit the use of the duties inscribed in the tariff in those cases where duties had been temporarily lowered or suspended to meet particular circumstances of an economic nature or because other types of barriers were being used. On the other hand, if the word were interpreted in the sense of 'applicable' duties, it would be reasonable, in the computation of a common external tariff, to disallow the customs duties of a legal tariff if these duties had never actually been applied and there was no reasonable expectation that they ever would be applied".⁶³

The Report of the Working Party on the "Accession of Greece to the European Communities" notes that "Several members of the Working Party took the view that since it was the task of the Working Party under Article XXIV:5(a), *inter alia*, to make an assessment of the changes in the tariff level of Greece, it was necessary to obtain information not only relating to the bound or legal rates but also to the applied rates The spokesman for the EC replied that for the purposes of the Working Party, only the bound rates were of relevance".⁶⁴

The 1991 Report of the Working Party on the "Free-Trade Agreement between Canada and the United States" notes (in relation to the elimination of Canadian duty remission schemes conditional on export performance) that

"The representative of Canada said that the objective of not raising barriers to the trade of other parties in Article XXIV:4 had to be considered together with the requirements of Article XXIV:5(b). Any judgement on the restrictive effect of eliminating [this] ... scheme ... should be made with respect to trade in goods with bound tariff rates. Parties to a free-trade agreement did not have the obligation to continue, regardless of the GATT bound rates, the duties applied at lower rates than GATT bound rates through duty remission schemes or temporary reduction or suspension of duties prior to the formation of the free-trade agreement. The representative of a group of countries noted with interest that the parties' interpretation of Article XXIV was that the obligation not to increase the restrictiveness of duties related exclusively to bound rates. One member maintained the view that the term 'duties' in Article XXIV:5(b) was not only limited to bound rates but covered all the duties applied by the parties at the time of the formation or the enlargement of a free-trade agreement".⁶⁵

The Report also records the view of the parties to the Agreement that: "With respect to concerns expressed about duty drawback and duty remission provisions in the Agreement they questioned whether it was the intent of Article XXIV to bind parties never to increase m.f.n. rates of duty which, at the time of entry into force of the FTA, had been suspended or subject to exoneration in some way".⁶⁶

⁶³L/1919, dated 14 November 1962, paras. 5-8. See also request for opinion at SR.19/7, p. 89-90; discussion of opinion by CONTRACTING PARTIES, which "noted the views of the Executive Secretary" (p. 171), at SR.20/11, p. 169-171.

⁶⁴L/5453, adopted 9 March 1983, 30S/168, 175 paras. 19-20.

⁶⁵L/6927, adopted 12 November 1991, 38S/47, 66, para. 62.

⁶⁶*Ibid.*, 38S/71, para. 77.

Paragraph 2 of the Understanding on Interpretation of Article XXIV of the GATT 1994, concerning evaluation of the formation of a customs union, provides that “The Secretariat shall compute the weighted average tariff rates and customs duties collected in accordance with the methodology used in the assessment of tariff offers in the Uruguay Round of Multilateral Trade Negotiations. For this purpose, the duties and charges to be taken into consideration shall be the applied rates of duty”.

d) Other issues concerning methodology for comparison of duty rates

The 1988 Report of the Working Party on “Accession of Portugal and Spain to the European Communities” records the extensive debate in the Working Party concerning the use of the trade coverage approach (favoured by the EEC) and the “duties collected” approach (favoured by certain other delegations) in analysing changes in duty rates.⁶⁷ The same Report also notes the statement of one member, which was not agreed to by the EEC, that “exclusion of preferential trade was necessary when making the Article XXIV:5(a) assessment of the impact of accession”.⁶⁸ See also the Understanding on the Interpretation of Article XXIV of the GATT 1994.

(4) “any interim agreement ... shall include a plan and schedule for the formation of such a customs union or of such a free-trade area”

The 1965 Report of the Working Party on “Association of Turkey with the European Economic Community” notes the view of the EEC and Turkey that

“the fact that Article XXIV:5 uses the words ‘interim agreement’ indicates rather clearly that the ‘plan and schedule’ need not necessarily be detailed and complete; the CONTRACTING PARTIES have examined other regional agreements which were also somewhat imprecise in this respect”.⁶⁹

In the Report of the Working Party on “European Economic Community - Agreements of Association with Tunisia and Morocco” which examined these agreements in 1970, it was stated that

“without a precise and complete plan and schedule, it would be impossible for the CONTRACTING PARTIES to make findings with regard to whether the agreements were likely to result in free-trade areas within a reasonable period and, if necessary, to make recommendations”.⁷⁰

The Report of the Working Party of 1975, on “Agreement between the EEC and Lebanon” records the statement by the EEC

“that Article XXIV:5 must be read in its entirety. The parties’ view, shared by some other members of the Working Party, was and remained that the three concepts of ‘interim agreement’, ‘plan and schedule’ and ‘reasonable length of time’ could not be dissociated from one another as to their significance and their scope. They could not claim to be able to foresee, in an interim agreement, in any precise manner at this stage and in a situation constantly changing, all the modalities that would lead to its objective.

“It nevertheless remained that, within the context of the Agreement, there was a plan and a schedule in the sense that the Agreement contained specific concrete provisions for attaining the objectives of tariff and quota dismantlement in a first stage, and the provisions necessary for continuing such dismantlement in accordance with the stated will of the parties to achieve a free-trade area within the meaning of Article XXIV and in compliance with the provisions of the General Agreement. Some members reminded the Working Party that their authorities did not share this interpretation and said that the parties should, in any event, provide reference dates so that contracting parties could judge for themselves whether the time period was reasonable in their view”.⁷¹

⁶⁷L/6405, adopted 20 October 1988, 35S/293, 297-303, paras. 10-16, and 312-318, paras. 37-44.

⁶⁸*Ibid.*, 35S/311, para. 36 and 35S/320, para. 48; see also 35S/304, para. 18.

⁶⁹L/2265, adopted on 25 March 1965, 13S/59, 62, para. 9.

⁷⁰L/3379, adopted on 29 September 1970, 18S/149, 157, para. 27.

⁷¹L/4131, adopted on 3 February 1975, 22S/43, 46, para. 12.

The Report of the Working Party of 1980 on “Agreement between the EFTA Countries and Spain” records the view of the parties to this agreement

“that a study of the practice of GATT showed that the borderline between the two legal concepts of free-trade agreement and interim agreement was not quite distinct”.⁷²

The 1984 Report of the Working Party on “Australia/New Zealand Closer Economic Relations Trade Agreement (ANZCERT)” notes that the New Zealand representative emphasized that “the Agreement was in no sense provisional or incomplete but a definitive establishment of a free trade area under Article XXIV, paragraph 7(a). There was, however, an intervening period between entry into force and the complete elimination of duties and other restrictive regulations on substantially all the trade”.⁷³

The Report of the Working Party on the “Free-Trade Agreement between Canada and the United States” records that “one member was unable to take a definitive position on the consistency of the Agreement with Article XXIV:5(c) because of the absence of a clear plan and schedule for the elimination of certain non-tariff barriers in agricultural products ...”.⁷⁴

See also the discussion on “plan and schedule” in various other Working Party reports.⁷⁵

Paragraph 10 of the Understanding on the Interpretation of Article XXIV provides that “Should an interim agreement notified under paragraph 7(a) of Article XXIV not include a plan and schedule, contrary to paragraph 5(c) of Article XXIV, the working party shall in its report recommend such a plan and schedule. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations. Provision shall be made for subsequent review of the implementation of the recommendations.”

(5) “within a reasonable length of time”

During discussions at the London session of the Preparatory Committee a South African proposal to replace the ambiguous term “reasonable” by a definite time limit was not taken up.⁷⁶

The 1962 Working Party on “Association of Greece with the European Economic Community” notes that “Some members of the Working Party expressed concern about the length of the transitional period provided for by the Association Agreement. Article 15 of this Agreement stipulated, for a number of products covering a relatively large percentage of Greek imports (30 percent of Greek imports from the EEC) a transitional period of twenty-two years. Doubt was expressed as to whether this could be considered a reasonable length of time for the realization of the customs union”.⁷⁷

The Report of the Working Party on “European Economic Community - Agreement with Spain” records that the parties to that Agreement noted that the meaning of the term “reasonable length of time”, which must be

⁷²L/5045, adopted on 10 November 1980, 27S/127, 129, para. 7.

⁷³L/5664, adopted on 2 October 1984, 31S/170, 179, para. 29.

⁷⁴L/6927, adopted 12 November 1991, 38S/47, 74, para. 89.

⁷⁵See, e.g., Reports on: South African/Southern Rhodesia Customs Union Agreement, II/176, paras. 16-19; European Economic Community, 6S/70, paras. 17-18; EFTA, 9S/70, para. 31; EEC-Association with Turkey, 13S/59, paras. 8-9, 19S/102, paras. 3-4, 9, 11, 21S/108, paras. 7-9; Arab Common Market, 14S/94, paras. 5, 12, 16, 20, 21; EEC-Association Agreements with African and Malagasy states, 14S/100, paras. 5, 6, 11, 23, 24, 30; New Zealand-Australia FTA, 14S/115, paras. 5, 9, 15-17; UK-Ireland FTA, 14S/122, para. 8; EEC-Association of Tunisia and Morocco, 18S/149, paras. 7, 17-20; EEC-Agreement with Israel, 18S/158, paras. 3, 7, 9, 14-21, 24-26, 23S/55, paras. 4-5, 24; EEC-Agreement with Spain, 18S/166, paras. 17, 20, 22; EFTA-Accession of Iceland, 18S/174, para. 5; EEC-Association of Malta, 19S/90, paras. 1, 11-13, 21, 23; EEC-Agreements with Austria, 20S/145, paras. 11, 34; EEC-Agreements with Iceland, 20S/158, paras. 11, 38; EEC-Agreements with Portugal, 20S/171, paras. 11, 35; EEC-Agreements with Sweden, 20S/183, paras. 12, 36; EEC-Agreements with Switzerland and Liechtenstein, 20S/196, paras. 11, 38; EEC-Agreements with Norway, 21S/83, paras. 12, 33; EEC-Association with Cyprus, 21S/94, paras. 5-8; EEC-Agreement with Egypt, 21S/102, paras. 5, 9, 13-15, 19; EEC-Agreement with Lebanon, 22S/43, paras. 10-12; EFTA-Agreement with Spain, 27S/127, paras. 7-11, 13-14, 27-28.

⁷⁶EPCT/C.II/38, p. 8; EPCT/C.6/34, pp. 4-5.

⁷⁷L/1829, adopted on 15 November 1962, 11S/149, 150, para. 6.

appreciated in conjunction with that of “interim agreement”, had never been defined by the CONTRACTING PARTIES.⁷⁸

The 1972 Report of the Working Party on “EEC - Agreement of Association with Malta” records that:

“Most members of the Working Party stated that paragraphs 5-9 of Article XXIV had to be interpreted against the background of paragraph 4. ... From the point of view of the General Agreement an evolutionary time-table, such as the one presented in this Agreement, was preferable to a precise and detailed schedule in the case of countries with different levels of development. Such a time-table might be more likely to lead to the formation of a customs union within a shorter period ...

“The parties to the Agreement ... stated - and several members of the Working Party supported them - that in view of the difference in stage of development of Malta and the Community, the provisions of the Agreement concerning the plan and schedule for the establishment of a customs union represented a realistic approach ... Paragraph 5(c) dealt expressly with the case of interim agreements. The very term ‘interim’ as applied to the notions of ‘plan and schedule’ and ‘reasonable length of time’ made it clear that they did not necessarily have to be fixed at the outset in an absolutely specific and detailed manner.

“One member of the Working Party could not accept the foregoing interpretation of Article XXIV, pointing out that ... the text of paragraph 5(c) was very clear and unequivocal”.⁷⁹

The 1972 Report of the Working Party on “European Economic Community - Agreement of Association with Turkey”, which examined an Additional Protocol and Interim Agreement concluded in 1970 and 1971 pursuant to the Ankara Agreement examined in 1964, records the views of Turkey that “[t]he modalities and time period for the formation of a customs union [between developed and developing countries], while remaining consistent with Article XXIV of the General Agreement, must take into consideration the special conditions of the developing countries concerned, for their development and well-being were essential objectives of the same General Agreement, and in particular Part IV thereof”⁸⁰ and that “no determination of what constituted a reasonable length of time had been made by the CONTRACTING PARTIES”.⁸¹

The Report of the Working Party on “Agreement between the European Communities and Israel” records that

“a member of the Working Party noted the parties’ viewpoint that there was nothing in Article XXIV to prevent the time-table for the fulfilment of the reciprocal obligations being phased differently if the parties so agreed. His authorities considered that such a different phasing could be a legitimate matter for concern, especially if the difference were substantial. The representative of Israel did not share this view, especially in the light of the Tokyo Declaration and the need for differential measures providing special and more favourable treatment for developing countries. He said that, in the present instance, the parties’ different stages of economic development made the phasing appropriate and compatible with both the letter and the spirit of the General Agreement”.⁸²

The Report of the Working Party on the Free-Trade Agreement between Canada and the United States notes as follows.

“Several members had doubts about the temporary nature of the measures which allowed re-imposition of duties on fresh fruit and vegetables over a period of twenty years and which did not set out a time period for the phasing out of Canadian import permits for grain and grain products. They questioned the consistency of these provisions with Article XXIV:5(c). ... The representative of the United States said that ... this provision would not have the effect of frustrating the ultimate objective of eliminating tariff restrictions between the two parties in a certain time frame The parties to the FTA considered that

⁷⁸L/3579, adopted on 6 October 1971, 18S/166, 172, para. 22.

⁷⁹L/3665, adopted on 29 May 1972, 19S/90, 92-93, paras. 10-12.

⁸⁰L/3750, adopted on 25 October 1972, 19S/102, 103, para. 3.

⁸¹*Ibid.*, 19S/105, para. 8.

⁸²L/4365, adopted on 15 July 1976, 23S/55, 63, para.23.

[these provisions] were applied as a type of emergency clause and therefore met the requirements of Article XXIV.”⁸³

“With regard to the requirement referred to in paragraph XXIV:5(c) that free-trade areas be formed ‘within a reasonable length of time’, the Working Party noted that the plan and schedule for the elimination of tariffs in the Agreement did not exceed the time period of ten years. Furthermore, bilateral emergency actions (Article 1102) allowing the suspension of reductions in duty or a return to m.f.n rates of duty would be limited to the transition period However one member was unable to take a definitive position on the consistency of the Agreement with Article XXIV:5(c) because of the absence of a clear plan and schedule for the elimination of certain non-tariff barriers in agricultural products, in particular the existence of a twenty-year snapback provision for fresh fruit and vegetables (Article 702) and the indefinite time-frame allowing the imposition of restrictions on grain and grain products (Article 705).”⁸⁴

See also the discussion in various Working Party reports concerning “reasonable length of time”⁸⁵ and the references to the powers of the CONTRACTING PARTIES below under paragraph 7 of Article XXIV.

Paragraph 3 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 provides that “The ‘reasonable length of time’ referred to in paragraph 5(c) of Article XXIV should exceed 10 years only in exceptional cases. In cases where Members parties to an interim agreement believe that 10 years would be insufficient they shall provide a full explanation to the Council for Trade in Goods of the need for a longer period”.

5. Paragraph 6

The present paragraph 6 of Article XXIV emerged from the initiative of France at the First Session of the CONTRACTING PARTIES at Havana in 1948, to immediately replace the original text of Article XXIV by the text of the corresponding articles of the Havana Charter in order to accommodate the customs union agreement that had been signed between France and Italy. In discussions at the First Session, the representative of the United States stated that “he would have to give further study to the position of bound rates of duty in the event of formation of a customs union”; the representative of France stated that “he would have no objection to providing some procedure whereby an injured party could seek a satisfactory adjustment or compensation; he mentioned in this connection the formula provided in Article XXIII and in Article XXVIII”.⁸⁶ The Report of the Sub-Committee on Supersession at the First Session, which recommended the replacement of Article XXIV, notes that “in connection with paragraph 5(a) of Article XXIV, the Sub-Committee discussed the question of increases in bound rates of duty which might arise from the provision that the duties imposed at the institution of a customs union are not to be on the whole higher than the general incidence of the duties previously applicable in the constituent territories. This question was referred to the delegates of France and the United States who were asked to submit recommendations”. The report of these two delegations recommended an addition to paragraph 5(a) which became the present paragraph 6.⁸⁷

(1) “the procedure set forth in Article XXVIII shall apply”

(a) Application of Article XXVIII procedures

Paragraph 10 of the 1980 Guidelines on “Procedures for Negotiations under Article XXVIII”⁸⁸ provides that these procedures are in relevant parts also valid for renegotiations under Article XXIV:6.

⁸³L/6927, adopted 12 November 1991, 38S/47, 63, para. 52.

⁸⁴*Ibid.*, 38S/74, para. 89.

⁸⁵See the relevant discussion in the Reports of the following Working Parties: EEC-Association of Greece, 11S/149, paras. 6, 7; EEC-Association with Turkey, 13S/59, paras. 6, 7, 19S/102, paras. 6, 8, 14, 21S/108, paras. 7, 10; UK-Ireland FTA, 14S/122, paras. 24, 26.

⁸⁶GATT/1/SR.2, p. 4.

⁸⁷GATT/1/21, p. 2, para. 8; report of the two delegations, GATT/1/41; discussion and adoption at GATT/1/SR.7, p. 4, GATT/1/SR.10, p. 2, GATT/1/SR.11, p. 1.

⁸⁸C/113 and Corr.1, 27S/26.

The 1988 Working Party Report on “Accession of Portugal and Spain to the European Communities” notes the statement of one member of the Working Party that “The exclusion of preferential trade was necessary ... for the purpose of determining supplier rights in the negotiations conducted under Article XXIV:6”.⁸⁹

The 1990 Award by the Arbitrator on “Canada/European Communities - Article XXVIII Rights” discusses, *inter alia*, the Article XXVIII rights of Canada dating from Article XXIV:6 negotiations Canada concluded with the Community on 29 March 1962 and the agreements on quality and ordinary wheat concluded between the parties on the same day. The Award notes as follows:

“... it is appropriate to give weight to the generally accepted proposition that the right to withdraw concessions is an integral part of the right to negotiate, which right is not in dispute here. It is worth recording that Article XXIV:6 itself specifies that in the negotiations required by Article XXIV ‘the procedures set forth in Article XXVIII shall apply’. There can be no doubt that here the procedures include the right to withdraw concessions”.⁹⁰

Paragraph 4 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 provides that “Paragraph 6 of Article XXIV establishes the procedure to be followed when a Member forming a customs union proposes to increase a bound rate of duty. In this regard Members reaffirm that the procedure set forth in Article XXVIII, as elaborated in the guidelines adopted on 10 November 1980 (BISD 27S/26-28) and in the Understanding on the Interpretation of Article XXVIII of GATT 1994, must be commenced before tariff concessions are modified or withdrawn upon the formation of a customs union or an interim agreement leading to the formation of a customs union”.

(b) *Conciliation and arbitration*

In October 1963 a panel was established at the request of the EEC and the US “to render an advisory opinion to the two parties concerned in order to determine: on the basis of the definition of poultry provided in paragraph 02.02 of the Common Customs Tariff of the European Economic Community, and on the basis of the rules of and practices under the GATT, the value (expressed in United States dollars) to be ascribed, as of 1 December 1960, in the context of the unbindings concerning this product, to United States exports of poultry to the Federal Republic of Germany”. The unbindings in question had taken place pursuant to Article XXIV:5(a). The Panel determined the appropriate reference period, adjusted the figures for that period to take into account discriminatory quantitative restrictions existing in the Federal Republic of Germany during that period, and assessed what the United States could reasonably have expected that the value of its exports would have been in the reference period had there been no discriminatory quantitative restrictions.⁹¹ See further under Article XXVIII.

In 1974 Canada could not reach an agreement with the EEC in Article XXIV:6 negotiations in connection with the accession to the Communities of Denmark, Ireland and the United Kingdom. A Panel was established under paragraphs 1(c) and 2 of Article XXIII upon Canada’s request, “to investigate whether the entry into force of Schedules LXXII and LXXIIbis maintains the general level of reciprocal and mutually advantageous concessions between Canada and the European Communities, not less favourable to trade than that provided for in Schedules XL, XLbis, XIX, XXII and LXI; the investigation would not be limited to statistical or quantitative tests but would take account of the broader economic elements as is customary in Article XXVIII negotiations”.⁹² The Panel was not activated because the parties reached an agreement which resulted in a Joint Declaration.⁹³

In July 1987 Argentina, supported by a number of delegations, requested establishment of a panel under Article XXIII:2, stating that the EEC had “insisted on applying incorrect methods in calculating compensation

⁸⁹L/6405, adopted on 19-20 October 1988, 35S/293, 311, para. 36.

⁹⁰DS12/R, 37S/80, 85.

⁹¹Establishment of Panel, 12S/65; full text of Panel Report on “Panel on Poultry”, L/2088 (not reprinted in the BISD).

⁹²L/4107, C/W/250, C/M/101 p. 7-II, C/W/251, C/M/102 p. 2-5.

⁹³C/W/259, C/M/105 p. 1-3.

(global balance) which are not consistent with Article XXIV:6 of the General Agreement”.⁹⁴ The matter was not pursued.

At the special meeting of the Council in October 1988 to review developments in the trading system, the Director-General informed the Council that in April 1988, Canada and the EC had asked him, with reference to paragraph 8 of the 1979 Understanding, to render an advisory opinion on whether a tariff concession granted by Portugal to Canada in 1961 was applicable to wet salted cod. This issue had arisen in tariff negotiations between Canada and the EC under Article XXIV:6. He had agreed on 15 April to render such an opinion and on 15 July had made it available to the two parties concerned.⁹⁵

(c) *Application of Article XXVIII:3, including time-limits*

See under Article XXVIII:3.

(2) “compensatory adjustment”

(a) *Methods of calculation and negotiation*

The 1988 Working Party Report on “Accession of Portugal and Spain to the European Communities” notes that one member of the Working Party

“... construed the concept of ‘compensatory adjustment’ in Article XXIV:6 as implying that a tariff reduction on one item in some constituent territories of the customs union should be taken into account in calculating the amount of compensation for the increase in the tariffs applied to the same item in other constituent territories of the same customs union. It was therefore opposed to the view that ‘compensatory adjustment’ implied that the amount of compensation should be estimated on the basis of the aggregate change in tariff levels applying to all items, including those not subject to concession”.⁹⁶

Paragraph 5 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 provides that “These negotiations will be entered into in good faith with a view to achieving mutually satisfactory compensatory adjustment. In such negotiations, as required by paragraph 6 of Article XXIV, due account shall be taken of reductions of duties on the same tariff line made by other constituents of the customs union upon its formation. Should such reductions not be sufficient to provide the necessary compensatory adjustment, the customs union would offer compensation, which may take the form of reductions of duties on other tariff lines. Such an offer shall be taken into consideration by the Members having negotiating rights in the binding being modified or withdrawn. Should the compensatory adjustment remain unacceptable, negotiations should be continued. Where, despite such efforts, agreement in negotiations on compensatory adjustment under Article XXVIII as elaborated by the Understanding on the Interpretation of Article XXVIII of GATT 1994 cannot be reached within a reasonable period from the initiation of negotiations, the customs union shall, nevertheless, be free to modify or withdraw the concessions; affected Members shall then be free to withdraw substantially equivalent concessions in accordance with Article XXVIII”.

(b) *“Reverse compensatory adjustment”*

A Communication from the Commission of the European Communities of 11 January 1973, in connection with the accession to the Communities of Denmark, Ireland and the United Kingdom, proposed that contracting parties consider that the concessions then bound in Schedules XL and XLbis were the concessions offered for application to the customs territory of the enlarged Community subject to adjustments in tariff quotas, and stated: “The Communities consider that under the provisions of Article XXIV they have no obligation to extend to the enlarged Communities the concessions formerly granted by the six-State Communities. Having regard to this

⁹⁴L/6201; C/M/212, p. 34-35; C/M/213, p. 8-9.

⁹⁵C/M/225, p. 2.

⁹⁶L/6405, adopted on 19-20 October 1988, 35S/293, 315, para. 38.

consideration, the Communities consider that the concessions they are offering are greater than any compensation which might result for third countries from the provisions of Article XXIV:6".⁹⁷

The 1988 Working Party Report on "Accession of Portugal and Spain to the European Communities" notes that one member of the Working Party

"... rejected the European Communities' view that as a corollary of 'compensatory adjustment', a customs union could claim 'counter-compensation' from other contracting parties for the reduction of the general incidence of customs duties resulting from the customs union, since this concept was utterly without foundation in the GATT".⁹⁸

Paragraph 6 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 provides that "GATT 1994 imposes no obligation on Members benefiting from a reduction of duties consequent upon the formation of a customs union, or an interim agreement leading to the formation of a customs union, to provide compensatory adjustment to its constituents".

(c) *Effect of Article XXIV:6 negotiations*

The 1989 Panel Report on "EEC - Payments and Subsidies paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins" examined, *inter alia*, the effect of the substitution of EEC Schedules, after successive Article XXIV:6 negotiations as a result of Community enlargement, on non-violation nullification or impairment claims of contracting parties with respect to concessions in those Schedules.

"The first issue the Panel examined in this context was ... whether the benefits accruing to the United States under the tariff concessions on oilseeds presently in force include the protection of expectations that prevailed in 1962 when the tariff concessions on oilseeds were originally incorporated in the Schedule of Concessions of the Community. ...

"The Panel concluded ... that the answer to the question of whether the expectations of 1962 continue to be protected depends on whether the concessions on oilseeds resulting from the subsequent renegotiations under Article XXIV:6 were part of a new balance of concessions or whether the reinstatement of the concessions at the same rate after the successive enlargements of the Community meant that the balance of concessions originally negotiated in 1962 was to be continued. The Panel noted that the result of the initial Article XXIV:6 negotiations of the Community in 1962 was the creation of a Schedule of Concessions for its common external tariff that had replaced the tariffs of the six founding member States. In these negotiations, the trading partners of the Community compared the benefits accruing to them under the previous tariff concessions of the individual member States with the benefits accruing to them under the common external tariff in the whole territory of the Community. The result of the Article XXIV:6 negotiations following the successive enlargements of the Community was not the creation of a new common external tariff but the extension of the existing tariff concessions of the Community to the new member States.⁹⁹ On the occasion of these negotiations pre-existing concessions of the Community were renegotiated as well but such modifications remained exceptional. Except where such modifications were specifically renegotiated, the partners of the Community could confine themselves to comparing the benefits accruing to them under the previous tariff concessions of the new member States with the benefits accruing to them as a result of the application of the Community's tariff concessions by the new member States. They had no reason to proceed to a global reassessment of the value of all the Community's concessions in the whole of the Community's territory.

⁹⁷L/3807.

⁹⁸L/6405, adopted on 19-20 October 1988, 35S/293, 315, para. 38.

⁹⁹The footnote to this sentence refers to "Article XXIV:6 Negotiations: Communication from the Commission of the European Communities", document L/3807 dated 11 January 1973; "Negotiations Under the Provisions of Article XXIV:6: Communication from the Commission of the European Communities", document TAR/16 dated 20 May 1981; "Enlargement of the European Economic Community: Accession of Portugal and Spain", document L/5936, Add.2 and Third Geneva (1987) Protocol, Schedule LXXX.

“In these circumstances, the partners of the Community in the successive renegotiations under Article XXIV:6 could legitimately assume, in the absence of any indications to the contrary, that the offer to continue a tariff commitment by the Community was an offer not to change the balance of concessions previously attained. The Panel noted that nothing in the material submitted to it indicated that the Community had made it clear to its negotiating partners that the withdrawal and reinstitution of the tariff concessions for oilseeds as part of the withdrawal of the whole of the Community Schedule meant that the Community was seeking a new balance of concessions with respect to these items. There is in particular no evidence that the Community, in the context of these negotiations, offered to compensate its negotiating partners for any impairment of the tariff concessions through production subsidies or that it accepted compensatory tariff withdrawals by its negotiating partners to take into account any such impairment. The balance of concessions negotiated in 1962 in respect of oilseeds was thus not altered in the successive Article XXIV:6 negotiations. The Panel therefore found that the benefits accruing to the United States under the oilseed tariff concessions resulting from the Article XXIV:6 negotiations of 1986/87 include the protection of reasonable expectations the United States had when these concessions were initially negotiated in 1962”.¹⁰⁰

6. Paragraph 7

(1) “Any contracting party ... shall promptly notify the CONTRACTING PARTIES”

(a) Notification of agreements under Article XXIV

The Council Decision of 25 October 1972 on procedures for the examination of customs unions and free-trade areas provides that

“The Council notes that Article XXIV:7(a) of the General Agreement requires that any contracting party deciding to enter into a customs union or free trade area or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES.

“Without prejudice to the legal obligations to notify in pursuance of Article XXIV, the Council decides to invite contracting parties that sign an agreement falling within the terms of Article XXIV, paragraphs 5 to 8, to inscribe the item on the agenda for the first meeting of the Council following such signature, to the extent that the advance notice of ten days prescribed for inclusion of items on the agenda can be observed. Inclusion of the item should allow the Council to determine the procedures for examination of the agreement”.¹⁰¹

(b) Procedures for examination of agreements under Article XXIV

The examination of agreements under Article XXIV has been conducted in working parties established for that purpose; such working parties have generally commenced with an exchange of written questions and answers concerning the agreement under examination.

The Report in 1949 of the Working Party on “The South Africa-Southern Rhodesia Customs Union”, which was the first Working Party ever to examine an agreement under Article XXIV, notes that

“It was suggested at the meeting of the CONTRACTING PARTIES when the working party was appointed that its terms of reference might include an examination of the procedure to be established for the implementation of Article XXIV. The working party discussed this question and reached the conclusion that consideration by the CONTRACTING PARTIES of proposals for customs unions would have to be based on the circumstances and conditions of each proposal and, therefore, that no general procedures can be established beyond those provided in the article itself”.¹⁰²

¹⁰⁰L/6627, adopted on 25 January 1990, 37S/86, 126-128, para. 144-146.

¹⁰¹19S/13.

¹⁰²GATT/CP.3/24, adopted on 18 May 1949, II/176, 181, para. 20.

During the discussion of this report, it was stated that “each case should be considered on its own merits. The case under consideration could not create a precedent because no two cases had the same characteristics”. It was also submitted that “to establish precedents was clearly against the spirit of Article XXIV”.¹⁰³

The Report of the Working Party on “Association of Greece with the EEC”

“... stressed that the sum of the conditions prevailing in Greece was unique to Greece and that the present Agreement was not a precedent for possible future association agreements between other countries and the European Economic Community. The Working Party considered that in any event, because of differing economic factors, each agreement for association would have to be considered, in the context of GATT, entirely on its own merits”.¹⁰⁴

The Report of the Working Party on “EEC - Agreement of Association with Turkey” records the view that “as acknowledged by prior working parties, these association agreements had to be considered on a case-by-case basis and in their own context”.¹⁰⁵

Paragraph 7 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 provides that “All notifications made under paragraph 7(a) of Article XXIV shall be examined by a working party in the light of the relevant provisions of GATT 1994 and of paragraph 1 of this Understanding. The working party shall submit a report to the Council for Trade in Goods on its findings in this regard. The Council for Trade in Goods may make such recommendations to Members as it deems appropriate”.

c) *Periodic reporting*

At the end of the Twenty-seventh Session in 1971, the CONTRACTING PARTIES instructed the Council to establish a calendar fixing dates for the examination, every two years, of reports on regional preferential agreements.¹⁰⁶ However, no such calendar has been fixed since 1987.

At the Twenty-Fifth Session in 1968, the representative of the EEC stated that since 1 July 1968 the customs union had been fully achieved, and the Community did not anticipate submitting further reports on the formation of the customs union.¹⁰⁷ At the February 1970 Council meeting, the EEC cited its notification that on 1 January 1970 the Common Market had completed its transitional period of existence and entered the definitive stage, and “this Customs Union is now complete in accordance with the criteria laid down in Article XXIV”¹⁰⁸ and stated that the Community would no longer submit annual reports on the development of its customs union. The Chairman in his summing-up noted that he had consulted on this matter with delegations and had come to the conclusion that it would be wiser not to pursue an examination of the legal issues involved; he noted as well that “such a decision was without prejudice to the legal rights of all contracting parties under Article XXIV, so that it was open to any contracting party to raise on the agenda of the Council or on the agenda of the CONTRACTING PARTIES any specific matter arising under Article XXIV in relation to the Community”.¹⁰⁹

The Report of the Working Party on “Australia/New Zealand Closer Economic Relations Trade Agreement (ANZCERT)” also records the view of the representative of Australia that “consistent with past GATT practice, the parties would be prepared to submit a report biennially to the CONTRACTING PARTIES on the operation of the Agreement. They would, however, see no need to continue this reporting once the full free trade area had been finally established”.¹¹⁰

¹⁰³ GATT/CP.3/SR.13, p. 5, 7.

¹⁰⁴ L/1829, adopted on 15 November 1962, IIS/149, 157, para. 32.

¹⁰⁵ L/3750, adopted on 25 October 1972, 19S/102, 103, para. 3.

¹⁰⁶ L/3641, 18S/37, 38. For calendars established by the Council, see, e.g., documents L/3682/Rev.1, L/4100, L/4445, L/4725, L/5158, L/5502 and L/5825.

¹⁰⁷ L/3125, SR.25/7 p. 119ff, SR.25/9 p. 171ff; see also later statement by the EEC that from a legal point of view, there was no reporting obligation in the case of customs unions and free-trade areas which had been fully completed, C/M/123, p. 6.

¹⁰⁸ L/3332.

¹⁰⁹ C/M/61, p. 6-7.

¹¹⁰ L/5664, adopted on 2 October 1984, 31S/170, 179, para. 28.

See also material on this subject in various reports of working parties.¹¹¹

Paragraph 11 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 provides that “Customs unions and constituents of free-trade areas shall report periodically to the Council for Trade in Goods, as envisaged by the CONTRACTING PARTIES to GATT 1947 in their instruction to the GATT 1947 Council concerning reports on regional agreements (BISD 18S/38), on the operation of the relevant agreement. Any significant changes and/or developments in the agreements should be reported as they occur”.

(2) “the CONTRACTING PARTIES shall make recommendations”

(a) Powers of the CONTRACTING PARTIES under paragraph 7

It was stated during discussions on the General Agreement at the Geneva session of the Preparatory Committee that

“there is no question of the [CONTRACTING PARTIES] ... having any power to approve or disapprove a Customs Union ... if a country which is a Member of this Agreement enters into an arrangement with another country ... which involves preferential arrangements which are not consistent with its obligations under Article I, and justifies that departure from its obligations on the ground that it is a step toward a Customs Union, then the contracting parties should have a chance to have a look at those proposals and see whether they are in fact as represented. If the [CONTRACTING PARTIES] find that the proposals made by the country that is making them will in fact lead towards a Customs Union in some reasonable period of time, why they must approve it. They have no power to object. It is simply a mechanism foreseeing, if necessary, that some Member does not find a way out of its obligations under Article I under the guise of entering into a Customs Union when it is really not likely that a Customs Union will eventuate”.¹¹²

The Report of the Working Party on “EEC - Agreement with Spain” contains the following paragraph:

“Members of the Working Party noted that paragraph 7(b) stipulated that the CONTRACTING PARTIES should make recommendations to the parties to a free-trade agreement if they found that the Agreement was not likely to result in the formation of a customs union or a free-trade area within the period contemplated by the parties to the Agreement or the period foreseen for the formation of free-trade area was not a reasonable one. In the absence of a specific time period for achieving that purpose, it was obviously impossible in the case under discussion to judge its reasonableness. Hence the CONTRACTING PARTIES were deprived of one of the important safeguard provisions incorporated in Article XXIV”.¹¹³

Paragraphs 7 through 10 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 provide as follows:

“... The Council for Trade in Goods may make such recommendations to Members as it deems appropriate.

“In regard to interim agreements, the working party may in its report make appropriate recommendations on the proposed time-frame and on measures required to complete the formation of the customs union or free-trade area. It may if necessary provide for further review of the agreement.

“Members parties to an interim agreement shall notify substantial changes in the plan and schedule included in that agreement to the Council for Trade in Goods and, if so requested, the Council shall examine the changes.

¹¹¹See the relevant discussion in the Reports of the following Working Parties: ANZCERT, 31S/170, paras. 26, 28, 31; Australia-Papua New Guinea, 24S/63, paras. 14, 15, 19; Canada-US FTA, 38S/47, paras. 80, 97, 98; CARICOM, 24S/68, para. 14; ACP-EEC Convention of Lomé, 23S/46, paras. 21, 24-26, 29S/119, paras. 7, 9, 10, 24; EEC-Agreement with Egypt, 25S/114, paras. 13-15, 39; EEC-Agreement with Jordan, 25S/133, paras. 14-16, 39; EEC-Agreement with Lebanon, 25S/142, paras. 14-16, 39; EEC-Association of Morocco, 24S/88, paras. 6, 8, 30; EEC-Agreement with Syria, 25S/123, paras. 13-15, 39; EEC-Agreement with Tunisia, 24S/97, paras. 6, 20, 29; EEC-Agreement with Yugoslavia, 28S/115, paras. 10, 12, 25; EFTA-Agreement with Spain, 27S/127, paras. 27, 29.

¹¹²EPCT/TAC/PV/II, p. 37.

¹¹³L/3579, adopted on 6 October 1971, 18S/166, 172, para. 21.

“Should an interim agreement notified under paragraph 7(a) of Article XXIV not include a plan and schedule, contrary to paragraph 5(c) of Article XXIV, the working party shall in its report recommend such a plan and schedule. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations. Provision shall be made for subsequent review of the implementation of the recommendations”.

(b) *Practice under paragraph 7*

In the early years of GATT, the examination of agreements notified under Article XXIV:7 was sometimes concluded by the adoption of a Declaration or Decision. See, for instance, the Declaration of 18 May 1949 on “The Customs Union Agreement between the Governments of the Union of South Africa and Southern Rhodesia”, in which

“The CONTRACTING PARTIES

“*Declare* that the Governments of the Union of South Africa and Southern Rhodesia are entitled to claim the benefits of the provisions of Article XXIV of the General Agreement on Tariffs and Trade relating to the formation of customs unions;

“*Request* the Governments of the Union of South Africa and Southern Rhodesia to instruct the Customs Union Council to include in each annual report a definite plan and schedule of the steps to be taken during the ensuing twelve months towards the re-establishment of the said union; and

“*Decide* to review the above declaration if, after study of reports and plans submitted by the two Governments, they find at any time that the Interim Agreement is not likely to result by 1 April 1959 in the establishment of a customs union in the sense of Article XXIV”.¹¹⁴

Since that time, the examination of agreements notified under Article XXIV:7 has almost never led to a unanimous conclusion or a specific endorsement by the CONTRACTING PARTIES that all the legal requirements of Article XXIV had been met and that the parties to the agreement in question could claim the benefits of Article XXIV. The exceptions are the customs union between the Czech Republic and the Slovak Republic; the Caribbean Community and Common Market (CARICOM); the Caribbean Free Trade Agreement; and the El Salvador-Nicaragua Free Trade Area and the Participation of Nicaragua in the Central American Free Trade Area. In the case of the Ireland-United Kingdom Free Trade Agreement the conclusions stated that no recommendations were being made under Article XXIV: 7.¹¹⁵

In the Twelfth Session, the CONTRACTING PARTIES examined the Treaty Establishing the European Economic Community in a Committee composed of all contracting parties, which appointed four sub-groups. The report of the Committee notes that “the sub-group reports contained no definite conclusions, because either the time at the disposal of the sub-groups or the information available did not permit such conclusions to be drawn”.¹¹⁶ Further consideration of questions relating to the Treaty was conducted in the Intersessional Committee and at the Thirteenth Session, where “After giving further consideration to the continuation of their examination of the Rome Treaty the CONTRACTING PARTIES arrived at the following conclusions:

“(a) As many contracting parties considered that because of the nature of the Rome Treaty there were a number of important matters on which there was not at this time sufficient information to enable the CONTRACTING PARTIES to complete the examination of the Rome Treaty pursuant to paragraph 7 of Article XXIV, this examination and the discussion of the legal questions involved in it could not usefully be pursued at the present time.

¹¹⁴II/29.

¹¹⁵For citations for these agreements, see the table that follows this chapter.

¹¹⁶6S/69.

- “(b) This postponement would clearly not prejudice the rights of the CONTRACTING PARTIES under Article XXIV.
- “(c) The CONTRACTING PARTIES welcomed the readiness of the members of the EEC to furnish further information pursuant to paragraph 7(a) of Article XXIV as the evolution of the Community proceeded.
- “(d) The CONTRACTING PARTIES noted that procedures for consultations under Article XXII had been agreed upon and were being applied in connexion with questions arising out of the application of the Rome Treaty.
- “(e) The CONTRACTING PARTIES also welcomed the willingness of the members of the EEC to furnish in Article XXII consultations information as to the measures arising out of the application of the Treaty.
- “(f) The CONTRACTING PARTIES noted that the other normal procedures of the General Agreement would also be available to contracting parties to call in question any measures taken by any of the six countries in the application of the provisions of the Rome Treaty, it being open of course to such country to invoke the benefit of Article XXIV insofar as it considered that this Article provided justification for any action which might otherwise be inconsistent with a provision or provisions of the General Agreement”.¹¹⁷

Similar phrasing was also used in some other conclusions adopted on regional trade agreements.¹¹⁸

In some cases the CONTRACTING PARTIES have granted a waiver or special exception. In other cases, the CONTRACTING PARTIES adopted conclusions which note, *inter alia*, that “the CONTRACTING PARTIES do not at this juncture find it appropriate to make recommendations to the parties to the Treaty pursuant to paragraph 7(b) of Article XXIV”.¹¹⁹ There are also cases where the CONTRACTING PARTIES took note of the interim arrangement and “invited” submission of “a sufficiently comprehensive plan and schedule”.¹²⁰

At the November 1992 Council in discussion of the Report of the Working Party on “Canada-United States Free Trade Agreement”, the Chairman of the Working Party noted that “Over fifty previous working parties on individual customs unions or free-trade areas had been unable to reach unanimous conclusions as to the GATT consistency of those agreements. On the other hand, no such agreements had been disapproved explicitly. ... he noted that some reservations expressed in the examination of the Canada-United States Agreement, as well as of earlier agreements, had been concerned primarily with possible future effects of the agreements. This suggested that greater reliance might be placed on a review of how such agreements were actually implemented”.¹²¹

(c) *Legal status of agreements in the absence of recommendations*

The Report of the Working Party on the “Accession of Greece to the European Communities” records the view of one member of the Working Party that “the compatibility of the Treaty of Rome itself with the provision of the General Agreement remained an open question since the Working Party which had examined the Treaty had not reached any final conclusions in this regard. Similarly, the compatibility of the 1973 enlargement with the General Agreement had also remained unresolved as that Working Party had not issued a final report”.¹²² The EC responded that it “did not share the view that these earlier treaties constituted an open question or that their legal status was unresolved in GATT since the CONTRACTING PARTIES had formulated no recommendations under Article XXIV:7(b) for any modifications to those arrangements. It was, however, always possible for any country to seek to resume discussions of these questions in another more appropriate context”.¹²³

¹¹⁷7S/71.

¹¹⁸See, e.g., similar conclusions adopted on Latin American Free Trade Area, 18 November 1960, 9S/21.

¹¹⁹See, e.g., Latin American Free Trade Area, 9S/21; Association of Greece with the EEC, 11S/57; Arab Common Market, 14S/21.

¹²⁰New Zealand/Australia Free Trade Agreement, 14S/23.

¹²¹C/M/253, p. 25.

¹²²L/5453, adopted on 9 March 1983, 30S/168, 174, para. 14.

¹²³*Ibid.*, 30S/175, para. 18.

During discussions in the Council concerning establishment of the Panel on “EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region”, one delegation “expressed disagreement with the interpretation that in not rejecting the agreements, the CONTRACTING PARTIES had accepted them. He referred to the reports of the Working Parties which had examined the EEC agreements with Algeria, Morocco and Tunisia respectively. It had been stipulated in those reports that some members of the Working Parties had held the view that it was doubtful that these agreements were entirely compatible with the requirements of the General Agreement. ... Moreover, the reports of the Working Parties which had examined the agreements of Malta, Cyprus and Israel respectively, all indicated that some members held views on these agreements similar to the view expressed above. ... In at least one specific case, members reserved their rights under the General Agreement”.¹²⁴

The 1985 Panel report on “EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region”, which has not been adopted, includes the following findings:

“The Panel noted that at the time of the examination of the agreements entered into by the European Community with certain Mediterranean countries, there was no consensus among contracting parties as to the conformity of the agreement with Article XXIV:5. ...”¹²⁵

“... The Panel considered that, in effect, the CONTRACTING PARTIES had withheld judgment at that time as to the conformity of the agreements with the requirements of Article XXIV. The agreements had not been disapproved, nor had they been approved. The Panel found therefore that the question of the conformity of the agreements with the requirements of Article XXIV and their legal status remained open. ...”¹²⁶

With regard to the applicability of Article XXIII:

“... The Panel noted that the absence of a pertinent decision by the CONTRACTING PARTIES did not create a legal vacuum. In fact the decision had to be considered as pending and could therefore be taken at any time in the future ... At this stage, on the multilateral level, the status of the agreements had to be considered as still undetermined”.¹²⁷

The Panel concluded, *inter alia*, that:

“Given the lack of consensus among contracting parties, there had been no decision by the CONTRACTING PARTIES on the conformity with Article XXIV of the agreements under which the EC grants tariff preferences to certain citrus products originating from certain Mediterranean countries, and therefore the legal status of the agreements remained open”.¹²⁸

During the discussion of this Panel report in the GATT Council, this Panel finding was criticized by some contracting parties which stated, *inter alia*, that “Article XXIV agreements had to be presumed to be in conformity with the General Agreement as long as the CONTRACTING PARTIES had not made a recommendation on them”.¹²⁹

In this connection see also the unadopted 1993 Report of the Panel on “EEC - Member States’ Import Régimes for Bananas”¹³⁰ and the unadopted 1994 Report of the Panel on “EEC - Import Régime for Bananas”.¹³¹

Paragraph 12 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 provides that “The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of

¹²⁴C/M/162, p. 15, referring respectively to 24S/80, 88, 97; 19S/90, 21S/94, 23S/55; and 19S/96. See also C/M/160, p. 18.

¹²⁵L/5776 (unadopted, dated 7 February 1985), para. 4.6.

¹²⁶*Ibid.*, para. 4.10.

¹²⁷*Ibid.*, para. 4.21.

¹²⁸*Ibid.*, para. 5.1(b).

¹²⁹C/M/186, pp. 9, 10, 16, 17.

¹³⁰DS32/R, dated 3 June 1993, paras. 364-372.

¹³¹DS38/R, dated 11 February 1994, paras. 156-164.

Article XXIV relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free-trade area”.

7. Paragraph 8

(1) *“duties and other restrictive regulations of commerce ... are eliminated”*

(a) *“regulations of commerce”*

The Report of the 1970 Working Party on “EEC - Association with African and Malagasy States” records the view of some members of the Working Party that “the regulations of commerce in question should be interpreted in relation to Articles I:1 and III of the General Agreement”.¹³²

(b) *Charges on imports other than customs duties*

The Report of the 1970 Working Party on “EEC - Association with African and Malagasy States” records the view of some members of the Working Party that “free trade within the meaning of Article XXIV:8(b) did not exist” in view of the continued imposition by certain parties to the Yaoundé Convention of fiscal charges on imports from other members, and that “an alternative approach should ... be sought, ... namely the Generalized System of Preferences”.¹³³

“The representatives of the parties to the Convention ... noted that, so far as they knew, the elimination of fiscal charges had never yet constituted an element necessary for recognition that a free-trade area was consistent with the GATT rules. ... The General Agreement made a clear-cut distinction between measures which had a protective effect and other measures applied in like manner to domestic and imported products. The rules and obligations in that respect were very clearly defined in Article III. It was evident that the provisions of Article XXIV concerning the concept of a free-trade area concerned only protective measures. The taxes referred to were of a fiscal character, not protective, and did not differ from similar taxes applied by other contracting parties. It was in any case unacceptable that developing countries should be denied the right to impose a general fiscal tax, and be deprived of one of the main sources of income when the imposition of such taxes was a normal and accepted practice in all other countries including contracting parties which were members of regional arrangements already examined in the GATT”.¹³⁴

The same differences of view are recorded in the Report of the Working Party on “EEC - Association with Certain Non-European Countries and Territories”.¹³⁵

The Report of the Working Party on “EEC - Agreement of Association with Malta” notes that one member stated that “If after entering a customs union Malta were to retain essentially the same level of charges on imports from all sources as presently existed in the Maltese tariff, but redefined as revenue duties, his delegation wondered how it could be said that trade was free of duties; in his view this would not be consistent with the intent of the General Agreement as regards the establishment of customs unions”.¹³⁶ In response,

“The parties to the Agreement denied the validity of this interpretation concerning revenue duties in relation to the application of Article XXIV. There was nothing in the General Agreement to prohibit the levying of revenue duties, which indeed represented an essential source of revenue for developing economies. The freedom of action of any contracting party in the application of its fiscal policy was not limited by the General Agreement except where its direct or indirect protective effects might be detrimental to a concession. In the face of the provisions of Article XXIV, the existence of revenue duties, which by definition ruled out discriminatory application, could not be regarded as jeopardizing the establishment of free trade. Such an interpretation would be tantamount to denying the benefit of the provisions of Article XXIV and the economic integration desired by those who framed it to practically all countries,

¹³²L/3465, adopted on 2 December 1970, 18S/133, 135-136, para. 7.

¹³³*Ibid.*

¹³⁴*Ibid.*, 18S/136-137, para. 8.

¹³⁵L/3611, adopted on 9 November 1971, 18S/143, 146-147, paras 9-12.

¹³⁶L/3665, adopted on 29 May 1972, 19S/90, 94, para. 14.

developing countries in particular. In the present instance, the objective of the parties to the Agreement was to institute free trade among them and to establish a customs union involving the adoption by Malta of the Common Customs Tariff of the Community. Those were strictly the only points to be taken into consideration in the face of the provisions of Article XXIV.

“One member of the Working Party ... stressed that there was no obligation to eliminate non-protective revenue duties on goods traded between members of a customs union or a free-trade area.

“The discussion brought to light the fact that the English and French versions of Article XXIV paragraph 8(a) differed inasmuch as the English text referred only to ‘duties’, whereas the French text referred to ‘droits de douane’ (customs duties). The Working Party did not reach any conclusion on the point”.¹³⁷

The Report of the Working Party on “EEC - Agreement of Association with the United Republic of Tanzania, the Republic of Uganda and the Republic of Kenya” notes the view of the parties to this Agreement that the fiscal entry charges levied by these African countries were not “duties or other regulations of commerce” within the meaning of Article XXIV.¹³⁸ This view was challenged by other members of the Working Party.

The Report of the Working Party on the “Free-trade Agreement between Canada and the United States” notes that “In response to a suggestion by one other member that the customs user fee should be more appropriately considered as ‘other restrictive regulations of commerce’ that applied between the two FTA parties in terms of Article XXIV:8(b), the representative of the United States said that the customs user fee could not be qualified as ‘restrictive regulation of commerce’ in the way it was presently applied by his country”.¹³⁹

See also the discussion of this issue in various other Working Party reports and documents.¹⁴⁰

(c) *Duties in the context of free-trade areas between market economy and centrally-planned economy countries*

During discussion of the free-trade area agreements between Finland and Hungary, Finland and Bulgaria, and Finland and Czechoslovakia at the February 1975 meeting of the Council, the representative of the United States stated that “Article XXIV of the GATT was intended to permit the creation of free-trade areas by the removal of duties and other restrictive regulations of commerce. He wondered how this was to be achieved in the case of countries where duties had a nominal or at most a limited effect on trade, while other restraints on commerce played a more significant role”. He further expressed “doubt that the criteria and intent of Article XXIV could be met by agreements between market and non-market economy countries which essentially dealt only with the removal of duties”.¹⁴¹

The Reports of the Working Parties on the examination of the agreements concluded by Finland with Czechoslovakia¹⁴², the German Democratic Republic¹⁴³, Hungary¹⁴⁴ and Poland¹⁴⁵ record divergent views as to the applicability of Article XXIV to such agreements. The 1977 Working Party Report on “Agreement between Finland and Hungary” notes that “Some members of the Working Party considered that all agreements concluded under Article XXIV should be examined in the same manner but with regard to agreements involving a centrally-planned economy State-trading country and a market economy or a mixed economy country, they considered that serious and novel questions were raised which merited serious consideration, although this did not mean that they took the position that such agreements could not under any circumstances comply with the requirements of

¹³⁷*Ibid.*, 19S/94-95, paras. 15-17.

¹³⁸L/3721, adopted on 25 October 1972, 19S/97, 100, para. 14.

¹³⁹L/6927, adopted on 12 November 1991, 38S/47, 60, para. 40.

¹⁴⁰See the Reports of the following Working Parties: EEC-Association with African and Malagasy states, 18S/133, paras. 7, 8, 14, 27, 29; EEC-Association with Tanzania, Uganda and Kenya, 19S/97, paras. 11-17; ANZCERT, 31S/170, paras. 25-29. See also note on discriminatory application by Italy of administrative and statistical fees, L/3279, discussed at C/M/59; request for consultations by Colombia regarding Italian fiscal duties on bananas, L/6138, discussed at C/M/207 and C/M/212, referred to as resolved at 35S/323, para. 8.

¹⁴¹C/M/103, p. 10-11.

¹⁴²L/4342, adopted on 14 June 1976, 23S/67; L/4837, Second Report adopted on 6 November 1979, 26S/327.

¹⁴³L/4471, Interim Report adopted on 2 March 1977, 24S/106; there was no final report.

¹⁴⁴L/4230, adopted on 31 October 1975, 22S/47; L/4497, Second Report adopted on 23 May 1977, 24S/107.

¹⁴⁵L/4928, adopted on 26 March 1980, 27S/136.

Article XXIV. Accordingly, they would be interested in determining whether the customs tariff alone influenced trade flows between the parties”.¹⁴⁶ The 1980 Working Party Report on “Agreement between Finland and Poland” notes that one member of the Working Party stated that “he could not accept any approach that would question *a priori* the compatibility of the Agreement with the provisions of the General Agreement, on the basis that the parties to the Agreement were of different economic and social systems”.¹⁴⁷

(d) *Quantitative restrictions*

The Report of the Sub-group of the Committee on the “European Economic Community” which examined the provisions of the EEC Treaty relating to quantitative restrictions notes that most members of the Sub-Group “could not accept the term ‘other regulations of commerce’ in 8(a)(ii) included quantitative restriction. Moreover they pointed out that if paragraph 8(a)(ii) were interpreted to require a common level of quantitative restrictions against third countries, this would be incompatible with the explicit permission in paragraph 8(a)(i) for the use of quantitative restrictions within the system for balance-of-payments reasons since it would appear not to be practicable to have a common level of quantitative restrictions against third countries in a situation where countries within the customs union made use of their right to impose such restrictions against their partners. Moreover, the effect of such an arrangement would be that some country or countries in the union would be imposing quantitative restrictions not required by their own individual balance-of-payments position and would, therefore, be raising barriers to trade with other contracting parties”.¹⁴⁸

The Report of the Working Party on the “Free-Trade Agreement between Canada and the United States” notes with respect to the retention of import quotas on eggs and dairy products by Canada that “one member said that the provisions of Article XXIV:8(b) did not give open-ended permission to maintain quantitative restrictions”.¹⁴⁹ In the case of the reciprocal exemptions from meat import laws granted by each party, one member “wished to know the legal basis on which such restrictions vis-à-vis third countries could be justified; and on which the party taking the action could exempt exports of the other party from the quantitative restrictions if it was those exports which were causing injury”.¹⁵⁰

(2) ***“except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX”***

Article 44 of the Havana Charter, from which this provision was taken, refers to “except, where necessary, those permitted under Section B of Chapter IV and under Article 45”.

The Report of the Sub-group of the Committee on the “European Economic Community” which examined the consistency with Article XXIV of the EEC Treaty provisions for the association of overseas territories records the view of some members that

“paragraph 8(b), in derogation of the rule regarding the elimination of internal obstacles, made provision for certain restrictive trade regulations authorized under certain Articles of the General Agreement; the list of these did not, however, include Article XVIII, concerning governmental assistance to economic development. The application of the customs duties and of the restrictions instituted under Article XVIII did not therefore benefit from the exception for which provision was made in Article XXIV. The latter did not make provision for allowing one constituent territory of a free-trade area, in order to protect its industry, to levy import duties on imports from another constituent territory”.¹⁵¹

¹⁴⁶L/4497, adopted on 23 May 1977, 24S/107, 110, para. 12.

¹⁴⁷L/4928, adopted on 26 March 1980, 27S/136, 138, para. 11.

¹⁴⁸L/778, adopted on 29 November 1957, 6S/70, 79, para. 6.

¹⁴⁹L/6927, adopted on 12 November 1991, 38S/47, 65, para. 57.

¹⁵⁰L/6927, adopted on 12 November 1991, 38S/47, 63-64, para. 53.

¹⁵¹L/778, adopted on 29 November 1957, 6S/70, 94, para. 16.

The EEC member States responded that

“the Rome Treaty did not make any legal use of Article XVIII. Furthermore, the argument which had been drawn *a contrario* from the fact that Article XVIII was not one of those referred to in Article XXIV:8(b) did not take into account the fact that Article XXI was not mentioned either. It would be difficult, however, to dispute the right of contracting parties to avail themselves of that provision which related, *inter alia*, to traffic in arms, fissionable materials, etc., and it must therefore be concluded that the list was not exhaustive”.¹⁵²

The Report of the Working Party on “European Free Trade Association and Association between EFTA and Finland - Accession of Iceland” records the view of certain members of the Working Party that “Article XXIV did not affect the obligation of contracting parties to apply quota restrictions in a non-discriminatory manner”.¹⁵³

The Report of the Working Party on “EC Agreements with Finland” records the view of the EEC and Finland that “Article XXIV:8(b), specifically mentioning Article XIII, was permissive in this respect and covered certain possibilities in relation to the maintenance of outward restrictive regulations of commerce in certain circumstances, while eliminating those between the parties to the Agreement”.¹⁵⁴

The 1988 Report of the Working Party on “Accession of Portugal and Spain to the European Communities” notes that “Several representatives wondered whether in the opinion of the European Communities, Article XXIV provided a derogation from the obligations arising out of other GATT provisions. The representative of the European Communities considered that Article XXIV applied in the light of other provisions of the GATT”.¹⁵⁵

The 1991 Report of the Working Party on “Free-Trade Agreement between Canada and the United States” notes the view of one member that “if a party to a free-trade agreement invoked Article XX to justify an export licensing scheme for short supply or conservation purposes, it should apply such a measure in a non-discriminatory manner. ... Article XXIV:8(b) did not allow parties to a free trade agreement to exempt other parties from the measures taken under the exceptions provided in that article. Such measures could not be considered ‘other restrictive regulations of commerce’ in terms of Article XXIV:8(b). The representative of Canada said that under Article XXIV:8(b) of the GATT, restrictions meeting the exceptions of Article XX could be maintained in a free-trade agreement. Export control measures were included in ‘other restrictive regulations of commerce’ in this article. ... Article XXIV:8(b) ... did not preclude the parties to a free-trade agreement from undertaking elimination of restrictions vis-à-vis the other party to the agreement”.¹⁵⁶

The 1992 Panel Report on “United States - Denial of Most-favoured-nation Treatment as to Non-Rubber Footwear from Brazil” includes the following footnote:

“The Panel noted that Brazil had also mentioned the existence of other preferential arrangements -- specifically, free-trade arrangements between the United States and other contracting parties that would be covered by Article XXIV. However, the question of whether such Article XXIV arrangements can include non-tariff preferences has repeatedly been discussed but never resolved by the CONTRACTING PARTIES. See, for example, the Report of the Working Party on the Accession of Iceland to EFTA, BISD 18S/174, 177. In any case, the Panel did not consider that the resolution of such an issue with respect to Article XXIV arrangements was necessary to the disposition of the case at hand.”¹⁵⁷

See also the discussion below of the relationship between Article XXIV and Articles XII, XIII, XVIII and XIX, and see material on Article XXIV under Article XX.

¹⁵²*Ibid.*, 6S/97, para. 26.

¹⁵³L/3441, adopted on 29 September 1970, 18S/174, 177, para. 10.

¹⁵⁴L/4064, adopted on 30 October 1974, 21S/76, 80, para. 16.

¹⁵⁵L/6405, adopted on 19-20 October 1988, 35S/293, 310, para. 35.

¹⁵⁶L/6927, adopted on 12 November 1991, 38S/47, 61, para. 45.

¹⁵⁷DS18/R, adopted on 19 June 1992, 39S/128, 153, footnote to para. 6.17.

(3) “with respect to substantially all the trade”

(a) Quantitative criteria

The Report of the Sub-group of the Committee on the “European Economic Community” which examined the consistency with Article XXIV of the EEC Treaty provisions for the association of overseas territories notes that the EEC member States proposed the following definition of the term “substantially all”: “a free-trade area should be considered as having been achieved for substantially all the trade when the volume of liberalized trade reached 80 per cent of total trade”.¹⁵⁸

“Many members of the Sub-Group said that each case of a proposed customs union or free-trade area had to be considered on its merits and that it was, therefore, inappropriate to fix a general figure of the percentage of trade which could be subjected to internal barriers without running counter to the definition in paragraph 8(b) of Article XXIV. A matter to be considered was whether the provisions of a free-trade area pointed towards a gradual increase of barriers affecting the trade between the constituent parties or a gradual reduction of such barriers. Moreover, any calculation of the percentage of trade not freed from barriers would need to take account of the fact that this would be, or would have been, larger if the trade had been allowed to flow freely. Some members of the Sub-Group thought that it would be unrealistic to apply the same criterion to a free-trade area such as that existing between Nicaragua and El Salvador and to a free-trade area the members of which were highly industrialized countries accounting for a large percentage of world trade”.¹⁵⁹

The same Report reflects different views as to whether a quantitative assessment of the trade liberalization within the free trade areas between the European and the overseas territories should be based, as suggested by the EEC States, on the total volume of trade including the intra-European trade among the EEC States or, as suggested by other contracting parties, solely on the trade between the EEC as a whole and the associated overseas territories.¹⁶⁰

The Report of the Working Party on “European Communities - Agreements with Portugal” notes the view of the EEC “that no exact definition of the expression [‘substantially all the trade’] existed and that the precise figures would vary from case to case according to several factors. At any rate, percentages were established as a general indicator of the trade covered by the Agreement and were not to be regarded as a conclusive factor”.¹⁶¹

See also discussions in various Working Party reports on this subject.¹⁶²

¹⁵⁸L/778, adopted on 29 November 1957, 6S/70, 99, para. 30.

¹⁵⁹*Ibid.*, 6S/100, para. 34.

¹⁶⁰*Ibid.*, 6S/98-101.

¹⁶¹L/3901, adopted on 19 October 1973, 20S/171, 176, para. 16.

¹⁶²See the Reports of the following Working Parties: Arab Common Market, 14S/94, paras. 12-13; ANZCERT, 31S/170, paras. 4-5, 25; Australia/Papua New Guinea Agreement, 24S/63, paras. 6-7, 13; CARIFTA, 18S/129, paras. 5, 7, 13; CARICOM, 24S/68, paras. 5, 7; European Economic Community, 6S/94-101, paras. 15-36; EEC-Association Agreements with African and Malagasy States, 14S/100, paras. 5, 6, 11, 23, 24, 30, 18S/133, paras. 4, 5, 8, 11, 12, 27; ACP-EEC Convention of Lomé, 23S/46, para. 4; EEC-Agreement with Algeria, 24S/80, paras. 5, 12; EEC-Association with Cyprus, 21S/94, paras. 20-22; EEC-Agreement with Egypt, 21S/102, paras. 16, 19, 25S/114, paras. 5, 13; EEC-Association of Greece, 11S/149, paras. 10-11; EEC-Agreement with Israel, 18S/158, paras. 3, 7, 22, 28, 23S/55, paras. 4, 6, 7, 9, 19, 21, 22, 24; EEC-Agreement with Jordan, 25S/133, paras. 5, 14; EEC-Agreement with Lebanon, 22S/43, paras. 4, 15, 16, 25S/142, paras. 5, 14; EEC-Association of Malta, 19S/90, paras. 15, 18; EEC-Association of Morocco, 18S/149, paras. 22-25, 27, 24S/88, paras. 5, 12; EEC-Agreements with Portugal, 20S/171, paras. 5, 13-17, 34, 38, 24S/73, paras. 11-14; EEC-Agreement with Spain, 18S/166, paras. 6, 17, 18, 22; EEC-Agreement with Syria, 25S/123, paras. 5, 13; EEC-Association with Tanzania, Uganda, Kenya, 19S/97, para. 17; EEC-Association of Tunisia, 18S/149, paras. 22-25, 27, 24S/97, paras. 5, 12, 24; EEC-Association of Turkey, 13S/59, para. 7; EEC-Agreement with Yugoslavia, 28S/115, paras. 6, 9, 16; EEC-Agreements with Austria, 20S/145, paras. 4, 5, 14-16, 33, 37; EEC-Agreements with Finland, 21S/76, paras. 4, 6, 9, 12-14; EEC-Agreements with Iceland, 20S/158, paras. 5, 14-19, 37, 41; EEC-Agreements with Norway, 21S/83, paras. 4, 6, 9, 14-16, 32, 35; EEC-Agreements with Sweden, 20S/183, paras. 5, 15-17, 35, 39; EEC-Agreements with Switzerland and Liechtenstein, 20S/196, paras. 5, 14-16, 37, 41; EFTA, 9S/70, paras. 47-54; EFTA-Association of Finland, 10S/101, paras. 3, 8; EFTA-Accession of Iceland, 18S/174, para. 6; EFTA-Agreement with Spain, 27S/127, paras. 4, 10, 15, 27, 28; Finland-Czechoslovakia, 23S/67, paras. 5, 6, 30; Finland-Hungary, 22S/47, paras. 5, 8, 20; Finland-Poland, 27S/136, para. 5; Israel-US FTA, 34S/58, paras. 6, 21; LAFTA, 9S/87, paras. 5, 7; New Zealand, Australia FTA, 14S/115, paras. 7, 14-17.

(b) *Qualitative criteria and sectoral exclusions*

The Report of the Working Party on the “European Free Trade Area - Examination of the Stockholm Convention” notes:

“The Working Party considered first whether the requirement relating to ‘substantially all the trade’ in Article XXIV:8(b) was met in the case of the Stockholm Convention. The view was put forward that, as the provisions of, *inter alia*, Articles 3 and 10 of the Convention relating to the elimination of barriers to trade in the free-trade area did not apply to trade in agricultural products, it could not be maintained that duties and other restrictive regulations of commerce were being eliminated on ‘substantially all the trade’. It was also contended that the phrase ‘substantially all the trade’ had a qualitative as well as quantitative aspect and that it should not be taken as allowing the exclusion of a major sector of economic activity. For this reason, the percentage of trade covered, even if it were established to be 90 per cent, was not considered to be the only factor to be taken into account.

“The member States agreed that the quantitative aspect, in other words the percentage of trade freed, was not the only consideration to be taken into account. Insofar as it was relevant to consider the qualitative as well as the quantitative aspect, it would be appropriate to look at the consistency of the Convention with Article XXIV:8(b) from a broader point of view and to take account of the fact that the agricultural agreements did facilitate the expansion of trade in agricultural products even though some of the provisions did not require the elimination of the barriers to trade. Moreover, insofar as both qualitative and quantitative aspects were concerned it was incorrect to say that the agricultural sector was excluded from the free-trade area; in fact barriers would be removed on one third of total trade in agricultural products between member States ...

“... The member States did not accept the contention that they should not take credit for the removal of barriers to trade on a product unless such barriers were removed by all the member States. In this connexion the drafting history of Article XXIV was important. The Article had been drafted against the background of the possibility of a free-trade area being established in Europe in which the United Kingdom, in particular, might wish to retain some barriers against certain imports from its partners mainly as a result of its preferential arrangements. It was envisaged, therefore, that an individual member of a free-trade area should have a certain latitude in respect of some products; this latitude would be permitted by the phrase ‘substantially all the trade’. In view of the preferential arrangements of the United Kingdom, there was an inference that this latitude would be used particularly with respect to agricultural products. It was important to note that the phrase used in Article XXIV was ‘substantially all the trade’ and not ‘trade in substantially all products’. Some members might wish to avail themselves of this latitude in respect of different products. The member States did not claim that free trade would be achieved in the case of all agricultural products, but they did consider themselves entitled to take into account the trade affected by the complete removal of barriers under the agricultural agreements for certain products when assessing the total amount of trade freed under the free-trade area arrangements. ...

“There was, therefore, a divergence of view regarding the justification for including, in estimating the amount of trade within the free-trade area to be freed from barriers in terms of Article XXIV, the trade in agricultural products where imports were freed in the case of one member State only. In the time at its disposal, the Working Party was unable to reach agreement concerning the interpretation which should be given to the relevant provisions of Article XXIV”.¹⁶³

Various other Reports of Working Parties on agreements presented under Article XXIV also include statements that the meaning of “substantially all the trade” had never been defined in GATT.¹⁶⁴ It was also stated that Article XXIV:8(b) had to be interpreted to mean free trade in all products and not carved out by sectors; the exclusion of a whole sector, no matter what percentage of current trade it constituted was contrary to the spirit of both Article XXIV and the General Agreement.¹⁶⁵

¹⁶³L/1235, adopted on 4 June 1960, 9S/70, 83-85, paras. 48-49, 51, 54.

¹⁶⁴18S/164; 21S/80; 27S/132.

¹⁶⁵21S/79, para. 12.

The Report of the Working Party on the “Free-trade Agreement between Canada and the United States” notes that:

“The Working Party generally recognized that, in terms of its coverage, this Agreement was one of the more comprehensive free-trade agreements examined in GATT so far. The Canada-United States Free-trade Agreement did not attempt to exclude the whole of the agricultural sector from its coverage. Nevertheless several members raised doubts as to consistency of the Agreement with the definition of a free-trade area in Article XXIV:8(b) and as to whether it covered ‘substantially all’ the trade between the parties. These members remained concerned about the exceptions allowing restrictions on trade between the two parties in a number of specific products. ... The representative of Canada pointed out that [certain of the measures cited] related to emergency arrangements for addressing any unforeseen developments in these sectors”.¹⁶⁶

The preamble of the Understanding on the Interpretation of Article XXIV of the GATT1994 provides, *inter alia*:

“*Recognizing* the contribution to the expansion of world trade that may be made by closer integration between the economies of the parties to such agreements;

“*Recognizing* also that such contribution is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded”.

(c) *Reverse preferences and one-way free-trade areas*

The 1976 Report of the Working Party on “The ACP-EEC Convention of Lomé” notes the statement of the EEC that: “In the light of their development needs and the principles of Part IV of the General Agreement, the Community had not demanded reciprocity in its trade with the ACP”.¹⁶⁷ “The representative of the ACP countries stated that the Convention did not require them to grant reverse preferences. At the same time, Article 7 of the Convention accommodated a historical situation in which, prior to the enlargement of the EEC, some ACP countries granted preferences to the original six members of the EEC and others to the United Kingdom ... he would expect ACP countries progressively to eliminate those preferences which remained ...”.¹⁶⁸ However, the view of the parties to the Convention - “that the Convention was compatible with their obligations under the General Agreement, in particular the provisions of Articles I:2, XXIV and XXXVI, which had to be considered side by side and in conjunction with one another”¹⁶⁹ - was not shared by some other members of the Working Party.¹⁷⁰ The 1982 Report of the Working Party on “Second ACP-EEC Convention of Lomé” notes the statement of the ACP representative that “ACP countries were not obliged to give preferences to the EEC. Prior to the first Lomé Convention, a number of ACP countries had granted reverse preferences to the EEC. Since the Convention had been implemented, all States but two had eliminated such preferences”.¹⁷¹

The 1977 Report of the Working Party on “The Australia/Papua New Guinea Trade and Commercial Relations Agreement” provides:

“The representative of Australia stated that although Papua New Guinea would not be extending any reverse preferences to Australia under the Agreement, trade statistics showed that substantially all the trade was covered within the meaning of Article XXIV:8(b). It was pointed out in this connexion that Article XXIV did not contain any specific provision with respect to reverse preferences. The absence of reverse preferences in favour of Australia did not, in the view of his authorities, affect the free-trade area status of the Agreement.”¹⁷²

¹⁶⁶L/6927, adopted on 12 November 1991, 38S/47, 73, para. 83.

¹⁶⁷L/4369, adopted on 15 July 1976, 23S/46, 48, para. 4. See also Working Party Report on EEC-Association with African and Malagasy States, 14S/100, paras. 13, 14, 25, 26, 30.

¹⁶⁸*Ibid.*, 23S/50, para. 12. See also material below on Article XXIV:9.

¹⁶⁹*Ibid.*, 23S/53-54, para. 23.

¹⁷⁰*Ibid.*, 23S/54, paras. 25, 26.

¹⁷¹L/5292, adopted on 31 March 1982, 29S/119, 123, para. 17.

¹⁷²L/4571, adopted on 11 November 1977, 24S/63, 64, para. 7.

“Some members expressed doubts about the conformity of the Agreement with the provisions of Article XXIV, since it appeared that no reciprocal reduction of duties or elimination of other restrictive regulations of commerce by Papua New Guinea had been required. ... One member ... stated that he did not share the view expressed by the representative of Australia that, in the light of the fact that Article XXIV made no mention of reverse preferences, reciprocity was not required between the partners to free-trade area agreements.”¹⁷³

The 1977 Reports of the Working Parties on “Agreement between the EC and Algeria”, “Agreement between the EC and Morocco”, and “Agreement between the EC and Tunisia” each note that one member of the Working Party “welcomed the confirmation by the spokesman for the European Communities that the Agreement did not provide for reverse preferences and expressed his expectation that the Agreement would not contain such preferences in the future. He also expressed concern at the rules of origin, which might in several cases have the same effect as reverse preferences and deflect trade from lower cost suppliers, often at an increased cost to the developing country and thereby deflect scarce resources from other development needs”.¹⁷⁴

The 1984 Report on the “Application of the EEC-Algeria, EEC-Morocco, EEC-Tunisia, EEC-Egypt, EEC-Jordan, EEC-Lebanon and EEC-Syria Co-operation Agreements” contains the following communication by the parties to these agreements: “By virtue of the provisions of the agreements, the partners of the Community have not so far granted it any concessions in conformity with the principles of Part IV of the General Agreement”.¹⁷⁵

In this connection see also the unadopted 1993 Report of the Panel on “EEC - Member States’ Import Régimes for Bananas”¹⁷⁶ and the unadopted 1994 Report of the Panel on “EEC - Import Régime for Bananas”.¹⁷⁷

(4) “substantially the same duties and other regulations of commerce are applied ...”

In September 1978, the EEC notified the contracting parties concerning its change in the unit of account for specific duties in its common customs tariff other than those applied to certain agricultural products. While the specific duties had been expressed in terms of national currencies, the rates were converted to the European Unit of Account (EUA); as a result, the specific duties expressed in terms of certain national currencies (e.g. the German mark) would be lowered and those expressed in terms of other currencies (e.g. the Italian lira) would be raised. The notification stated that “the legal basis for this change derives from the entry into force on 1 April 1978 of the second amendment to the IMF Articles of Agreement”¹⁷⁸ and further stated:

“The alignment with the EUA of specific duties and other specific elements of the common customs tariff expressed in terms of national currencies does not fall within the provisions of either Article XXVIII of GATT or Article II:6, and is moreover consistent with the provisions of Article II:3.

“... the move toward standardization of the specific duties in the CCT, to be made on 1 January 1979, does not involve any modification or withdrawal of EEC concessions, since these have never been expressed in terms of the respective currencies of the member States. If the amounts in national currencies corresponding to the specific duties had been adjusted in proportion to their fluctuation away from the unit of account, as allowed under the provisions governing bindings, the result would be less favourable for contracting parties than that resulting from alignment with the EUA, because the latter is at a level lower than the EUA par value. Far from diminishing the value of EEC concessions, the [EUA] in fact implies a reduction of specific duties which the EEC, under the terms of its schedule of bindings, would be justified in applying in pursuance of Article II ... It is simply an up-dating operation comprising reductions and increases of specific duties expressed in terms of national currencies, so as in this way to ensure a return to a unified common customs tariff in accordance with the obligations established by Article XXIV:8(a)(ii). Nor is it a matter of an upward adjustment of specific duties following a monetary devaluation in excess of

¹⁷³*Ibid.*, 24S/65, para. 11.

¹⁷⁴L/4559, adopted on 11 November 1977, 24S/80, 83, para. 8; L/4560, adopted on 11 November 1977, 24S/88, 92, para. 8; L/4558, adopted on 11 November 1977, 24S/97, 101, para. 8.

¹⁷⁵L/5674, p. 1.

¹⁷⁶DS32/R, dated 3 June 1993, paras. 364-372.

¹⁷⁷DS38/R, dated 11 February 1994, paras. 156-164.

¹⁷⁸L/4706, dated 4 October 1978, p. 2, para. 4.

20 per cent (Article II:6(a)), because the bindings concerned have never been expressed in terms of national currencies and the purpose of the alignment is not to offset a devaluation. Lastly, the alignment does not alter the method of converting currencies so as to impair the value of any concessions, and is thus consistent with the provisions of Article II:3 of the General Agreement”.¹⁷⁹

8. Paragraph 9: Historical preferences and customs unions or free-trade areas

The Interpretative Note *Ad* Paragraph 9 was rectified by the Third Protocol of Rectification, which entered into force on 21 October 1951, to meet a difficulty of Southern Rhodesia, which had a customs union with South Africa. At Havana “it had not been envisaged that the importing country might be one which granted the same preferential rate to the country of origin of the product as the re-exporting country and in that case the difference payable should be that between the duty already paid and the preferential rate”.¹⁸⁰

The Report of Sub-Group D on “Association of Overseas Territories” of the Committee which examined the Treaty Establishing the European Economic Community notes the following views of some members of the Sub-Group:

“Paragraph 9 of Article XXIV stipulated that the formation of a customs union or of a free-trade area should not affect the preferences authorized in paragraph 2 of Article I of the General Agreement; those preferences might, however, be eliminated or adjusted by means of negotiations, in particular the preferences of which the elimination was required to conform with the provisions of paragraph 8(a)(i) and paragraph 8(b). The association of the overseas territories provided for in the Rome Treaty ran counter to this rule since it strengthened the preferences referred to in paragraph 9 and established new preferences in favour of imports originating in the associated territories. ... Certain members pointed out that [the Interpretative Note *Ad* paragraph 9] indicated the course which should have been followed in order to link the preferential systems existing between Belgium, France and the Netherlands on the one hand, and the overseas territories, on the other, with the customs union provided for in the Treaty”.¹⁸¹

The 1966 Working Party Report on “EEC - Association Agreements with African and Malagasy States and Overseas Countries and Territories” notes regarding paragraph 9:

“The objection was made that resort to Article XXIV was merely a device to cover the situation arising out of the extension of preferences. Reference was made to the Note to paragraph 9 of Article XXIV ... The representative of the Community said that the Community was well aware of this rule and applied it under the Rome Treaty in respect of imports from third parties benefiting from preferences in the territory of one of the members of the Community. The rule did not, however, apply to the present case since the countries or territories which originally benefited from preferences were not members of the free-trade area and there was no longer any question of preferences in the sense of Article I”.¹⁸²

¹⁷⁹*Ibid.*, p. 4-5, paras. 9-10. See also C/M/128, and L/4774 dated 7 February 1979 (notification of request by United States for consultations under Article XXII:1).

¹⁸⁰GATT/CP.3/SR.6, p. 7-8.

¹⁸¹L/778, adopted on 29 November 1957, 6S/70, 95, Part D, para. 19.

¹⁸²L/2441, adopted on 4 April 1966, 14S/100, 113, para. 36.

9. Paragraph 10

(1) *Formation of customs unions and free trade areas with non-GATT contracting parties*

As originally proposed, the Charter only provided for the formation of customs unions between Members. The provisions of paragraph 10 were added at the Havana Conference; the reports on discussions at Havana note that “a sixth paragraph was added to provide that the Organization may, by a two-thirds vote, approve proposals which do not fully comply with the requirements of the Article provided that they lead to the establishment of a customs union or a free-trade area in the sense of the Article. It was the understanding of the Sub-Committee that this new paragraph 6 will enable the Organization to approve the establishment of customs unions and free-trade areas which include non-Members”.¹⁸³ It was the view of those who favoured the insertion of the words “as between the territories of Members” in Article 44 that “this Article, including the new paragraph 6 ... would not prevent the formation of customs unions and free-trade areas of which one or more parties were non-Members but would give the Organization an essential degree of control”.¹⁸⁴ Paragraph 10 was added to the General Agreement when the original text of Article XXIV was replaced by the texts of the corresponding Havana Charter articles.

Free-trade areas including a contracting party and one or more non-contracting parties have been approved by the CONTRACTING PARTIES in two instances: the Decision of 25 October 1951 on Free-Trade Area Treaty between Nicaragua and El Salvador¹⁸⁵ and the Decision of 13 November 1956 on participation of Nicaragua in the Central American Free-Trade Area.¹⁸⁶

See also the excerpts from the Panel Report on “EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region”¹⁸⁷ and the discussion above concerning the scope of Article XXIV:5, at page 798. In this connection see also the unadopted 1993 Report of the Panel on “EEC - Member States’ Import Régimes for Bananas”¹⁸⁸ and the unadopted 1994 Report of the Panel on “EEC - Import Régime for Bananas”.¹⁸⁹

(2) *“by a two thirds majority”*

In the corresponding paragraph of Article 44 of the Havana Charter, the voting rule reads “by a two thirds majority of the Members present and voting”. However, this rule was not brought into the General Agreement in 1948 when the original text of Article XXIV was replaced with the text of Charter Articles 42-44.¹⁹⁰ At the Review Session in 1954-55, a proposal to amend the rule to read “by a majority comprising two thirds of the contracting parties” was rejected.¹⁹¹

10. Paragraph 11: Arrangements between India and Pakistan

Paragraph 11 and its Interpretative Note were added to Article XXIV of the GATT in September 1947 at the Geneva session of the Preparatory Committee¹⁹² and a corresponding provision was added to the Charter at Havana, to respond to the particular situation of India and Pakistan as the partition of India and Pakistan had taken place on 10 August 1947. At the Review Session of 1954-55, the need for this provision was considered and it was retained at the request of the delegations of India and Pakistan.¹⁹³

¹⁸³Havana Reports, p.52, para. 27.

¹⁸⁴*Ibid.*, p. 51, para. 23.

¹⁸⁵II/30.

¹⁸⁶5S/29.

¹⁸⁷L/5776, para. 3.14; see also 18S/154.

¹⁸⁸DS32/R, dated 3 June 1993, paras. 364-372.

¹⁸⁹DS38/R, dated 11 February 1994, paras. 156-164.

¹⁹⁰GATT/1/SR.2, p. 4; see Section III below.

¹⁹¹L/189, W.9/193.

¹⁹²EPCT/W/339, dated 17 September 1947, discussed and adopted at EPCT/TAC/PV/23, p. 2-5. The reference in Annex A to “India (as on April 10, 1947)” was phrased in this manner in order to recognize historical preferences existing on that date. See EPCT/TAC/PV/26-27.

¹⁹³L/189, W.9/193 p. 13.

11. Paragraph 12: “observance of the provisions of this Agreement by ... regional and local governments and authorities”

(1) *Purpose and scope of paragraph 12*

During the negotiation of the Charter and the General Agreement, the following justifications and explanations were given by delegations that suggested the inclusion of a “federal clause”. During the London session of the Preparatory Committee, Australia stated in connection with a proposed rule to prevent internal fiscal and regulatory discrimination against imported goods:

“Where the matter is one solely of action by a State, and our ‘external powers’ laws do not give the Commonwealth authority to act, we would agree to use our best efforts to secure modification or elimination of any practice regarded as discriminatory”.¹⁹⁴

The United States delegation stated with reference to a rule on discriminatory government procurement practices:

“The obligation to accord fair and equitable treatment in awarding contracts applied to both central and local governments where the central government was traditionally or constitutionally able to control the local government”.¹⁹⁵

The Report of the Sub-committee on Technical Articles noted that “Several countries emphasized that central governments could not in many cases control subsidiary governments in this regard, but agreed that all should take such measures as might be open to them to ensure the objective”.¹⁹⁶

During negotiation of the General Agreement at the Geneva session of the Preparatory Committee, the United States rejected a proposal by China to change the language of Article XXIV:12 by pointing out:

“it is necessary to distinguish between central or federal governments, which undertake these obligations in a firm way, and local authorities, which are not strictly bound, so to speak, by the provisions of the Agreement, depending of course upon the constitutional procedure of the country concerned”.¹⁹⁷

At the Havana Conference, Mexico proposed an amendment under which federal States would have been fully responsible for actions by regional and local governments. The sub-committee which examined the proposal reported: “The Mexican amendment ... was withdrawn as certain delegates stated that their governments would encounter constitutional difficulties in attempting to enforce the provisions ... as drafted in the Mexican amendment”.¹⁹⁸

In the 1985 Panel report on “Canada - Measures Affecting the Sale of Gold Coins”, which has not been adopted:

“... the Panel considered that the purpose of Article XXIV:12 was to qualify the basic obligation to ensure the observance of the General Agreement by regional and local government authorities in the case of contracting parties with a federal structure...

“The Panel then examined whether Article XXIV:12 applies (a) to *all measures* taken at the regional or local level or (b) *only to those measures which the federal government cannot control* because they fall outside its jurisdiction under the constitutional distribution of competence. ...”.¹⁹⁹

¹⁹⁴EPCT/C.II/5, p. 1.

¹⁹⁵EPCT/C.II/27, p. 1.

¹⁹⁶EPCT/C.II/54, p. 4.

¹⁹⁷EPCT/TAC/PV/19, p. 33.

¹⁹⁸E/CONF. 2/C. 6/48/Rev.1, p. 4.

¹⁹⁹L/5863 (unadopted, dated 17 September 1985), paras. 53-54.

The Panel examined the drafting history of Article XXIV:12 and then further noted:

“... This drafting history indicates, in the view of the Panel, that Article XXIV:12 applies only to those measures taken at the regional or local level which the federal government cannot control because they fall outside its jurisdiction under the constitutional distribution of competence.”²⁰⁰

“... The Panel considered that, if Article XXIV:12 is to fulfil its function of allowing federal States to accede to the General Agreement without having to change the federal distribution of competence, then it must be possible for them to invoke this provision not only when the regional or local governments’ competence can be clearly established but also in those cases in which the exact distribution of competence still remains to be determined by the competent judicial or political bodies. The Panel therefore concluded that Canada had to be given the benefit of the doubt and that Article XXIV:12 had to be deemed to be applicable to the Ontario measure.”

“The Panel then turned to the question of the legal consequences of the application of Article XXIV:12 to the Ontario measure. The Panel considered that Article XXIV:12 could be interpreted either (a) as limiting the *applicability* of the other provisions of the General Agreement or (b) as merely limiting the obligation of federal states to secure the *implementation* of these provisions.”²⁰¹

“The Panel proceeded to an evaluation of the relative merits of the two interpretations of Article XXIV:12. The Panel noted that Article XXIV:12 refers to the ‘observance’ of the provision of the General Agreement by local governments. Only a rule that applies to local governments can be ‘observed’ by them. This suggests that Article XXIV:12 was not meant to regulate the scope of application of the provisions of the General Agreement but merely the measures to secure their observance by local governments. The Panel further noted that Article XXIV:12 is an exception to the general principle that a party to a treaty may not invoke its internal law as a justification for not performing its treaty obligations ... that it grants a special right to federal States without giving an offsetting privilege to unitary States and that it could therefore lead to imbalances in rights and obligations between unitary and federal States if the latter encounter constitutional difficulties in carrying out their obligations under the General Agreement.

“The Panel considered that, as an exception to a general principle of law favouring certain contracting parties, Article XXIV:12 should be interpreted in a way that meets the constitutional difficulties which federal States may have in ensuring the observance of the provisions of the General Agreement by local governments, while minimizing the danger that such difficulties lead to imbalances in the rights and obligations of contracting parties. Only an interpretation according to which Article XXIV:12 does not limit the *applicability* of the provisions of the General Agreement but merely limits the obligations of federal States to secure their *implementation* would achieve this aim.”²⁰²

In Council discussion of this Panel Report in October 1985, the representative of South Africa stated that “The Panel’s findings and conclusions were addressed to the Federal Government” to which the Panel “had recommended certain actions” so that “the provincial governments were ... not directly involved in adoption of this report”.²⁰³

In the 1988 Panel Report on “Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies”, the Panel “noted Canada’s claim that the practices [concerning listing/delisting requirements and the availability of points of sale which discriminate against imported alcoholic beverages] ... were not ‘restrictions’ in the sense of Article XI because ... they were provincial measures and because they were consistent with the Provincial Statement of Intentions. ... The Panel noted that the relevance of the fact that the measures concerned were provincial measures would be examined in the second part of its findings [concerning Article XXIV:12]”.²⁰⁴

²⁰⁰*Ibid.*, para. 56.

²⁰¹*Ibid.*, para. 58-59.

²⁰²*Ibid.*, paras. 63-64.

²⁰³C/M/192, p. 15.

²⁰⁴L/6304, adopted on 22 March 1988, 35S/37, 89, paras. 4.23-4.24.

The 1991 Report of the Working Party on the “Free-Trade Agreement between Canada and the United States” notes that

“Some members noted that the specific obligations incurred by the two parties in terms of Article 103 of the FTA appeared to be more direct than the obligations of Article XXIV:12 to ensure compliance at the sub-federal levels of government in respect of international trade matters. The representative of a group of countries ... wondered whether there was a difference in the constitutional status of bilateral agreements compared to multilateral agreements which created an impediment to undertaking more stringent commitments at sub-federal level under multilateral agreements. ... The representative of Canada said that regarding this matter, the two parties agreed that there was no difference between the constitutional status of federal obligations of bilateral and multilateral agreements with respect to the compliance of sub-federal governments. ... The representative of the United States said that the wording of Article 103 did not alter the federal jurisdiction on international trade, regardless of how the wording was formulated in the two provisions”.²⁰⁵

In the 1992 Panel Report on “Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies”

“The Panel ... noted that Article XXIV:12 was not an exception to other rules of the General Agreement; it merely qualified the obligation to implement the provisions of the General Agreement in relation to measures taken by regional and local governments and authorities. Consequently, the provisions of the General Agreement were applicable to measures by regional and local governments and authorities notwithstanding Article XXIV:12. This followed clearly from the obligation set out in this provision ‘to ensure observance of the provisions of this Agreement’ by such governments and authorities because a provision could only be ‘observed’ by a government or authority if it was applicable to it”.²⁰⁶

The 1992 Panel Report on “United States - Measures Affecting Alcoholic and Malt Beverages” examined the application of Article XXIV in relation to various measures of state and local governments within the United States.

“The Panel noted from the drafting history of Article XXIV:12²⁰⁷ that this provision was designed to apply only to those measures by regional or local governments or authorities which the central government cannot control because they fall outside its jurisdiction under the constitutional distribution of powers. The Panel agreed with this interpretation in view of the general principle of international treaty law that a party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty obligation.²⁰⁸ As indicated in an earlier panel report,²⁰⁹ not yet adopted by the CONTRACTING PARTIES, the qualification in Article XXIV:12 of the obligation to implement the provisions of the General Agreement grants a special right to federal states without giving an offsetting privilege to unitary states, and has to be construed narrowly so as to avoid undue imbalances in rights and obligations between contracting parties with unitary and federal constitutions. The above-mentioned interpretation -- according to which Article XXIV:12 applies only to measures by regional or local authorities which the central government cannot control under the constitutional distribution of powers -- meets the constitutional difficulties which central governments may have in ensuring the observance of the provisions of the General Agreement by regional and local authorities, but minimizes the risk that such difficulties lead to imbalances in the rights and obligations of contracting parties”.²¹⁰

The 1990 Panel Report on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile” notes that in this proceeding, Chile argued that, noting the Commission’s responsibility for EEC trade policy, and that member States’ import licensing systems were determined by EEC legislation, the Commission should be held responsible for ensuring that its member States administered such licensing in accordance with Article X; the

²⁰⁵ L/6927, adopted on 12 November 1991, 38S/47, 57, para. 31.

²⁰⁶ DS17/R, adopted on 18 February 1992, 39S/27, 86-87, para. 5.36.

²⁰⁷ A footnote to the Report refers here to, e.g., EPCT/13, p. 1; EPCT/C.II/27, p. 1; EPCT/C.II/54, p. 4; EPCT/C.II/64, p. 3.

²⁰⁸ The footnote to this sentence refers to Article 27 of the 1969 Vienna Convention on the Law of Treaties.

²⁰⁹ A footnote to the Report here refers to the unadopted Panel Report on “Canada - Measures Affecting the Sale of Gold Coins”, L/5863.

²¹⁰ DS23/R, adopted on 19 June 1992, 39S/206, 296, para. 5.79.

EEC stated that it understood Article XXIV:12 to be an exception and that since the Community had not invoked it in the present case, it saw no grounds for the Panel to examine the EEC's obligations thereunder. "The Panel ... noted that the EEC Commission Regulations in question were directly applicable in all of the ten Member States concerned in a substantially uniform manner, although there were some minor administrative variations ... The Panel found that these differences were minimal and did not in themselves establish a breach of Article X:3. The Panel therefore did not consider it necessary to examine the question whether the requirement of 'uniform' administration of trade regulations was applicable to the Community as a whole or to each of its Member States individually".²¹¹

Paragraphs 13-15 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 provide as follows:

"Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.

"The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a Member. When the Dispute Settlement Body has ruled that a provision of GATT 1994 has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.

"Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of GATT 1994 taken within the territory of the former".

(2) "reasonable measures"

As regards the meaning to be given to the term "reasonable", see the discussion under Article III concerning the interpretative note to Article III:1, which defines the term "reasonable measures" in the case of national legislation authorizing local governments to impose taxes.

The 1985 Panel Report on "Canada - Measures Affecting the Sale of Gold Coins", which has not been adopted, includes the following Panel findings:

"The Panel considered that neither the wording nor the drafting history of Article XXIV:12 supported the Canadian view that each contracting party had the right to determine itself whether a measure was 'reasonable' within the meaning of Article XXIV:12. The obligation to take reasonable measures which Article XXIV:12 imposes on federal States is a counterpart to the privilege which this provision confers upon these States (see para. 42 above). If the Canadian position were accepted, the obligation under Article XXIV:12 would be void of all substance while the corresponding privilege would remain intact.

"The Panel consequently examined what meaning should be given to the term 'reasonable'. The Panel noted that the only indication in the General Agreement of what was meant by 'reasonable' was contained in the interpretative note to Article III:1, which defined the term 'reasonable measures' for the case of national legislation authorizing local governments to impose taxes. According to this note the question of whether the repeal of such enabling legislation would be a reasonable measure required by Article XXIV:12 should be answered by taking into account the spirit of the inconsistent local tax laws, on the one hand, and the administrative or financial difficulties to which the repeal of the enabling legislation would give rise, on the other. The basic principle embodied in this note is, in the view of the Panel, that in determining which measures to secure the observance of the provisions of the General Agreement are 'reasonable' within the meaning of Article XXIV:12, the consequences of their non-observance by the local government for trade

²¹¹L/6491, adopted on 22 June 1989, 36S/93, 133, para. 12.30; arguments at 36S/118, paras. 7.1-7.2.

relations with other contracting parties are to be weighed against the domestic difficulties of securing observance. While recognizing that this note refers to the case of national enabling legislation, the Panel considered that the basic principle embodied therein was applicable to the present case".²¹²

The 1988 Panel Report on "Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies" provides:

"The Panel noted that Canada had taken the position that the only authority that could judge whether all reasonable measures had been taken under Article XXIV:12 was in this case the Canadian government. While noting that in the final analysis it was the contracting party concerned that would be the judge as to whether or not specific measures could be taken, the Panel concluded that Canada would have to demonstrate to the CONTRACTING PARTIES that it had taken all reasonable measures available and that it would then be for the CONTRACTING PARTIES to decide whether Canada had met its obligations under Article XXIV:12.

"The Panel noted that the Government of Canada considered that it had already taken such reasonable measures as were available to it to ensure observance of the provisions of the General Agreement by the provincial liquor boards. The Panel, however, also noted that the efforts of the Canadian federal authorities had been directed towards ensuring the observance of these provisions as they themselves interpreted them and not as interpreted in these findings. The Panel therefore concluded that the measures taken by the Government of Canada were clearly not all the reasonable measures as might be available to it to ensure observance of the provisions of the General Agreement by the provincial liquor boards, as provided in Article XXIV:12 and that therefore the Government of Canada had not yet complied with the provisions of that paragraph. The Panel was of the view, however, that in the circumstances the Government of Canada should be given a reasonable period of time to take such measures to bring the practices of the provincial liquor boards into line with the relevant provisions of the General Agreement".²¹³

The 1992 Panel on "Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies", the members of which were the same as the 1988 Panel above, examined the application of Article XXIV:12 to various measures, some of which they had examined in 1988. With respect to certain measures examined which had not been before the Panel before (restrictions on private delivery of beer, and the imposition of minimum prices by a number of provincial liquor boards), "the Panel found it appropriate to follow the procedure adopted by the 1988 Panel ... and to propose that the Government of Canada should be given a reasonable period of time to take measures which would lead to an elimination of this practice".²¹⁴ However, the Panel "considered that, pending the elimination of such discrimination, the liquor boards should in no case levy charges for the delivery of imported beer higher than the costs actually incurred by them".²¹⁵

With respect to certain measures which had already been examined in 1988 (restrictions on access to points of sale for beer, and differential mark-up practices of the provincial liquor boards):

"... the Panel proceeded to examine whether Canada had demonstrated that it had taken all reasonable measures available with respect to the different practices which the Panel had found to be contrary to the General Agreement. The Panel considered that, for this purpose, Canada would have to show that it had made a serious, persistent and convincing effort to secure compliance by the provincial liquor boards with the provisions of the General Agreement. The Panel first reviewed Canada's claim that it had taken reasonable measures to eliminate restrictions on access to points of sale for beer, which the Panel had found to be inconsistent with the General Agreement. It recalled that the 1988 Panel had already concluded that 'the availability of points of sale which discriminate against imported alcoholic beverages were restrictions made effective through state-trading operations contrary to Article XI:1'. As a result of that finding the CONTRACTING PARTIES had requested Canada to take 'such reasonable measures as may be available to ensure observance of the provisions of Article XI of the provincial liquor boards'. After reviewing all the information and documentation before it, including the statement made by Canada ... the Panel came to the

²¹²L/5863 (unadopted), paras. 68-69.

²¹³L/6304, adopted on 22 March 1988, 35S/37, 92, paras. 4.34-4.35.

²¹⁴DS17/R, adopted on 18 February 1992, 39S/27, 87-88, 89, paras. 5.38, 5.40.

²¹⁵*Ibid.*, 39S/88, para. 5.38.

conclusion that, in spite of that request made by the CONTRACTING PARTIES in 1988, Canada had not demonstrated that it had made serious, persistent and convincing efforts to secure elimination of restrictions on points of sale for beer. These discriminatory practices had not been dealt with in the agreement reached with the EEC subsequent to the adoption of the 1988 Panel report, nor had they been specifically addressed in the interprovincial agreement designed to achieve an integrated market for Canadian beer. The Panel therefore *concluded* that Canada had failed to comply with its obligations under Article XXIV:12 of the General Agreement with respect to availability of points of sale.”²¹⁶

“The Panel then turned to the differential mark-up practices of the provincial liquor boards and to its finding in paragraph 5.21 above, that these practices were inconsistent with Article II:4 of the General Agreement. It noted that, as a result of the agreement between the European Communities and Canada and of the interprovincial agreement, the liquor boards had accepted to eliminate discriminatory pricing practices on beer (both domestic and imported), not later than 31 December 1994. It recalled, in this context, the last sentence of the Note Ad Article III:1, which indicated that the term ‘reasonable measures’ could be interpreted to permit the elimination of inconsistent measures ‘gradually over a transition period, if abrupt action would create serious administrative and financial difficulties’. Since the CONTRACTING PARTIES had already requested Canada in 1988 to take reasonable measures to ensure that differential mark-ups were not applied contrary to the provisions of Article II:4, the Panel asked itself whether the provincial liquor boards encountered administrative and financial difficulties which could justify a transition period of more than six years to ensure the application of differential mark-ups in full compliance with the 1988 Panel report. This was clearly not the case: as far as administrative practices were concerned, the Panel had already noted that most provincial liquor boards had introduced a system of cost-of-service charges (in addition to a uniform mark-up); any financial difficulties could be resolved by increasing the mark-up uniformly for both imported and domestic beer. By agreeing, in 1991, to become party to an agreement which sanctioned postponement until the end of 1994 of a practice which the CONTRACTING PARTIES had found in 1988 to be inconsistent with the General Agreement, the Government of Canada could hardly claim that it had taken a reasonable measure in compliance with the CONTRACTING PARTIES’ request. The Panel therefore *concluded* that Canada had not made serious, persistent and convincing efforts to secure elimination of discriminatory mark-up practices and that it had not taken all the reasonable measures as might be available to it to ensure observance by the provincial liquor boards of the provisions of Article II:4 of the General Agreement. The Panel therefore *found* that with respect to provincial liquor board mark-up practices Canada had failed to comply with its obligations under Article XXIV:12.”²¹⁷

In the 1992 Panel Report on “United States - Measures affecting Alcoholic and Malt Beverages”,

“The Panel recalled that the United States invoked Article XXIV:12 in respect of any state measures that the Panel were to find to be inconsistent with the General Agreement. ... The Panel noted that the United States had not provided the Panel with any evidence in support of its invocation of this provision. In particular, it had presented no evidence in support of its claim that reasonable measures were not available to it to ensure the observance by the state authorities of the relevant provisions of the General Agreement. ...

“The Panel recalled its finding with respect to the [Protocol of Provisional Application] that, according to the evidence submitted to this Panel, GATT law is part of federal law in the United States and as such is superior to GATT-inconsistent state law.²¹⁸ Based on the evidence submitted, the Panel concluded that the United States has not demonstrated to the Panel that the general obligation of contracting parties to withdraw measures inconsistent with the General Agreement cannot be observed in this case by the United

²¹⁶*Ibid.*, 39S/27, 87, para. 5.37.

²¹⁷*Ibid.*, 39S/27, 88-89, para. 5.39.

²¹⁸The footnote to this paragraph states as follows: “The Panel noted that this view is also shared by the legal authorities to which the parties referred in their submissions. E.g. Hudec, ‘The Legal Status of GATT in the Domestic Law of the United States’ in Hilf, Jacobs, Petersmann (eds), *The European Community and GATT* (1986), page 221: ‘Article XXIV:12 obligates the United States to compel state adherence to [the General Agreement] ...’.”

States as a result of its federal constitutional structure and that the conditions for the application of Article XXIV:12 are met”.²¹⁹

During consideration of this Panel Report at the June 1992 Council meeting, the representative of the United States said that “While the United States would not oppose adoption of the Panel report, it would enter for the record a formal reservation” regarding these paragraphs.²²⁰

(3) “regional and local governments and authorities”

In the 1988 Panel Report on “Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies”, “The Panel noted that there was no dispute that the provincial liquor boards were “regional authorities” within the meaning of Article XXIV:12”.²²¹ In the 1992 Panel Report on “Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies”, “The Panel noted that the parties to the dispute agreed that the provincial liquor boards were ‘regional authorities’ within the meaning of Article XXIV:12 of the General Agreement and that this Article was therefore applicable to all the provincial practices at issue”.²²²

B. RELATIONSHIP BETWEEN ARTICLE XXIV:4-11 AND OTHER GATT PROVISIONS

1. Article XI

In this connection, see the unadopted Panel Report of 1993 on “EEC - Member States’ Import Régimes for Bananas”.²²³

2. Articles XII and XVIII

Divergent views have been expressed on various occasions as to whether the regional economic integration provisions of Article XXIV can justify a discriminatory application of balance-of-payments restrictions. At the Twelfth Session in 1957, four sub-groups were appointed to examine the relevant provisions of the Treaty of Rome in the light of the provisions of the General Agreement. The Report of Sub-Group B, which examined those provisions of the Treaty relating to quantitative restrictions²²⁴ notes the difference in views between certain members of the Sub-Group, who expressed concern that the Rome Treaty provisions would permit a Member State to use quantitative restrictions not justified by its own balance-of-payments position, and the six EEC member States, who considered that the opening phrase of paragraph 5 of Article XXIV provided a general exception under which they were entitled to deviate from the other provisions of the General Agreement, including Articles XI to XIV, insofar as the application of these provisions would constitute obstacles to the formation of the customs union and to the achievement of its objectives.²²⁵ See under Article XII:1.

See also the discussion of Articles XIII and XXIV in the 1959 Report of the Working Party on “German Import Restrictions”.²²⁶

The 1974 Report of the Working Party on “Italian Import Deposit” examined a prior import deposit scheme introduced by the Italian government on a non-discriminatory basis, and notes the statement by the representative of the European Communities that “The deposit was applied without distinction to the origin of products, although that did not mean that the Community regarded itself as bound to accept that as a rule of the General Agreement”.²²⁷

²¹⁹DS23/R, adopted 19 June 1992, 39S/206, 296-297, paras. 5.78, 5.80. See also material from this report in the chapter on provisional application of the General Agreement.

²²⁰C/M/257.

²²¹L/6304, adopted on 22 March 1988, 35S/37, 91, para. 4.33.

²²²DS17/R, adopted on 18 February 1992, 39S/27, 86, para. 5.35.

²²³DS32/R, dated 3 June 1993, para. 358.

²²⁴L/778, adopted on 29 November 1957, 6S/70, 76ff, section B.

²²⁵*Ibid.*, 6S/76-80, paras. 2-11.

²²⁶L/1004, adopted on 30 May 1959, 8S/160, 161-163, paras. 6-9.

²²⁷L/4082, adopted on 21 October 1974, 21S/121, 122, para. 3.

The Chairman of the Committee on Balance-of-Payments Restrictions, reporting in 1978 to the Council on the consultation with Finland, said “that during the consultation with Finland the question of the relationship between Articles XII and XXIV had been raised with respect to the non-discriminatory application of balance-of-payments measures and divergent views had been expressed in this respect”.²²⁸

See also the July 1994 Secretariat background document for consultations under Article XII:4(a) with the Slovak Republic concerning a surcharge imposed for balance-of-payments reasons; this document notes that the import surcharge applied to all imports in a non-discriminatory manner, including “the Czech Republic as well as other countries with which the Slovak Republic has made bilateral or multilateral free trade agreements.”²²⁹ The 1994 basic document supplied by Poland for consultations under Article XII:4 notes that a surcharge imposed for balance-of-payments purposes will be applied to all imports; see directly below under relationship with Article XIII.²³⁰

3. Article XIII

The 1984 Report of the “Panel on Newsprint” examined the claim of Canada concerning the application of a tariff concession on newsprint established by the European Communities. The concession in the EC’s Schedule LXXII provided for an annual tariff quota of 1.5 million tonnes duty-free, leaving the bound duty rate at 7 per cent for imports exceeding that quota. Under agreements between the EC and the EFTA countries, newsprint imports from EFTA countries became duty-free as from 1 January 1984, and the EC then opened a duty-free tariff quota for m.f.n. suppliers of 500,000 tonnes for newsprint for the year 1984. The Panel “concluded that the EC, in unilaterally establishing for 1984 a duty-free quota of 500,000 tonnes, had not acted in conformity with their obligations under Article II of the GATT. ...

“The Panel carefully noted and examined the statement by the EC that, should the Panel consider the action taken by the EC as not being in conformity with the GATT, they might proceed to option (b) under which the tariff quota would be maintained at 1.5 million tonnes but that imports from all sources, including the EFTA countries, would be recorded against that quota; once the latter had been filled, the Community’s formal contractual obligations would have been met. While the Panel could find no specific GATT provision forbidding such action and no precedents to guide it, it considered that this would not be an appropriate solution to the problem and would create an unfortunate precedent. It is in the nature of a duty-free tariff quota to allow specified quantities of imports into a country duty-free which would otherwise be dutiable, which is not the case for EFTA imports by virtue of the free-trade agreements. Imports which are already duty-free, due to a preferential agreement, cannot by their very nature participate in an m.f.n. duty-free quota. The situation in this respect could only change if the free-trade agreements with the EFTA countries were to be discontinued; in this case these countries would be entitled to fall back on their GATT rights vis-à-vis the EC, which rights continue to exist.

“On the basis of the findings and conclusions reached above, the Panel suggests that the CONTRACTING PARTIES recommend that the European Communities engage promptly in renegotiations under the procedures of Article XXVIII of the GATT with regard to the tariff quota on newsprint in Schedule LXXII. Further, the Panel suggests that the CONTRACTING PARTIES recommend to the European Communities that, pending the termination of such renegotiations, the duty-free tariff quota of 1.5 million tonnes for m.f.n. suppliers be maintained”.²³¹

The 1986 Report of the Working Party on the Sixth Review under the Protocol of Accession of Hungary notes the view of Hungary that “it was unacceptable that Spain’s accession to the EEC resulted in the introduction of discriminatory quantitative restrictions vis-à-vis Hungary. Article XXIV did not release any contracting party from the obligation of non-discrimination as provided for by Article XIII of the GATT”.²³² In

²²⁸C/M/127, referring to BOP/R/102.

²²⁹BOP/319, para. 5; see also BOP/R/218.

²³⁰BOP/317, p. 4, subpara. (c).

²³¹L/5680, adopted on 20 November 1984, 31S/114, 131-133, paras. 52, 55-56.

²³²L/5977, adopted on 22 May 1986, 33S/136, 143, para. 24.

Council discussion on this Report it was pointed out that “The Working Party had noted that discriminatory quantitative restrictions not consistent with Article XIII were still maintained against Hungarian exports by the European Economic Community, and had discussed at length the slow pace at which the remaining restrictions were being removed”.²³³ The Report of the Working Party on “Trade with Romania - Sixth Review under the Protocol of Accession” also records the view of the representative of Hungary with regard to quantitative restrictions resulting from the accession of Spain and Portugal to the EEC “that Article XXIV of the GATT did not allow any contracting party the introduction of restrictions inconsistent with Article XIII”.²³⁴

The 1988 Report of the Working Party on “Accession of Portugal and Spain to the European Communities” records the concern of several members of the Working Party that “since acceding to the Communities, Spain had introduced discriminatory quantitative restrictions which contravened Articles XI, XIII and XXIV:4 as well as their countries’ Protocols of Accession to the GATT under which contracting parties undertook not to increase the element of discrimination which they maintained on these countries’ imports. ... Since Article XXIV did not provide a waiver from obligations contained in Articles XI and XIII and did not allow or require a country acceding to a customs union to adopt the more restrictive trade régime of the customs union, they called on the Communities and Spain to eliminate all GATT-inconsistent measures, which in the case of one of these countries affected one quarter of its total exports to Spain”.²³⁵

The 1994 basic document supplied by Poland for consultations under Article XII:4 notes with respect to a surcharge imposed for balance-of-payments purposes that “As required by Article XIII:1 of the General Agreement, the surcharge will be applied to all imports without preference of discrimination as regards the type of goods, sources of imports and the nature of bilateral relations with the countries of origin, rates, procedures and all other modalities of the measure. It will apply equally to all trade, including trading partners with whom Poland’s commercial relations are based on Article XXIV of the General Agreement.”²³⁶

4. Article XIX

The modalities of application of Article XIX have been discussed on a number of occasions in relation to agreements presented under Article XXIV. Differing views have been expressed on whether the fact that Article XIX is not mentioned among the exceptions in Article XXIV:8 should be interpreted to mean that a member of a customs union or free-trade area is entitled to exempt from the application of Article XIX measures imports from other members of the customs union or free-trade area.²³⁷

The Reports of the Working Parties concerning the agreements between the European Communities and Austria²³⁸, Iceland²³⁹, Portugal²⁴⁰, Sweden²⁴¹ and Switzerland and Liechtenstein²⁴² each contain the following three paragraphs:

“Some members of the Working Party expressed their concern that the parties to the Agreement seemed to interpret the provisions of Article XXIV:8(b) of the General Agreement so as to allow discriminatory application of Article XIX when safeguard action was being taken. They would like it to be understood in the Working Party that the reply given by the parties to the Agreement to the question on application of safeguard provisions did in fact mean that safeguard action would be taken on a strictly most-favoured-nation basis.

“The representative of the European Communities called attention to the omission of Article XIX from among those mentioned in Article XXIV:8(b), which required the elimination of certain ‘other

²³³C/M/198, p. 14.

²³⁴L/6282, adopted on 2 February 1988, 35S/337, 345, para. 29.

²³⁵L/6405, adopted on 19-20 October 1988, 35S/293, 315-316, para. 39.

²³⁶BOP/317, p. 4, subpara. (c).

²³⁷Concerning the negotiating history of Article XXIV in relation to Article XIX, see the Secretariat Note on “Article XXIV of the General Agreement” (Addendum), MTN.GNG/NG7/W/13/Add.1, dated 10 August 1988.

²³⁸L/3900, adopted on 19 October 1973, 20S/145.

²³⁹L/3902, adopted on 19 October 1973, 20S/158.

²⁴⁰L/3901, adopted on 19 October 1973, 20S/171; see also 24S/73 (same views repeated in 1977 Report).

²⁴¹L/3899, adopted on 19 October 1973, 20S/183.

²⁴²L/3898, adopted on 19 October 1973, 20S/196.

restrictive regulations of commerce' as between members of the free-trade area. His authorities, accordingly, were of the view that they were free to exempt these members from possible restrictions imposed under Article XIX.

"Some members could not accept that explanation. In their view, the invocation of Article XXIV did not mean that other Articles of the General Agreement should cease to apply; and these members could not agree that the invocation of Article XXIV permitted the discriminatory application of Article XIX".²⁴³

With regard to the EEC's Article XIX action in 1973 relating to imports of magnetophones into Italy, Japan noted "that the import restrictive measure did not apply to the associated countries and the other members of the Community, while Article XIX required global application". The representative of the EC stated that the measure was consistent with Article XXIV²⁴⁴. The matter was subsequently discussed in the twenty-ninth session of the CONTRACTING PARTIES. The representative of the European Communities stated that while Article XIX measures "should apply *erga omnes*, they need not apply to countries which had an agreement with the Community in accordance with Article XXIV. The Community was always prepared to enter into consultations and consultations had been held on this subject".²⁴⁵

The Panel Report on "Norway's Article XIX Action on Certain Textile Products" noted the exclusion of EFTA and EEC products from the scope of Norway's Article XIX action, but the Panel, noting that Hong Kong had limited its formal request for a ruling on Norway's Article XIX action, also "noted and consequently based its decision on the statements by Hong Kong that ... a finding concerning the exclusion from the quotas of the EEC and EFTA countries was not necessary"²⁴⁶ and did not make a finding with respect to the exclusion of these products.

In "Questions and Replies" concerning the Free-Trade Agreement between Canada and the United States one question related to the provisions in this agreement providing that each party to this agreement could exempt imports from the other party from Article XIX actions taken by it, except where imports from the other contribute importantly to serious injury caused by all imports. The two parties stated in response that "there is no agreed interpretation by contracting parties of the relationship between Articles XIX and XXIV. There is, however, a practice in place under other Article XXIV arrangements that provides for the exemption of Parties to the arrangement from safeguard actions".²⁴⁷ In the Report of the Working Party on this agreement, various members of the Working Party took issue with this statement or with its implications for the determination of serious injury under Article XIX:

"... For these members, selective non-application of safeguard measures to the other party was not consistent with the provisions of Article XIX of the General Agreement. ... One member considered that discriminatory provisions of the Agreement on global emergency actions diluted the principle of non-discrimination and m.f.n. application of emergency measures, particularly when imports from the other party contributed to the serious injury".²⁴⁸

With respect to the September 1991 Article XIX action by Austria consisting of a global quota applied to all imports of certain types of cement and cement preparations, except for imports from the EC and EFTA member states, Japan and a number of other contracting parties stated at the October 1991 Council meeting that in their view, Article XIX did not permit a contracting party to exempt its partners in free-trade agreements from the application of its safeguard measures. Austria stated that it had exempted these imports on the basis of the Stockholm Convention and the association agreement between Austria and the EC; that these were agreements notified under Article XXIV; and that since Article XIX was not mentioned in the list in Article XXIV:8(b), measures taken thereunder might be not applied to other members of a free-trade area.²⁴⁹

²⁴³20S/156, 169, 181, 194, 207.

²⁴⁴C/M/86.

²⁴⁵SR.29/1, p. 5-6.

²⁴⁶L/4959, para. 14(a).

²⁴⁷L/6739, p. 36. See also L/7219 (notification of investigation by Canadian International Trade Tribunal of imports of boneless beef originating other than from the United States).

²⁴⁸"Free-Trade Agreement between Canada and the United States", working party report adopted on 12 November 1991, L/6927, 38S/47, 74-75, para. 90; see also *ibid.* at 38S/66-67, para. 63.

²⁴⁹C/M/252, p. 12-15. See also L/6899/Add.7/Suppl.1 (notification of import quota for cement of origin other than from EC or EFTA-

Other instances of non-application of Article XIX measures to imports from other members of a regional trade agreement include the following: import licensing imposed by the Federal Republic of Germany on coal products since September 1958 only for imports from non-ECSC countries²⁵⁰; quantitative restrictions imposed by Australia in 1976 on chest freezers for all imports other than those under the existing special trading arrangements provided for in the New Zealand-Australia Free Trade Agreement²⁵¹; action under Article XIX by Hungary in November 1992 with respect to certain paper and paper products, but not applied to imports from the EEC or from Finland; two Article XIX actions in 1993 by Austria, on certain types of cement and certain preparations containing cement, and certain fertilizers, from which imports originating in EC or EFTA member States were exempted²⁵²; and a tariff quota under Article XIX imposed by Canada in 1993 on boneless beef, from which imports originating in the US were exempted.²⁵³ On the other hand, there are also instances of application of Article XIX safeguard measures on a non-discriminatory basis to all imports, including imports from other members of a regional trade agreement under Article XXIV.²⁵⁴

5. Articles XXII and XXIII

The possibility of invoking Article XXII with regard to agreements presented under Article XXIV has been expressed in various working party reports since the examination of the Treaty of Rome.²⁵⁵ During the consideration at the Twelfth Session of the Treaty of Rome in a special Committee on the Rome Treaty consisting of all contracting parties, when it was suggested to continue examination of this Treaty by prolonging the Committee's mandate, the representative of the Interim Committee for the Common Market and Euratom stated that "the Six ... could not accept any special procedures which would imply for them additional obligations not applied to the other contracting parties. In regard to the question under consideration, the provisions of Articles XXII and XXIII of the General Agreement should be sufficient for the holding of any consultations which the CONTRACTING PARTIES might desire".²⁵⁶ Also in connection with the examination of the Treaty of Rome, the "Procedures under Article XXII on Questions Affecting the Interests of a Number of Contracting Parties" were agreed in 1958 in the Intersessional Committee and adopted at the Thirteenth Session.²⁵⁷ The 1978 Working Party Report on "Agreement between the EEC and Egypt" notes that the representative of the EEC stated that "As regards the possibility of consultations with the contracting parties concerning the incidence of the Agreement on their trade interests... nothing prevented these countries from invoking the relevant provisions of the General Agreement, such as Articles XXII and XXIII ... The representative of Egypt said that his Government was also prepared to enter into consultations under Articles XXII and XXIII should the need arise".²⁵⁸ See also discussion in the Council concerning the invocation of Article XXIII in relation to measures under Article XXIV.²⁵⁹

In 1974, a Canadian request for a panel because of lack of agreement in Article XXIV:6 negotiations led to the establishment of a panel under paragraphs 1(c) and 2 of Article XXIII, which was not activated because the parties reached an agreement; see this and other instances of conciliation and arbitration at page 811 above.

The 1985 Panel Report on "EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region," which has not been adopted, contains, *inter alia*, the following findings as to the relationship between Articles XXIII and XXIV.

"... In the opinion of the Panel, the examination - or re-examination - of Article XXIV agreements was the responsibility of the CONTRACTING PARTIES. In the absence of a decision by the CONTRACTING

Member State).

²⁵⁰L/855, 920.

²⁵¹L/4387.

²⁵²L/6899/Add.7-8, L/6899/Add.7/Suppl.1; L/7204 and Add.1-4, L/7204/Suppl.1.

²⁵³L/7219 & Add. 1-5.

²⁵⁴E.g., non-discriminatory surcharge by Finland 1976-1979 on imports of pantyhose (tights) below a basic price, listed in the table of Article XIX actions following the chapter on Article XIX; emergency measures under Article XIX on imports of whitefish from all origins, February/March 1993 (L/7194).

²⁵⁵E.g., 23S/61, 24S/66.

²⁵⁶CRT/SR.5, p. 60.

²⁵⁷7S/24, adopted on 10 November 1958; see reference to Article XXII consultations in Chairman's summing-up on action at the Thirteenth Session on the Treaty of Rome, 7S/71; see also the discussion of these procedures under Article XXII.

²⁵⁸L/4460, adopted on 17 May 1978, 25S/114, 119, paras. 15-16.

²⁵⁹E.g., C/M/73, p. 5; C/M/162, p. 13; C/M/166, p. 12.

PARTIES and without prejudice to any decision CONTRACTING PARTIES might take in the future on such a matter, the Panel was of the view that it would not be appropriate to determine the conformity of an agreement with the requirements of Article XXIV on the basis of a complaint by a contracting party under Article XXIII:1(a). The Panel did not preclude that amongst the procedures available to CONTRACTING PARTIES, a panel could be established to give an advisory opinion on the conformity of an agreement or an interpretation of specific criteria under Article XXIV to assist CONTRACTING PARTIES in making findings or recommendations under Article XXIV:7(b). However, the Panel was of the view that irrespective of the procedure to be followed for this purpose, including a panel, this should be done clearly in the context of Article XXIV and not Article XXIII, as an assessment of all the duties, regulations of commerce and trade coverage as well as the interests and rights of all contracting parties were at stake in such an examination, and not just the interests and rights of one contracting party raising a complaint.

“The Panel considered that the practice, so far followed by the CONTRACTING PARTIES, never to use the procedures of Article XXIII:2 to make recommendations or rulings on the GATT-conformity of measures subject to special review procedures was sound. It felt that the purposes these procedures served and the balance of interests underlying them would be lost if contracting parties could invoke the general procedures of Article XXIII:2 for the purpose of requesting decisions by the CONTRACTING PARTIES, on measures to be reviewed under the special procedures. The panel therefore concluded that it should, in the absence of a specific mandate by the Council to the contrary, follow this practice also in the case before it and therefore abstain from an overall examination of the bilateral agreements.”²⁶⁰

“The Panel further noted that in some of the conclusions on agreements, following their examination under Article XXIV:7, the CONTRACTING PARTIES had recalled that procedures for consultations under Article XXII had been accepted and had then noted that ‘the other normal procedures of the General Agreement would also be available to contracting parties to call into question any measures taken’ under the interim agreements (see Rome Treaty: BISD 7S/71; EFTA: BISD 9S/20; LAFTA: BISD 9S/21, and Finnish Association with EFTA: BISD 10S/24). The reference to ‘the other normal procedures of the General Agreement’, after the mention of Article XXII, can only be understood to mean the procedures of Article XXIII. The CONTRACTING PARTIES have established in the above conclusions that this procedure could be used to call into question ‘any measure’ taken by the parties to the agreements; they did not mention the possibility of calling into question the agreements as a whole, under the procedures of Article XXIII. Furthermore, the Panel noted that in the reports of the working parties relating to the respective EEC agreements with Egypt, Lebanon, and Jordan, it was specified that ‘as regards the possibility of consultations with the contracting parties concerning the incidence of the Agreement on their trade interests, which had been mentioned by some members of the Working Party, the spokesman for the European Communities stated that nothing prevented these countries from invoking the relevant provisions of the General Agreement, such as Articles XXII and XXIII’ (BISD 25S/119 para.15, 139 para.16, and 147 para.16).

“... a decision of the CONTRACTING PARTIES on the agreements would inevitably have amounted to a judgment on their conformity with Article XXIV. Had it been recognized that an agreement was in conformity with the requirements of Article XXIV, the implementation of this agreement could no longer be considered as nullifying or impairing benefits accruing under the General Agreement. On the other hand, had the agreement been considered by the CONTRACTING PARTIES as not being in conformity with the said requirements, its implementation would amount to a clear infringement of the provisions of the General Agreement which would constitute *prima facie* a clear case of nullification or impairment in the sense of Article XXIII:1(a).”²⁶¹

The Panel’s conclusion “that in this particular situation the balance of rights and obligations underlying Articles I and XXIV of the General Agreement had been upset to the disadvantage of the contracting parties not parties to these agreements and that the United States was therefore entitled to offsetting or compensatory adjustment to the extent that the grant of the preferences had caused substantial adverse effects to its actual

²⁶⁰L/5776 (unadopted, dated 7 February 1985), paras. 4.15-4.16.

²⁶¹*Ibid.*, paras. 4.18-4.19.

trade or its trade opportunities”²⁶² was disputed by several contracting parties in the GATT Council discussion of the Panel report, which was not adopted.²⁶³

The 1991 Report of the Working Party on the “Free-Trade Agreement between Canada and the United States” records that its members were concerned about possible conflict between the bilateral dispute settlement procedure under the FTA and the multilateral dispute settlement procedure under the GATT. They feared this situation would result in either delays in the adoption of panel reports by CONTRACTING PARTIES or the report never being adopted due to contradictory findings in the FTA bilateral dispute settlement process and the General Agreement multilateral process. In the view of one member “such obstruction of the proper functioning of the multilateral dispute settlement process was not in accordance with the obligations of parties under the GATT”.²⁶⁴ The representative of the United States “emphasized that the rights and obligations of the FTA parties under the GATT remained unchanged”.²⁶⁵

Paragraph 12 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 provides that “The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free-trade area”.

6. Article XXVIII

The 1966 Report of the Working Party on “Turkey - Consultation under Article XXII:2” describes the results of consultations in respect of the following matter raised by the United Kingdom: “The application by Turkey of Article XXIV:5(a) and of Article XXIV:6 when, in the course of forming a customs union with the European Economic Community, the Turkish Government reduces its tariff in successive stages towards the Community on the one hand and towards other contracting parties on the other”.²⁶⁶ Under a waiver, the Turkish Government was imposing duties on a number of imports in excess of bound rates, and was seeking to renegotiate these duties under Article XXVIII; meanwhile Turkey had notified its association agreement with the EEC as an interim agreement leading to a customs union. The United Kingdom sought to ascertain the Turkish Government’s intentions with respect to aligning its tariff to the EEC’s and reducing its tariff on imports from Community sources to zero. Some members of the Working Party pointed out that

“while there may have been no connexion in intent between the Ankara Agreement and the tariff increase, in terms of practical effect the connexion existed and the way in which Turkey moved toward customs union with the Community was of great interest to third countries, particularly in respect of duty rates on items presently bound in Schedule XXXVII ...”.²⁶⁷

The Turkish Government offered to incorporate a Declaration into agreements reached in the renegotiations under Article XXVIII, providing that “it will give due consideration to the equitable rights of contracting parties who are not members of the Ankara Agreement when it comes to implementing differential tariff treatment in favour of the EEC on these items”.²⁶⁸

See also sections above relating to paragraphs 6 and 9 of Article XXIV, and the discussion of Article XXVIII in the Reports of the Working Parties on “European Economic Community”, and “EEC - Association of Greece”.²⁶⁹

²⁶²*Ibid.*, para. 4.37.

²⁶³C/M/186, 187, C/W/462.

²⁶⁴L/6927, adopted on 12 November 1991, 38S/47, 54, para. 22.

²⁶⁵*Ibid.*, 38S/55, para. 25.

²⁶⁶L/2465, adopted on 28 March 1966, 14S/59, 59-60, para. 1.

²⁶⁷*Ibid.*, 14S/63, para. 17.

²⁶⁸*Ibid.*, 14S/64, para. 22.

²⁶⁹European Economic Community, 6S/70, para. 12; EEC - Association of Greece, 11S/149, para. 8.

7. Article XXX

During the Review Session of 1954-55, in response to a question whether an amendment to Article XXIV would require unanimous acceptance for its entry into force if it involved a departure from the no-new-preference rule in Article I, the Executive Secretary gave the following legal opinion:

“By virtue of the provisions of Article XXX an amendment to Article XXIV would enter into force for those contracting parties accepting it upon acceptance by two-thirds of the contracting parties. This would apply, however, only in the case of an amendment which was in accordance with the principles of Article XXIV, that is to say if it relates to an arrangement for establishing a customs union or a free-trade area involving the complete or substantial abolition of duties or restrictions between the parties to the arrangement. If an amendment did not look to this objective it would amount to an amendment of Article I and would therefore require unanimity”.²⁷⁰

8. Article XXXIII

The 1989 Report of the Working Party on the “Accession of Bolivia” notes:

“Some members referred to the effect of Bolivia’s participation in regional agreements on its ability to enter into tariff negotiations with interested contracting parties. These members noted that the provisions of Article XXIV of the General Agreement and of the Enabling Clause did not support the assertion that trade concessions exchanged in the context of integration agreements could not be affected by tariff concessions negotiated with third countries. ... Any attempt to exclude concessional products from the tariff negotiations would be a reason for serious concern. In the view of these members, in the case of countries with wide-ranging preferential tariff commitments, the insistence on maintaining such a line of action might be tantamount to a refusal to enter into tariff negotiations with third countries which, without questioning Bolivia’s sovereign right to make or not to make concessions, they would not be able to accept. A member requested that Bolivia provide a list of the items in Bolivia’s tariff schedule which would be subject to the Common Minimum External Tariff of the Cartagena Agreement. This member added that in the view of her Government, Bolivia should be prepared to participate fully in tariff negotiations in connection with its accession proceedings without regard to instruments that were not in force at the present time”.²⁷¹

9. Part IV and the Enabling Clause

Reports of Working Parties on agreements presented under Article XXIV record divergent views as to the relationship between Article XXIV and Part IV of the General Agreement. On the one side, the parties to these agreements have often taken the view that the conformity of the agreement with GATT should be examined also in the light of Part IV. For instance, some Working Party Reports on EEC agreements with Mediterranean countries record the view of the parties to these agreements that, while Article XXIV remained fully valid as far as the EEC was concerned, the lack of reciprocal commitments on the part of the less-developed contracting parties “was consistent with the spirit and letter of Part IV of the General Agreement”.²⁷² On the other side, the view has also been expressed that provisions in agreements for the according of “reverse preferences” by developing countries to developed countries were inconsistent with the principle of non-reciprocity in Part IV.²⁷³ In the Working Party on “EEC - Association with African and Malagasy States” the view was expressed that the Agreement should be examined in the light of Part IV and that Part IV did not permit trade discrimination among developing countries²⁷⁴; the parties to the Yaoundé Convention replied that Article XXIV:5 specifies that the provisions in the General Agreement shall not prevent the formation of free-trade areas, and as Part IV does not

²⁷⁰W.9/114, p. 1.

²⁷¹L/6542, adopted on 19 July 1989, 36S/9, 23-24, para. 40. See in comparison Article 17 of the Havana Charter and material under Article I:2 concerning tariff negotiations and historical preferences.

²⁷²See, e.g., 25S/120, 126, 135, 144; 28S/117.

²⁷³EEC - Association Agreements with African and Malagasy states, 14S/100, 105-106, para. 13.

²⁷⁴L/3465, adopted on 2 December 1970, 18S/133, 140, para. 22; see also 18S/140; 24S/84, 93, 102; 25S/119, 127, 137; 28S/120; 29S/121.

override Article XXIV, the provisions of Article XXIV:5 applied.²⁷⁵ See also other references to Part IV in working party reports.²⁷⁶

In the 1985 Panel report on “EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region”, which has not been adopted, the Panel found as follows:

“The Panel considered that Article XXIV and Part IV constituted distinct sets of rights and obligations and that measures taken under one could not be covered by the other. As these agreements had been presented under the specific provisions of Article XXIV, then, whatever the general impact of Part IV and the Enabling Clause on the GATT as a whole, the agreements would in any event need to conform to the precise criteria of Article XXIV. The Panel therefore did not consider Part IV and the Enabling Clause as being relevant and therefore did not consider it any further.”²⁷⁷

The 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (“Enabling Clause”) provides, *inter alia*:

“1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries¹, without according such treatment to other contracting parties.

“2. The provisions of paragraph 1 apply to the following:² ...

“(c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another.”²⁷⁸

A list of the regional agreements notified under the Enabling Clause appears under Article I.

During 1992, there were extensive discussions in the Council and the Committee on whether the MERCOSUR Agreement should be notified and examined under the Enabling Clause or under Article XXIV. This agreement was notified under the Enabling Clause and the Committee established a working party with the following terms of reference:

“To examine the Southern Common Market Agreement (MERCOSUR) in the light of the relevant provisions of the Enabling Clause and of the General Agreement, including Article XXIV and to transmit a report and recommendations to the Committee for submission to the CONTRACTING PARTIES, with a copy of the report transmitted as well to the Council. The examination in the Working Party will be based on a complete notification and on written questions and answers.”²⁷⁹

²⁷⁵*Ibid.*, 18S/140, para. 23.

²⁷⁶EEC - Association Agreements with African and Malagasy states, 14S/100, paras. 13, 14, 25, 26, 30, 31; ACP-EEC Convention of Lomé, 23S/46, paras. 4, 8, 23, 24, 26, 29S/119, paras. 6, 8, 24; CARICOM, 24S/68, para. 11; EEC-Association of Morocco, 24S/88, paras. 5, 9-12; EEC-Association of Tunisia, 24S/97, paras. 5, 6, 9, 10, 12, 27; EEC-Agreement with Egypt, 25S/114, paras. 12, 18-23; EEC-Agreement with Syria, 25S/123, paras. 5, 12, 13, 18-23; EEC-Agreement with Jordan, 25S/133, paras. 5, 13, 14, 18-23; EEC-Agreement with Lebanon, 25S/142, paras. 5, 13, 14, 18-23; EEC-Agreement with Yugoslavia, 28S/115, paras. 6, 9-11, 14.

²⁷⁷L/5776 (unadopted, dated 7 February 1985), para. 4.11.

²⁷⁸L/4903, adopted on 28 November 1979, 26S/203. Footnotes 1 and 2 provide as follows: “(1) The words ‘developing countries’ as used in this text are to be understood to refer also to developing territories. (2) It would remain open for the CONTRACTING PARTIES to consider on an *ad hoc* basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph”.

²⁷⁹L/7029 (request); L/7373 (WP terms of reference) see Council discussion in C/M/202, C/M/223, C/M/226, C/M/247, C/M/249, C/M/254, C/M/255, C/M/258, C/M/259, C/M/260; see discussion in Committee on Trade and Development, COM.TD/132, L/7124; SR.48. See also documents listed under MERCOSUR above.

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

Corresponding provisions in the Havana Charter: Havana Charter Articles 42; 43; 44; 99:1(d) and Annex M; and 104:3 correspond to GATT Article XXIV paragraphs 1 and 2; 3; 4-10; 11; and 12 respectively. The corresponding provisions in the United States Draft Charter appear in Article 33; in the London and New York Drafts, in Article 38; and in the Geneva Draft, in Article 42.

Drafting history: Article 38 of the London Draft Charter contained provisions dealing with the territorial application of Chapter V of the Charter (“General Commercial Policy”), customs unions and frontier traffic.²⁸⁰ Regarding the question of the territorial application of the general commercial policy rules of the proposed Charter, Article 38:1 of the London Draft provided that Chapter V of the Charter would apply to the customs territories of members of the ITO and that where there were two or more customs territories under the jurisdiction of any member, each such customs territory would be considered as a separate member for the purpose of interpreting the provisions of Chapter V. The second paragraph of Article 38 provided that the commercial policy rules of Chapter V should not be construed to prevent advantages accorded by any member to adjacent countries in order to facilitate frontier traffic, or “the formation of a union for customs purposes” of any customs territory of any member and any other customs territory on the condition that the duties and other regulations of commerce imposed by any such union in respect of trade with other members should “not on the whole be higher or more stringent than the average level of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union”. The term “a union of customs territories for customs purposes” was defined in Article 38 as “the substitution of a single customs territory for two or more customs territories, so that all tariffs and other restrictive regulations of commerce as between the territories of members of the union are substantially eliminated and substantially the same tariffs and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union”. Regarding the procedural requirements for the formation of a customs union, the London Draft required any member proposing to enter into a customs union to consult with the ITO and to make available to the ITO such information regarding the proposed union as would enable it to make such reports and recommendations to members as it might deem appropriate. Finally, Article 38 contained a paragraph not included in the original proposal of the United States which recognized that in exceptional circumstances there might be justification for new preferential arrangements requiring an exception to the provisions of Chapter V. Such exceptions would be subject to approval by a two-thirds majority of the members of the ITO.

The Drafting Committee of the Preparatory Committee in January and February 1947 in New York made no substantial changes to the text of Article 38 of the Draft Charter.²⁸¹

During discussions during the Geneva meetings of the Preparatory Committee, it was decided to delete the paragraph in Article XXIV (and the corresponding Charter article) corresponding to the present Article XXIV:10. The General Agreement as agreed 30 October 1947 was the same as the Geneva Draft Charter Article 42, with the addition of provisions corresponding to paragraphs 11 and 12 of the present Article XXIV; the customs union provisions of both the Geneva Draft Charter Article and Article XXIV in the original text of the General Agreement were limited to customs unions and interim agreements necessary for the attainment of a customs union.

Article 42 was extensively revised at the Havana Conference. The three subjects which had previously been covered by one Article (territorial application, customs unions and frontier traffic) were divided into three separate Articles. Article 42 (territorial application) was an amended version of the first paragraph of the previous Article 42, while Article 43 (frontier traffic) constituted a modified version of the provisions previously contained in Article 42:2(b) of the Geneva Draft Charter.

Customs unions were dealt with in Article 44 of the Havana Charter, which differed substantially from the corresponding provisions in previous Charter drafts. A Secretariat Note of 1957 concerning the drafting history of paragraphs 4-10 of Article XXIV provides the following account.

²⁸⁰EPCT/33, p. 33.

²⁸¹New York Report p. 32, 77-78.

“Paragraph 1 (paragraph 4 in present GATT text) was new. The first sentence resulted from a decision that a redraft of paragraph 5 of Article 1 (Purpose and Objectives) could best be done by inserting this wording here. The second sentence was inserted by the working party.

“Paragraph 2 (paragraph 5 in present GATT text) was based on paragraph 2(b) of the Geneva Draft. Important additions, however, were the new provisions relating to the establishment of free-trade areas. This resulted from a proposal for an additional sub-paragraph to the effect that the provisions of this chapter shall not be construed to prevent:

‘the formation of a free-trade area by the conclusion of a free-trade agreement involving the substantial elimination of tariffs and other restrictive regulations of commerce between Members belonging to the same economic region’.

“The words ‘at the institution of’ at the end of the third line of sub-paragraph 5(a) of the present text were inserted at the request of the United Kingdom. Presumably the same principle motivated the drafting of the words ‘at the formation of’ with respect to free-trade areas in sub-paragraph 5(b).

“In the preamble to the paragraph the words ‘as between the territories of Members’ were inserted ... In sub-paragraph (a) it was recommended that the words ‘average level of the duties’ be replaced by ‘general incidence of the duties’ ...

“Paragraph 3 (paragraph 7 in present GATT text) was based on paragraph 3 of the Geneva Draft. Sub-paragraph (a) incorporated the substance of a proposal by the Italian delegation that any Member proposing to enter into a customs union ‘shall inform the Organization and give any ...’ and it was felt that the revised texts of sub-paragraphs went some way to meet the views of Argentina, Chile and Italy who had proposed the deletion of these sub-paragraphs in the Geneva text which had been more mandatory (e.g. ‘no Member shall institute or maintain an interim agreement ... if’ etc.).

“Paragraph 4 (paragraph 8 in present GATT text). The definition of a customs union, contained in the second sentence of paragraph 4 of the Geneva Draft, was amended and a definition of a free-trade area was added.

“The definition of a customs union in the Geneva Draft read as follows:

‘A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that all tariffs and other restrictive regulations of commerce as between the territories of Members of the union are substantially eliminated and substantially the same tariffs and other regulations of commerce are applied by each of the Members of the union to trade of territories not included in the union.’

Paragraph 5 (paragraph 9 in GATT text). This was a new paragraph which was intended to cover problems which would arise in cases where there were preferential rates of duty in force between a country entering a customs union or a free-trade area and a country remaining outside ...

Paragraph 6 (paragraph 10 in GATT text). A new paragraph to cover proposals which do not fully comply with the requirements of the Article provided they lead to the establishment of a customs union or a free-trade area in the sense of the Article. It was the understanding of the Committee that this new paragraph would enable the Organization to approve the establishment of customs unions and free-trade areas which include non-members.”²⁸²

During the First Session of the CONTRACTING PARTIES, which was held at the Havana Conference, the representative of France proposed the immediate replacement of the provisions of Article XXIV by the corresponding provisions of the Charter, stating that this “was a matter of fundamental importance to his

²⁸²W.12/18, p. 5-6.

Government in view of its plans for a customs union with Italy”.²⁸³ A Sub-Committee on Supersession was established and drew up the Special Protocol Relating to Article XXIV of the General Agreement on Tariffs and Trade, which entered into effect on 7 June 1948.²⁸⁴ See also above at page 810 concerning the addition of Article XXIV:6 during this process.

The Havana Charter Article on “Preferential Agreements for Economic Development and Reconstruction” (Article 15), which expressly recognized the desirability of such preferential agreements and permitted them as an exception to the general most-favoured-nation obligation after approval by a two-thirds majority, was not incorporated into the General Agreement. Article 15 of the Charter was however referred to in connection with preferences between countries formerly a part of the Ottoman Empire, under Article I:3 of the General Agreement; see the chapter in this work on Article I.

During the Review Session in 1954-55 a number of changes to Article XXIV were considered and rejected.²⁸⁵ Two minor drafting changes were agreed and entered into force in October 1957: “constituent territories” was substituted for “parties” in the second sentence of paragraph 4; and “included” replaced “provided for” after the word “schedule” in the first sentence of paragraph 7(b).²⁸⁶

²⁸³GATT/1/SR.1, p. 2; see also GATT/1/SR.3, p. 6.

²⁸⁴Special Protocol Relating to Article XXIV of the General Agreement on Tariffs and Trade, signed at Havana 24 March 1948, entered into force 7 June 1948, 62 UNTS 56. See discussion at GATT/1/SR.4, 11, 13, 14 and report of the Sub-Committee at GATT/1/21.

²⁸⁵See 3S/216, para. 24, and W.9/193, p. 13.

²⁸⁶See W.9/236 (Report of the Legal and Drafting Committee proposing various drafting changes).

IV. RELEVANT DOCUMENTS
London

Discussion: EPCT/C.II/38, 65
 Reports: EPCT/C.II/57 + Add.1
 London Report p. 11

New York

Discussion: EPCT/C.6/34, 48
 Reports: New York Report p. 32, 77-78

Geneva

Discussion: EPCT/EC/PV.2/22
 EPCT/A/SR.13, 35, 42
 EPCT/TAC/SR/12, 13, 16
 EPCT/TAC/PV/19, 23, 25, 28
 Reports: EPCT/135, 146, 189, 196, 209,
 214/Add.1/Rev.1
 EPCT/W/339
 Geneva Report p. 36.
 Other: EPCT/W/64, 163, 165, 169, 173,
 175, 184, 224, 225, 277, 285, 290,
 312, 340

Havana

Discussion: E/CONF.2/C.3/SR.44, 47
 E/CONF.2/C.6/SR.38
 Reports: E/CONF.2/C.2 and 3/A/14, 15
 E/CONF.2/C.3/78, 87, 90
 E/CONF.2/C.6/107
 Other: E/CONF.2/C.3/1, 11

CONTRACTING PARTIES

Discussion: GATT/1/SR.4, 5, 11, 13, 14
 GATT/CP.3/SR.6, 13
 GATT/CP.6/SR.23, 24
 Reports: GATT/1/21, 41
 GATT/CP.3/24
 GATT/CP.6/24 and Add.1

Review Session

Discussion: SR.9/25
 Reports: W.9/114, 193, 200, 212, 236
 L/329, 3S/205
 Other: L/189, L/261/Add.1
 W.9/45, 48, 55
 Spec/3/55, 85/55, 94/55

V. TABLES ON APPLICATION OF ARTICLE XXIV

A. WORKING PARTIES AND DECISIONS UNDER ARTICLE XXIV

<i>Arab Common Market</i>			
<i>Report of the Working Party</i> plan and schedule substantially all the trade <i>Conclusions adopted</i>	14S/94 paragraphs 5, 12, 16, 20, 21 paragraphs 12-13 14S/20	paragraph XXIV:8(b) "except where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX" relationship between Articles XXIV and XIX bilateral versus multilateral rules agricultural products trade in automotive goods periodic reviews	paragraphs 57, 77, 83, 84 paragraph 45 paragraphs 63, 90 paragraphs 26-31, 93 paragraphs 47-59 paragraphs 61, 62, 92 paragraphs 97, 98
<i>Australia/New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)</i>			
<i>Report of the Working Party</i> substantially all the trade "global" and "exclusive" access duties and other restrictive regulations of commerce biennial reports- Australia/New Zealand and Free-Trade Area	31S/170 paragraphs 4-5, 25 paragraphs 10-11, 15, 29 paragraphs 25-29 paragraphs 26, 28, 31	<i>Caribbean Free-Trade Association</i> <i>Report of the Working Party</i> substantially all the trade agricultural products	18S/129 paragraphs 5, 7, 13 paragraphs 8-11, 13
<i>Report of the Working Party</i> plan and schedule agricultural products substantially all the trade <i>Conclusions adopted</i>	14S/115 paragraphs 5, 9, 15-17 paragraph 6 paragraphs 7, 14-17 14S/22	The Working Party agreed that the Agreement provided for the establishment of a free-trade area within the meaning of Article XXIV:8(b).	paragraph 13
<i>Australia/Papua New Guinea Agreement</i>		<i>Caribbean Community and Common Market</i>	
<i>Report of the Working Party</i> substantially all the trade requirement of reverse preferences under Article XXIV consultations in case of difficulties reporting procedure	24S/63 paragraphs 6-7, 13 paragraphs 7, 11-12 paragraphs 14-15 paragraphs 14-15, 19	<i>Report of the Working Party</i> substantially all the trade common external tariff quantitative restrictions/ other regulations of commerce agricultural products relation to Part IV, Article XXXVII:1(f) periodic reports	24S/68 paragraphs 5, 7 paragraphs 5, 7-8 paragraphs 5, 9-10 paragraphs 11-13 paragraph 11 paragraph 14
<i>Canada-United States Free-Trade Agreement</i>		The Working Party generally agreed that the Caribbean Common Market constituted an interim agreement leading to the establishment of a customs union.	paragraph 13
<i>Report of the Working Party</i> effect on third party trade effects on benefits under GSP bilateral versus multilateral dispute settlement procedures relationship between XXIV:4 and XXIV:5(b) "other regulations of commerce" rules of origin "requirement of a plan and schedule" and "reasonable length of time" requirements for information	38S/47 paragraph 19 paragraph 39 paragraphs 20-25, 94 paragraphs 62 paragraphs 40, 88 paragraphs 37, 86 paragraphs 52, 56, 89 paragraph 80	<i>Central American Free-Trade Area (later Central American Common Market)</i> Participation of Nicaragua (Decision of 13 November 1956 under paragraph 10 of Article XXIV)	5S/29 10S/98
		<i>Report of the Working Party</i> (see also Nicaragua and El Salvador - Free-trade area) (see also Nicaragua - Increase in rates of duty, Decision of 23 November 1961)	10S/48

<i>Equatorial Customs Union/Cameroon (later Central African Economic and Customs Union)</i>		<i>Report of the Intersessional Committee; action at thirteenth session</i>	L/886, 7S/69-71
<i>Report of the Working Party</i> duties and other regulations of commerce tariffs on imports from third countries	12S/73 paragraph 6 paragraph 8	<i>European Atomic Energy Community</i>	6S/109
<i>Czech Republic-Slovak Republic Customs Union Agreement</i>		<i>Association with Certain Non-European Countries and Territories</i>	
<i>Report of the Working Party</i> coverage of all trade; replacement of external and internal trade regime of former CSFR absence of transitional period conclusions	L/7501 paragraphs 6, 9-11 paragraph 5 paragraphs 13-18	<i>Report of the Working Party</i> Conclusions adopted <i>Report of the Working Party</i> plan and schedule substantially all the trade other restrictive regulations of commerce	14S/112 14S/22 18S/143 paragraph 6 paragraphs 8,9 paragraphs 8, 10-12, 14-15
<i>European Communities</i>		<i>European Communities - Accessions</i>	
<i>European Economic Community</i>		<i>Accession of Denmark, Ireland and the United Kingdom</i>	
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Accession of Portugal and Spain

Report of the Working Party 35S/293
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quantitative restrictions paragraphs 19-24, 36-39
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bilateral agreement with United States under Article XXIV:6 paragraph 12
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Formal notification WT/L/7
Working party established WT/GC/M/

EC - Association Agreements

Association with African and Malagasy States

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substantially all the trade paragraphs 7, 8, 23, 30
application of quantitative restrictions paragraphs 9, 10
relation to Central African Economic and Customs Union paragraph 12
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developing countries/Article XXIV and Part IV
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ACP-EEC Convention of Lomé

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Report of the Working Party 29S/119
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Association with Cyprus

Report of the Working Party
plan and schedule
different stages of economic development
elimination of trade obstacles
rules of origin
substantially all the trade

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Agreement with Egypt

Report of the Working Party
plan and schedule
rules of origin
substantially all the trade
different stages of economic development

21S/102
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Report of the Working Party
substantially all the trade
agricultural products
applicability of Part IV
rules of origin
biennial reports
consultations
safeguards

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Report of the Working Party
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timing of renegotiation under Article XXVIII
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particularly those maintained for balance-of-payments reasons
compliance with Article XVII
effects of establishing common external tariff on new
tariff negotiations under Article XXVIII bis
Conclusions adopted

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Report of the Working Party
compatibility with General Agreement
effects on trade of third countries

Agreement with Israel

Report of the Working Party
plan and schedule
substantially all the trade

Report of the Working Party
substantially all the trade
agricultural products
plan and schedule
rules of origin
effects on third countries' trade
quantitative restrictions
different stages of economic development

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Agreement with Jordan

Report of the Working Party
substantially all the trade
agricultural products
applicability of Part IV
rules of origin
biennial reports
consultations
safeguards

25S/133
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paragraphs 5, 13, 15, 28-29
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Agreement with Lebanon

Report of the Working Party
substantially all the trade
plan and schedule
different stages of economic development
rules of origin

22S/43
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paragraphs 10-12
paragraph 10
paragraphs 13-14

Report of the Working Party
substantially all the trade
agricultural products
applicability of Part IV
rules of origin
biennial reports
consultations
safeguards

25S/142
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paragraphs 5, 13, 15, 28-29
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paragraph 16
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<i>Association with Malta</i>			rules of origin safeguard provisions, application of Article XIX consultations	paragraphs 19-23 paragraphs 24-26 paragraphs 27-28
<i>Report of the Working Party</i> substantially all the trade quantitative restrictions plan and schedule different stages of economic development	19S/90 paragraphs 15, 18 paragraphs 6, 18, 19 paragraphs 1, 11-13, 21, 23 paragraphs 10, 11, 22		<i>Agreement with Spain</i>	
<i>Agreement with Morocco</i>			<i>Report of the Working Party</i> substantially all the trade quantitative restrictions plan and schedule	18S/166 paragraphs 6, 17-18, 22 paragraphs 13-14 paragraphs 17, 20, 22
<i>Report of the Working Party</i> plan and schedule quantitative restrictions territories of contracting parties substantially all the trade	18S/149 paragraphs 7, 17-20 paragraphs 12-15 paragraph 16 paragraphs 22-25, 27		<i>Agreement with Syria</i>	
<i>Report of the Working Party</i> substantially all the trade/agricultural products reference to Part IV different levels of development rules of origin biennial reports interests of other developing countries	24S/88 paragraphs 5, 12 paragraphs 5, 9-12 paragraphs 8, 15 paragraphs 8, 19-21, 30 paragraphs 6, 8, 30 paragraphs 10-12, 28		<i>Report of the Working Party</i> substantially all the trade agricultural products applicability of Part IV rules of origin biennial reports consultations safeguards	25S/123 paragraphs 5, 13 paragraphs 5, 12, 14, 27-28 paragraphs 5, 12-13, 18-23 paragraphs 11-12, 23-26, 38 paragraphs 13-15, 39 paragraph 15 paragraphs 29-31
<i>Association with Nigeria</i>			<i>Association with Tanzania, Uganda and Kenya</i>	
Establishment of a Working Party (agreement did not enter into force)	C/M/41		<i>Report of the Working Party</i> quantitative restrictions duties or other restrictive regulations of commerce substantially all the trade	19S/97 paragraph 7 paragraphs 11-17 paragraph 17
<i>Agreements with Portugal</i>			<i>Association with Tunisia</i>	
<i>Report of the Working Party</i> different levels of development substantially all the trade agricultural products rules of origin effects on third-country trade effects on benefits under GSP plan and schedule discriminatory safeguard action	20S/171 paragraph 4 paragraphs 5, 13-17, 34, 38 paragraphs 5-6, 13, 15, 17, 19-21, 34 paragraphs 5-6, 10, 23-30, 34, 35, 38 paragraphs 5, 9, 22 paragraphs 7, 9, 37, 39 paragraphs 11, 35 paragraphs 31-35		<i>Report of the Working Party</i> plan and schedule application of quantitative restrictions territories of contracting parties substantially all the trade	18S/149 paragraphs 7, 17-20 paragraphs 12-15 paragraph 16 paragraphs 22-25, 27
<i>Interim Agreement with Portugal</i>			<i>Report of the Working Party</i> substantially all the trade/agricultural products reference to Part IV different levels of development biennial reports rules of origin interests of other developing countries	24S/97 paragraphs 5, 12, 24 paragraphs 5-6, 9-10, 12, 27 paragraphs 5-6, 8-11 paragraphs 6, 20, 29 paragraphs 8, 19-21, 29 paragraphs 10-12, 27
<i>Report of the Working Party</i> compatibility of Agreement with Article XXIV substantially all the trade/agricultural trade different levels of economic development	24S/73 paragraphs 7-9, 12, 20, 29 paragraphs 11-14 paragraphs 4, 9, 16			

Association with Turkey

Report of the Working Party
 reasonable length of time
 substantially all the trade
 plan and schedule
 other regulations of commerce

13S/59
 paragraphs 6-7
 paragraph 7
 paragraphs 8-9
 paragraphs 10-14

Report of the Working Party
 different levels of development
 plan and schedule
 reasonable length of time
 other regulations of commerce

19S/102
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 paragraphs 6, 8, 14
 paragraphs 9, 12, 14

Report of the Working Party
 different levels of development
 reasonable length of time
 plan and schedule
 quantitative restrictions

21S/108
 paragraphs 6, 10, 17
 paragraphs 7, 10
 paragraphs 7-9
 paragraphs 7, 12, 14-17

Agreement with Yugoslavia

Report of the Working Party
 different levels of development
 substantially all the trade
 references to Part IV
 lack of reciprocity
 references to Enabling Clause
 biennial reports
 rules of origin

28S/115
 paragraphs 4, 8, 11
 paragraphs 6, 9, 16
 paragraphs 6, 9-11, 14
 paragraphs 9, 16
 paragraphs 10, 14
 paragraphs 10, 12, 25
 paragraphs 20-21, 25

*EC - Agreements with EFTA countries**Agreements with Austria*

Report of the Working Party
 substantially all the trade
 agricultural products
 rules of origin
 effects on third-country trade
 effects on benefits under GSP
 plan and schedule
 quantitative restrictions
 discriminatory safeguard action

20S/145
 paragraphs 4, 5, 14-16, 33, 37
 paragraphs 4-6, 14-16, 18-19, 33
 paragraphs 4-6, 10, 22-29, 33, 34, 37
 paragraphs 5, 9
 paragraphs 7, 9, 20-21, 36, 38
 paragraphs 11, 34
 paragraph 17
 paragraphs 30-32

Agreements with Finland

Report of the Working Party
 substantially all the trade
 agricultural products
 rules of origin
 effects on third-country trade
 effects on benefits under GSP
 quantitative restrictions

21S/76
 paragraphs 4, 6, 9, 12-14
 paragraphs 5-8, 12, 13
 paragraphs 6, 21-22
 paragraphs 6, 8
 paragraphs 8, 18-20
 paragraphs 15-16

Agreements with Iceland

Report of the Working Party
 substantially all the trade
 agricultural products
 rules of origin
 effects on third-country trade
 effects on benefits under GSP
 plan and schedule
 discriminatory safeguard action

20S/158
 paragraphs 5, 14-19, 37, 41
 paragraphs 5-6, 14, 16, 19, 21-23, 37
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 paragraphs 5, 9, 24-25
 paragraphs 7, 9, 40, 42
 paragraphs 11, 38
 paragraphs 30-32

Agreements with Norway

Report of the Working Party
 substantially all the trade
 agricultural products
 rules of origin
 effects on third-country trade
 effects on benefits under GSP
 plan and schedule
 discriminatory safeguard action

21S/83
 paragraphs 4, 6, 9, 14-16, 32, 35
 paragraphs 4, 6, 14, 16, 19-20, 32
 paragraphs 6, 11, 24-29, 32, 33, 35
 paragraphs 7, 32
 paragraphs 8, 21-23, 34, 36
 paragraphs 12, 33
 paragraphs 30-31

Agreements with Sweden

Report of the Working Party
 substantially all the trade
 agricultural products
 rules of origin
 effects on third-country trade
 effects on benefits under GSP
 plan and schedule
 discriminatory safeguard action

20S/183
 paragraphs 5, 15-17, 35, 39
 paragraphs 5-6, 15-17, 19-20, 35
 paragraphs 5-6, 10, 24-31, 35-36, 39
 paragraphs 5, 9
 paragraphs 7, 9, 21-22, 38, 40
 paragraphs 12, 36
 paragraphs 32-34

Agreements with Switzerland and Liechtenstein			
<i>Report of the Working Party</i> substantially all the trade agricultural products rules of origin effects on third-country trade effects on benefits under GSP plan and schedule discriminatory safeguard action	20S/196	plan and schedule bilateral agreements on agriculture non-discriminatory application of safeguard measures rules of origin biennial reports	paragraphs 7-11, 13-14, 27-28 paragraphs 4, 15-19 paragraph 21 paragraphs 25-28 paragraphs 27, 29
	paragraphs 5, 14-16, 37, 41 paragraphs 5-6, 14-16, 20-22, 37 paragraphs 5-6, 10, 26-33, 37-38, 41 paragraphs 5.9 paragraphs 7, 9, 23-25, 40, 42 paragraphs 11, 38 paragraphs 34-36		
	European Free Trade Association		
	Examination of Stockholm Convention		
	<i>Report of the Working Party</i> rules of origin effects on preferential systems of member States and duty drawback quantitative restrictions plan and schedule agricultural products substantially all the trade conformity of bilateral agreements participation of non-contracting parties <i>Conclusions adopted</i>	9S/70	safeguards measures and their application balance-of-payments surcharge
paragraphs 4-10 paragraphs 11-18 paragraph 19-28 paragraph 31 paragraphs 32-45 paragraphs 47-54 paragraphs 55-56 paragraph 58 9S/20		<i>EFTA - Agreements with Czech Republic and Slovak Republic</i> Notification, documentation Questions and replies <i>Report of the Working Party</i> substantially all the trade fiscal duties periodic reviews substantially all the trade; agricultural products Relationship with Article XIX future effects of EU accession by one of member states conclusions Biennial reporting	L/7041 + Add.1, L/7220 L/7379 + Add.1 L/7570 paragraph 12-14 paragraph 14-15 paragraph 16 paragraphs 16-23 paragraph 25 paragraph 27 paragraphs 29-34
Association of Finland			
10S/101 paragraphs 3, 8 paragraphs 3, 12-16 paragraph 7 10S/24			
EFTA - Accession of Iceland			
<i>Report of the Working Party</i> plan and schedule substantially all the trade <i>Conclusions approved</i>	18S/174 paragraph 5 paragraph 6 C/M/64	Oral Interim Report of the Chairman of the Working Party	C/M/117
	Finland/Czechoslovakia Agreement		
<i>Report of the Working Party</i> nature and compatibility of Agreement problems of free-trade arrangements between countries with different economic systems substantially all the trade effects on third-country trade effects of CMEA trade on agreement rôle of customs duties and other regulations	23S/67	nature and compatibility of Agreement problems of free-trade arrangements between countries with different economic systems substantially all the trade effects on third-country trade effects of CMEA trade on agreement rôle of customs duties and other regulations	paragraphs 7-8, 11, 17-18, 27, 34-35 paragraphs 7-10, 17 paragraphs 5-6, 30 paragraphs 11-13 paragraphs 14-16, 20, 22 paragraphs 14-29, 32
	Finland/Bulgaria Agreement		
<i>Report of the Working Party</i> substantially all the trade quantitative restrictions	27S/127		
	Finland/Bulgaria Agreement		

for trade in state-trading countries		
agricultural products	paragraph 30	
quantitative restrictions	paragraph 33	
continuation of work	paragraphs 35-36	
<i>Second Report of the Working Party</i>	26S/10	
compatibility of Agreement with Article XXIV	paragraphs 5-6, 8, 13-14	
rôle of customs duties in State-trading countries	paragraphs 6-7	
operation of the Agreement	paragraphs 9-12	
examination of agreements between countries	paragraphs 13-15	
with different economic systems	paragraph 17	
continuation of work		
Finland/German Democratic Republic Agreement		
<i>Interim Report of the Working Party</i>	24S/106	
question of compatibility of Agreement with Article XXIV	paragraph 4	
continuation of work	paragraph 6	
Oral Report of the Chairman of the Working Party	C/M/135	
Finland/Hungary Agreement		
<i>Report of the Working Party</i>	22S/47	
nature and compatibility of Agreement	paragraphs 7, 19, 30-31	
examination of agreements between countries	paragraphs 7, 14-16, 19	
with different economic systems	paragraphs 7, 12-13, 15, 28	
rôle of customs duties in State-trading countries	paragraphs 5, 8, 20	
substantially all the trade	paragraphs 8, 20-22	
agricultural products	paragraphs 24, 26	
other regulations of commerce	paragraphs 31-32	
continuation of work		
<i>Second Report of the Working Party</i>	24S/107	
operation of Agreement	paragraphs 5-10	
nature and compatibility of Agreement	paragraphs 9, 14, 16, 21, 44-45	
examination of agreements between	paragraphs 10-14, 17, 20,	
countries with different economic systems	22, 23, 44-46	
rôle of customs duties in State-trading countries	paragraphs 31-33	
agricultural products	paragraphs 31-33	
other regulations of commerce	paragraphs 5, 24-28	
continuation of work	paragraphs 36-43	
	paragraph 48	
Finland/Poland Agreement		
<i>Report of the Working Party</i>	27S/136	
substantially all the trade	paragraph 5	
compatibility of Agreement	paragraphs 6, 8-11, 50-51	
question of Polish customs tariff	paragraphs 7, 16, 22, 29, 31, 34, 50-52	
agricultural products	paragraphs 19-20	
rules of origin	paragraphs 35-36	
quantitative restrictions and other measures	paragraphs 37-42	
continuation of work	paragraph 52	
Estonia-Finland, Finland-Latvia, Finland-Lithuania: Protocols Regarding Temporary Arrangements on Trade and Economic Cooperation		
Notification	L/7130 + Add.1-2	
Questions and replies	L/7196	
<i>Report of the Working Party</i>	L/7339	
substantially all the trade; treatment of agriculture	paragraphs 13-17, 25-26	
rules of origin	paragraph 18	
tariff preference and accession negotiations	paragraphs 9, 23	
Estonia-Norway Free Trade Agreement, Latvia-Norway Free Trade Agreement, Lithuania-Sweden Free Trade Agreement		
Notification, documentation	L/7104 + Add.1	
Questions and replies	L/7266	
<i>Report of the Working Party</i>	L/7337	
substantially all the trade; treatment of agriculture	paragraphs 14-17	
rules of origin	paragraph 18	
environmental trade restrictions	paragraph 20	
tariff preference and accession negotiations	paragraphs 10, 25	
Estonia-Sweden Free Trade Agreement, Latvia-Sweden Free Trade Agreement, Lithuania-Sweden Free Trade Agreement		
Notification, documentation	L/7036	
Questions and replies	L/7207	
<i>Report of the Working Party</i>	L/7338	
substantially all the trade; treatment of agriculture	paragraphs 14-16, 27	
rules of origin	paragraph 17	
environmental trade restrictions	paragraph 18	
tariff preference and accession negotiations	paragraphs 11, 24	
France/Italy Customs Union		
Decision of 20 March 1948 under Article XXV:5		GATT/CP/1

Israel/United States Free-Trade Area Agreement

Report of the Working Party
substantially all the trade
agricultural products
compatibility of Agreement
continuation of work

34S/58
paragraphs 6, 21
paragraphs 6, 11, 13, 14, 21, 22, 23, 24, 26
paragraphs 17-27
paragraphs 25-27

Latin American Free-Trade Association - Montevideo Treaty

Report of the Working Party
substantially all the trade
duties and surcharges
participation of non-contracting parties
other obstacles to trade
agricultural products
Conclusion adopted

9S/87
paragraphs 5, 7
paragraphs 6, 11
paragraph 12
paragraphs 17-22
paragraphs 23-29
9S/21

North American Free Trade Agreement

Working party established

New Zealand/Australia Free-Trade Area

Report of the Working Party
plan and schedule
agricultural products
substantially all the trade
Conclusions adopted

14S/115
paragraphs 5, 9, 15-17
paragraph 6
paragraphs 7, 14-17
14S/22

Nicaragua/El Salvador Free-Trade Area

Decision of 25 October 1951 under paragraph 10 of Article XXIV

II/30

South African/Southern Rhodesia Customs Union Agreement

Declaration of 18 May 1949
Report of the Working Party
plan and schedule

II/29
II/176
paragraphs 16-19

Decision of 17 November 1954 on extension until tenth session
Trade relations with Federation of Rhodesia and Nyasaland

3S/47
8S/154

United Kingdom/Ireland Free-Trade Area Agreement

Report of the Working Party
plan and schedule
quantitative restrictions for balance-of-payments reasons
maintenance of existing preferences
reasonable length of time
Ireland not a contracting party
Conclusions adopted

14S/122
paragraph 8
paragraph 20
paragraph 21
paragraphs 24, 26
paragraph 25
14S/23

B. PREFERENTIAL TRADE AGREEMENTS NOTIFIED UNDER ARTICLE XXIV, 1948 TO 1994

This table is a compilation of preferential trade agreements notified to GATT since its inception, listed in chronological order according to the date of signature. For each entry, seven columns of information are provided: (i) name of the agreement; (ii) participating countries or contracting parties; (iii) the form in which the contracting parties presented their agreement (for example, free trade area, customs union or preferential trade arrangement); (iv) the document reference for the text of the agreement; (v) the date of signature; (vi) the date of entry into force; and (vii) the GATT action taken and corresponding document references.

In accordance with the Decision of the Council of 25 October 1972 (19S/13), contracting parties that sign an agreement falling within the terms of Article XXIV are to inscribe the item on the agenda of the first meeting of the Council following its signature. Members of the agreement provide copies of the text of the agreement to contracting parties in order to permit them to review the agreement. The third column of the table notes the manner in which the agreement was presented by its members in the GATT (for example, free-trade area, customs union). This information reflects GATT provisions and may consequently not convey other aspects of the agreement (for example, liberalization of services, commitments regarding labour standards or competition policies). The final column reports the last GATT action taken. A working party is generally established which submits a report and recommendations, if any, to the Council. A biennial reporting requirement was established for regional agreements under the Decision of 26 November 1971 (L/3641). Contracting parties claiming to have completed the implementation of free trade areas or customs unions (the EC, ANZCERTA, EFTA, and EC-EFTA agreements) have not submitted reports. The calendar for such reports has not been revived since 1987.

	Name	Participating countries or contracting parties	Presented as	Text of agreement	Date of signature	Date of entry into force	GATT action taken and document references
1.	South Africa-Southern Rhodesia Customs Union Agreement ¹	South Africa and Zimbabwe (Southern Rhodesia)	Interim agreement for the formation of a customs union	GATT/CP.3/9	6 Dec. 1948	1 Apr. 1949	Working Party Report adopted on 18 May 1949 (II/176). Declaration of 18 May 1949 (II/29). Decision of 17 Nov. 1954 (3S/47).
2.	El Salvador-Nicaragua Free Trade Area	El Salvador and Nicaragua	Free-trade area	GATT/CP/104/Add. 1	9 Mar. 1951	21 Aug. 1951	Decision of 25 Oct. 1951 (II/30).
3.	European Economic Community (EEC) and European Atomic Energy Community ²	Belgium, France, Germany, Italy, Luxembourg and Netherlands	Customs union and common market for nuclear products	L/626	25 Mar. 1957	1 Jan. 1958	Committee Report adopted on 29 Nov. 1957 (L/778, 6S/70). Report of the Intersectoral Committee and Thirteenth Session (7S/69).
4.	Participation of Nicaragua in the Central American Free Trade Area ³	Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua	Free trade area	L/891	10 June 1958	2 June 1959	Decision of 13 Nov. 1956 (5S/29).
5.	Equatorial Customs Union and Cameroon	Cameroon, ⁴ Central African Republic, Chad, Congo and Gabon	Customs union	L/2061	23 June 1959	1 July 1962	Working Party Report adopted on 2 Mar. 1964 (L/2169, 12S/73).
6.	European Free Trade Association (EFTA) ⁵	Austria, Denmark, Norway, Portugal, Sweden, Switzerland ⁶ and United Kingdom	Free-trade area	L/1167	4 Jan. 1960	3 May 1960	Working Party Report adopted on 4 June 1960 (L/1235, 9S/70). Conclusions adopted on 18 Nov. 1960 (9S/20).
7.	Participation of Nicaragua in the General Treaty for Central American Economic Integration ⁷	Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua	Interim agreement leading to the formation of a free-trade area and equalization of customs duties and charges	L/1425 and Add.1	13 Dec. 1960	June 1961	Working Party Report adopted on 23 Nov. 1961 (L/1639, 10S/98). Decision of 23 Nov. 1961 (10S/48).

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8.	Latin American Free Trade Association (LAFTA) ⁸	Argentina, Brazil, Chile, Peru and Uruguay	Interim agreement leading to the formation of a free-trade area	L/1157	18 Feb. 1960	2 June 1961	Working Party Report adopted on 18 Nov. 1960 (L/1364, 9S/87). Conclusions adopted on 18 Nov. 1960 (9S/21).
9.	Borneo Free Trade Area ⁹	Sarawak and North Borneo	Free-trade area	L/1630	1961 ¹⁰	1 Jan. 1962	Oral statement by the Chairman of the CONTRACTING PARTIES (L/1630, L/1667, SR.19/2).
10.	EEC-Greece Association Agreement ¹¹	EEC member States (Belgium, France, Germany, Italy, Luxembourg and Netherlands) and Greece	Interim agreement for the formation of a customs union	L/1601	9 July 1961	1 Nov. 1962	Working Party Report adopted on 15 Nov. 1962 (L/1829, 11S/149). Conclusions adopted on 15 Nov. 1962 (11S/56).
11.	EFTA-Finland Association Agreement (FINEFTA) ¹²	EFTA member States (Austria, Denmark, Norway, Portugal, Sweden, Switzerland and United Kingdom) and Finland	Interim agreement for the formation of a free-trade area	L/1451	27 Mar. 1961	26 June 1961	Working Party Report adopted on 23 Nov. 1961 (L/1521, 10S/101). Conclusions adopted on 23 Nov. 1961 (10S/24).
12.	Ghana-Upper Volta Trade Agreement	Ghana and Burkina Faso (Upper Volta)	Free-trade area	L/1766	28 June 1961	9 May 1962	Working Party established. Oral statement by the Chairman of the CONTRACTING PARTIES referring the agreement to the Working Party established to examine the African Common Market (SR.20/4).
13.	African Common Market	Algeria, United Arab Republic, Ghana, Guinea, Mali and Morocco	Customs union	L/1835	1 Apr. 1962	1 July 1963	Working Party established (SR.20/4).
14.	EEC-Turkey Association Agreement ¹³	EEC member States (Belgium, France, Germany, Italy, Luxembourg and Netherlands) and Turkey	Interim agreement for the formation of a customs union	L/2155/Add.1	12 Sept. 1963	1 Dec. 1964	Working Party Report adopted on 25 Mar. 1965 (L/2265, 13S/59).
15.	EEC-Association with African and Malagasy States (Yaoundé I) ¹⁴	EEC member States (Belgium, France, Germany, Italy, Luxembourg and Netherlands), and Burundi, Cameroon, Central African Republic, Chad, Congo, Cote d'Ivoire, Benin (Dahomey), Burkina Faso (Upper Volta), Gabon, Madagascar (Malagasy Republic), Mali, Mauritania, Niger, Rwanda, Senegal, Somalia and Togo	Interim agreements for the formation of bilateral free-trade areas between the EEC and each member state	L/2160/Add.1	20 July 1963	1 Jan. 1964	Working Party on Yaoundé I and EEC-PTOM I. Report adopted on 4 Apr. 1966 (L/2441, 14S/100). Conclusions adopted on 4 Apr. 1966 (14S/22).
16.	Arab Common Market	Egypt, Iraq, Jordan, Libyan Arab Jamahiriya, Mauritania, Syria and Yemen Arab Republic	Interim agreement for the formation of a free-trade area leading to a customs union	L/2366 and Corr.2	13 Aug. 1964	1 Jan. 1965	Working Party Report adopted on 6 Apr. 1966 (L/2518, 14S/94). Conclusions adopted on 6 Apr. 1966 (14S/20).

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17.	EEC-Association with certain non-European countries and territories maintaining special relations with France and the Netherlands (EEC-PTOM I) ¹⁵	EEC member States (Belgium, France, Germany, Italy, Luxembourg and Netherlands), and Comoros Archipelago, French Polynesia, French Somali Coast, Southern and Antarctic Territories, Mayotte, New Caledonia and Dependencies, St. Pierre and Miquelon, Suriname, Wallis and Fortuna Islands and Netherlands Antilles	Free-trade area	L/2342	25 Feb. 1964	1 June 1964	Working Party on Yaoundé I and EEC-PTOM I. Report adopted on 4 Apr. 1966 (L/2441, 14S/100). Conclusions adopted on 4 Apr. 1966 (14S/22).
18.	Ireland-United Kingdom Free Trade Area Agreement ¹⁶	Ireland and United Kingdom	Free-trade area	L/2552/Add.1	14 Dec. 1965	1 July 1966	Working Party Report adopted 5 Apr. 1966 (L/2633, 14S/122). Conclusions adopted on 5 Apr. 1966 (14S/23).
19.	Caribbean Free-Trade Agreement (CARIFTA) ¹⁷	Antigua, Barbados, Guyana and Trinidad and Tobago	Free-trade area	L/3074	15 Dec. 1965	1 May 1968	Working Party Report adopted on 9 Nov. 1971 (L/3584, 18S/129).
20.	Australia-New Zealand Free-Trade Agreement ¹⁸	Australia and New Zealand	Interim agreement for the formation of a free-trade area	L/2485/Add.1	31 Aug. 1965	1 Jan. 1966	Working Party Report adopted on 5 Apr. 1966 (L/2628, 14S/115). Conclusions adopted on 5 Apr. 1966 (14S/22).
21.	EFTA and FINEFTA-Accession of Iceland	EFTA member States (Austria, Denmark, Norway, Portugal, Sweden, Switzerland and United Kingdom) and Finland and Iceland	Interim agreement for the formation of a free-trade area	L/3328	4 Dec. 1969	1 Mar. 1970	Working Party Report adopted on 29 Sept. 1970 (L/3441, 18S/174).
22.	EEC-Association Agreement with the East African States (Arusha II Agreement) ¹⁹	EEC member States (Belgium, France, Germany, Italy, Luxembourg and Netherlands) and Tanzania, Uganda and Kenya ²⁰	Free-trade area	L/3369	24 Sept. 1969	1 Jan. 1971	Working Party Report adopted on 25 Oct. 1972 (L/3721, 19S/97).
23.	EEC-Tunisia Association Agreement ²¹	EEC member States (Belgium, France, Germany, Italy, Luxembourg and Netherlands) and Tunisia	Interim agreement for the formation of a free-trade area	L/3226/Add.1 and Corr.1	28 Mar. 1969	1 Sept. 1969	Working Party Report adopted on 29 Sept. 1970 (L/3379, 18S/149).
24.	EEC-Association with African and Malagasy States (Yaoundé II) ²²	Member States of Yaoundé I and Mauritius ²³	Bilateral free-trade areas between the EEC and each member state	L/3283	29 July 1969	1 Jan. 1971	Working Party Report adopted on 2 Dec. 1970 (L/3465, 18S/133).
25.	EEC-Morocco Association Agreement ²⁴	EEC member States (Belgium, France, Germany, Italy, Luxembourg and Netherlands) and Morocco	Interim agreement for the formation of a free-trade area	L/3227/Add.1 and Corr.1	31 Mar. 1969	1 Sept. 1969	Working Party Report adopted on 29 Sept. 1970 (L/3379, 18S/149).
26.	EEC-Malta Association Agreement	EEC member States (Belgium, France, Germany, Italy, Luxembourg and Netherlands) and Malta	Interim agreement for the formation of a customs union	L/3512	5 Dec. 1970	1 Apr. 1971	Working Party Report adopted on 29 May 1972 (L/3665, 19S/90).

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27.	EEC-Turkey Additional Protocol to the Association Agreement and Interim Agreement ²⁵	EEC member States (Belgium, France, Germany, Italy, Luxembourg and Netherlands) and Turkey	Additional Protocol and Interim Agreement specifying transitional stage of formation of customs union	L/3554 L/3554/Add.1,2	23 Nov. 1970 27 July 1971	1 Jan. 1973 1 Sept. 1971	Working Party Report adopted on 25 Oct. 1972 (L/3750, 19S/102).
28.	EEC-Association with certain non-European countries and territories (EEC-PTOM II) ²⁶	Member States of EEC-PTOM I	Free-trade area	L/3467	29 Sept. 1970	1 Jan. 1971	Working Party Report adopted on 9 Nov. 1971 (L/3611, 18S/143).
29.	EEC-Israel Agreement ²⁷	EEC member States (Belgium, France, Germany, Italy, Luxembourg and Netherlands) and Israel	Interim agreement for the formation of a free-trade area	L/3428 and Corr.1	29 June 1970	1 Oct. 1970	Working Party Report adopted on 6 Oct. 1971 (L/3581, 18S/158).
30.	EEC-Spain Agreement ²⁸	EEC member States (Belgium, France, Germany, Italy, Luxembourg and Netherlands) and Spain	Interim agreement for the formation of a free-trade area	L/3427 and Corr.1	29 June 1970	1 Oct. 1970	Working Party Report adopted on 6 Oct. 1971 (L/3579, 18S/166).
31.	EEC-Egypt Agreement ²⁹	EEC member States (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Egypt	Interim agreement for the formation of a free-trade area; Protocol to the agreement relating to new members of EEC (Denmark, Ireland and United Kingdom)	L/3938/Add.1	18 Dec. 1972 19 Dec. 1972	1 Nov. 1973	Working Party Report adopted on 19 July 1974 (L/4054, 21S/102).
32.	EEC-Lebanon Agreement ³⁰	EEC member States (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Lebanon	Interim agreement for the formation of a free-trade area; Protocol to the agreement relating to new members of the EEC (Denmark, Ireland and United Kingdom)	L/4002	18 Dec. 1972 26 Nov. 1973	1 Jan. 1975	Working Party Report adopted on 3 Feb. 1975 (L/4131, 22S/43).
33.	EEC-Cyprus Association Agreement	EEC member States (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Cyprus	Interim agreement for the formation of a customs union	L/3870	19 Dec. 1972	1 June 1973	Working Party Report adopted on 21 June 1974 (L/4009, 21S/94).

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34.	EEC-Austria Agreement	EEC member States (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Austria	Free-trade area; coverage of ECSC products	L/3755/Add.1 L/3783/Add.1	22 July 1972 (EEC-Austria) 1 Jan. 1974 (ECSC-Austria)	1 Oct. 1972 (EEC-Austria) 1 Jan. 1974 (ECSC-Austria)	Working Party Report adopted on 19 Oct. 1973 (L/3900, 20S/145).
35.	EEC-Switzerland and Liechtenstein Agreement	EEC member States (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Switzerland and Liechtenstein	Free-trade area; coverage of ECSC products	L/3755/Add.1	22 July 1972 (EEC-Switzerland & Liechtenstein) 22 July 1972 (ECSC-Switzerland & Liechtenstein)	1 Jan. 1973 (EEC-Switzerland & Liechtenstein) 1 Jan. 1974 (ECSC-Switzerland & Liechtenstein)	Working Party Report adopted on 19 Oct. 1973 (L/3893, 20S/196).
36.	EEC-Accession of Denmark, Ireland and United Kingdom ³¹	EEC member States (Belgium, France, Germany, Italy, Luxembourg and Netherlands) and Denmark, Ireland and United Kingdom	Customs union	L/3677	22 Jan. 1972	1 Jan. 1973	Working Party established. Oral statement of the Chairman (L/3688/Rev.1, C/M/107, Spec(73)II).
37.	EEC-Portugal Free Trade Agreement ³²	EEC member States (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Portugal	Interim agreement for the formation of a free-trade area	L/3781/Add.1 and Corr.1	22 July 1972	1 Jan. 1973 (EEC Portugal) 1 Jan. 1974 (ECSC-Portugal)	Working Party Report adopted on 19 Oct. 1973 (L/3901, 20S/171).
38.	EEC-Sweden Agreement	EEC member States (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Sweden	Free-trade area; coverage of ECSC products	L/3782/Add.1	22 July 1972 (EEC-Sweden) 22 July 1972 (ECSC-Sweden)	1 Jan. 1973 (EEC-Sweden) 1 Jan. 1974 (ECSC-Sweden)	Working Party Report adopted on 19 Oct. 1973 (L/3899, 20S/183).
39.	EEC-Iceland Agreement	EEC member States (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Iceland	Free-trade area; coverage of ECSC products	L/3780/Add.1	22 July 1972 (EEC-Iceland) 22 July 1972 (ECSC-Iceland)	1 Apr. 1973 (EEC-Iceland) 1 Jan. 1974 (ECSC-Iceland)	Working Party Report adopted on 19 Oct. 1973 (L/3902, 20S/158).
40.	Caribbean Community and Common Market (CARICOM) ³³	Barbados, Guyana, Jamaica and Trinidad and Tobago ³⁴	Interim agreement for the formation of a customs union	L/4083	4 July 1973	1 Aug. 1973	Working Party Report adopted on 2 Mar. 1977 (L/4470, 24S/68).

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41.	EEC-Finland Agreement	EEC member States (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Finland	Free-trade area; coverage of ECSC products	L/3973 and Corr.1	5 Oct. 1973 (EEC-Finland) 5 Oct. 1973 (ECSC-Finland)	1 Jan. 1974 (EEC-Finland) 1 Jan. 1975 (ECSC-Finland)	Working Party Report adopted on 21 Oct. 1974 (L/4064, 21S/76).
42.	EEC-Norway Agreement	EEC member States (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Norway	Free-trade area; coverage of ECSC products	L/3872 and Add.1	14 May 1973 (EEC-Norway) 14 May 1973 (ECSC-Norway)	1 July 1973 (EEC-Norway) 1 Jan. 1975 (ECSC-Norway)	Working Party Report adopted on 28 Mar. 1974 (L/3996, 21S/83).
43.	EEC-Turkey Agreement	EEC member States (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Turkey	Free-trade area; coverage of ECSC products. Extension of association agreement to ECSC products and to new members of the EEC	L/3980	30 June 1973 (ECSC-Turkey) 30 June 1973 (EEC-Turkey)	1 Mar. 1986 (ECSC-Turkey) 1 Mar. 1986 (EEC-Turkey)	Working Party Report adopted on 21 October 1974 (L/4086, 21S/108).
44.	Finland-Hungary Agreement on the Reciprocal Removal of Obstacles to Trade ³⁵	Finland and Hungary	Interim agreement for the formation of a free-trade area	L/4136/Add.1	2 May 1974	1 Jan. 1975	Working Party Report adopted on 31 Oct. 1975 (L/4203, 22S/47). Second Report adopted on 23 May 1977 (L/4497, 24S/107).
45.	Czechoslovakia-Finland Agreement ³⁶	Czechoslovakia and Finland	Interim agreement for the formation of a free-trade area	L/4138/Add.1	19 Sept. 1974	1 Jan. 1975	Working Party Report adopted on 14 June 1976 (L/4342, 23S/67). Second Report adopted on 6 Nov. 1979 (L/4837, 26S/327).
46.	Bulgaria-Finland Agreement	Bulgaria and Finland	Free-trade area	L/4137/Add.1	26 Apr. 1974	1 Jan. 1975	Working Party established. Oral interim Report of the Chairman of the Working Party (C/M/117).
47.	Finland-German Democratic Republic Agreement ³⁷	Finland and German Democratic Republic	Interim agreement for the formation of a free-trade area	L/4211	4 Mar. 1975	1 July 1975	Working Party Interim Report adopted on 2 Mar. 1977 (L/4471, 24S/106). ³⁸
48.	EEC-Israel Agreement ³⁹	EEC member States (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Israel	Agreement on the implementation of free-trade area treatment; coverage of ECSC products	L/4194/Add.1	11 May 1975 (EEC-Israel) 11 May 1975 (ECSC-Israel)	1 July 1975 (EEC-Israel) 1 May 1978 (ECSC-Israel)	Working Party Report adopted on 15 July 1976 (L/4365, 23S/55).

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49.	EEC-Greece Extension of Association Agreement ⁴⁰	EEC member States (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Greece	Extension of the association agreement to new members of the EEC (Denmark, Ireland and United Kingdom)	L/4206	28 Apr. 1975	1 July 1975	Working Party Report adopted on 14 June 1976 (L/4340, 23S/64).
50.	ACP-EEC Lomé Convention (First Lomé Convention) ⁴¹	EEC member States (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Bahamas, Barbados, Botswana, Burundi, Burkina Faso (Upper Volta), Cameroon, Central African Republic, Chad, Congo, Cote d'Ivoire, Benin (Dahomey), Ethiopia, Fiji, Gabon, Gambia, Ghana, Grenada, Guinea, Guinea Bissau, Equatorial Guinea, Guyana, Jamaica, Kenya, Lesotho, Liberia, Malawi, Madagascar (Malagasy Republic), Mali, Mauritius, Mauritania, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Togo, Tonga, Trinidad and Tobago, Uganda, Western Samoa, Zaire and Zambia ⁴²	Preferential, non-reciprocal access to the EEC market (Part IV claim)	L/4193, L/4198	28 Feb. 1975	1 Apr. 1976	Working Party Report adopted on 15 July 1976 (L/4369, 23S/46).
51.	Australia-Papua New Guinea Trade and Commercial Relations Agreement (PATCRA) ⁴³	Australia and Papua New Guinea	Preferential non-reciprocal access to the Australian market	L/4451/Add.1	6 Nov. 1976	1 Feb. 1977	Working Party Report adopted on 11 Nov. 1977 (L/4571, 24S/63).
52.	EEC-Portugal Interim Agreement ⁴⁴	EEC member States (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Portugal	Extension of free trade agreement	L/4419	20 Sept. 1976	1 Nov. 1976	Working Party Report adopted on 26 July 1977 (L/4518, 24S/73).
53.	EEC-Tunisia Agreement ⁴⁵	EEC member States (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Tunisia	Preferential non-reciprocal access to the EEC market (Part IV claim); coverage of ECSC products	L/4379	25 Apr. 1976 (EEC-Tunisia) 25 Apr. 1976 (ECSC-Tunisia)	1 July 1976 (EEC-Tunisia) 1 Nov. 1978 (ECSC-Tunisia)	Working Party Report adopted on 11 Nov. 1977 (L/4558, 24S/97).

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54.	EEC-Algeria Interim Agreement	EEC member States (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Algeria	Preferential non-reciprocal access to the EEC market (Part IV claim); coverage of ECSC products	L/4380	26 Apr. 1976 (EEC-Algeria) 26 Apr. 1976 (ECSC-Algeria)	1 July 1976 (EEC-Algeria) 1 Nov. 1979 (ECSC-Algeria)	Working Party Report adopted 11 Nov. 1977 (L/4559, 24S/80).
55.	EEC-Morocco Co-operation Agreement ⁴⁶	EEC member States (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Morocco	Preferential non-reciprocal access to the EEC market (Part IV claim); coverage of ECSC products	L/4381	27 Apr. 1976 (EEC-Morocco) 27 Apr. 1976 (ECSC-Morocco)	1 July 1976 (EEC-Morocco) 1 Nov. 1978 (ECSC-Morocco)	Working Party Report adopted on 11 Nov. 1977 (L/4560, 24S/88).
56.	Finland-Poland Agreement ⁴⁷	Finland and Poland	Interim agreement for the formation of a free-trade area	L/4652	29 Sept. 1976	1 Apr. 1978	Working Party Report adopted on 26 Mar. 1980 (L/4928, 27S/136).
57.	EEC-Lebanon Interim Agreement	EEC member States (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Lebanon	Preferential non-reciprocal access to the EEC market (Part IV claim)	L/4524	3 May 1977	1 July 1977	Working Party Report adopted on 17 May 1978 (L/4663, 25S/142).
58.	EEC-Jordan Interim Agreement	EEC member States (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Jordan	Preferential non-reciprocal access to the EEC market (Part IV claim)	L/4523	18 Jan. 1977	1 July 1977	Working Party Report adopted on 17 May 1978 (L/4662, 25S/133).
59.	EEC-Syria Interim Agreement	EEC member States (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Syria	Preferential non-reciprocal access to the EEC market (Part IV claim)	L/4522	18 Jan. 1977	1 July 1977	Working Party Report adopted on 17 May 1978 (L/4661, 25S/123).
60.	EEC-Egypt Interim Agreement	EEC member States (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Egypt	Preferential non-reciprocal access to the EEC market (Part IV claim)	L/4521	18 Jan. 1977	1 July 1977	Working Party Report adopted on 17 May 1978 (L/4660, 25S/114).
61.	EFTA-Spain Agreement ⁴⁸	EFTA member States (Austria, Iceland, Norway, Portugal, Sweden and Switzerland) and Spain	Interim agreement for the formation of a free-trade area	L/4867	26 June 1979	1 May 1980	Working Party Report adopted on 10 Nov. 1980 (L/5045, 27S/127).

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62.	EEC-Accession of Greece	EEC member States (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Greece	Customs union	L/4845	28 May 1979	1 Jan. 1981	Working Party Report adopted on 9 Mar. 1983 (L/5453, 30S/168).
63.	ACP-EEC Second Lomé Convention ⁴⁹	Member States of the First Lomé Convention ⁵⁰	Preferential non-reciprocal access to the EEC market (Part IV claim)	L/5098	31 Oct. 1979	1 Jan. 1981	Working Party Report adopted on 31 Mar. 1982 (L/5292, 29S/119).
64.	EEC-Yugoslavia Agreement	EEC member States (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Yugoslavia	Preferential non-reciprocal access to the EEC market (Part IV claim)	L/5007 and Add.1	6 May 1980	1 July 1980	Working Party Report adopted on 6 Oct. 1981 (L/5191, 28S/115).
65.	Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERT) ⁵¹	Australia and New Zealand	Free-trade area	L/5475	28 Mar. 1983	1 Jan. 1983	Working Party Report adopted on 2 Oct. 1984 (L/5664, 31S/170).
66.	ACP-EEC Third Lomé Convention ⁵²	Member States of the Second Lomé Convention and Mozambique ⁵³	Preferential non-reciprocal access to the EEC market (Part IV claim)	L/6109 and Add.1	8 Dec. 1984	1 Mar. 1986	Working Party Report adopted on 22 Sept. 1988 (L/6382, 35S/321).
67.	EEC-Accession of Portugal and Spain ⁵⁴	EEC member States (Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands and United Kingdom) and Spain and Portugal	Customs union	L/5936 and Addenda	12 June 1985	1 Jan. 1986	Working Party Report adopted on 19-20 Oct. 1988 (L/6405, 35S/293).
68.	Israel-United States Free Trade Agreement	Israel and United States	Interim agreement for the formation of a free-trade area	L/5862	22 Apr. 1985	1 Sept. 1985	Working Party Report adopted on 14 May 1987 (L/6140, 34S/58).
69.	Canada-United States Free Trade Agreement	Canada and United States	Interim agreement for the formation of a free-trade area	L/6464 and Add.1	2 Jan. 1988	1 Jan. 1989	Working Party Report adopted on 12 Nov. 1991 (L/6927, 38S/47).
70.	ACP-EEC Fourth Lomé Convention ⁵⁵	Member States of the Third Lomé Convention, Dominican Republic, Haiti, St. Christopher and Nevis	Preferential, non-reciprocal access to the EEC market (Part IV claim)	L/7153/Add.1	15 Dec. 1989	1 Mar. 1990	Working Party established on 9-10 Feb. 1993. Report adopted on 4 October 1994 (L/7502). Waiver of Article I:1 XXV:5 granted under Article XXV:5 on 8 Dec. 1994 (L/7539 and Corr.1, L/7604, SR.50/1)

	Name	Participating countries or contracting parties	Presented as	Text of agreement	Date of signature	Date of entry into force	GATT action taken and document references
71.	EFTA-Turkey Free Trade Agreement	EFTA member States (Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland) and Turkey	Interim agreement for the formation of a free-trade area	L/6989/Add.1	10 Dec. 1991	30 Apr. 1992	Working Party established on 30 Apr. 1992. Report adopted on 17 Dec. 1993 (L/7336).
72.	EC-Poland Interim Agreement	EC member States (Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain and United Kingdom) and Poland	Interim agreement for the formation of a free-trade area; coverage of ECSC products	L/6992/Add.1	16 Dec. 1991	1 Mar. 1992	Working Party on agreements between the EC and the Visegrad countries established on 30 Apr. 1992.
73.	EC-Czech and Slovak Federal Republic Interim Agreement	EC member States (Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain and United Kingdom) and Czech and Slovak Federal Republic	Interim agreement for the formation of a free-trade area; coverage of ECSC products	L/6992/Add.1	16 Dec. 1991	1 Mar. 1992	Working Party on agreements between the EC and the Visegrad countries established on 30 Apr. 1992.
74.	EC-Hungary Interim Agreement	EC member States (Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain and United Kingdom) and Hungary	Interim agreement for the formation of a free-trade area; coverage of ECSC products	L/6992/Add.1	16 Dec. 1991	1 Mar. 1992	Working Party on agreements between the EC and the Visegrad countries established on 30 Apr. 1992.
75.	Estonia-Finland Protocol Regarding Temporary Arrangements on Trade and Economic Co-operation	Estonia and Finland	Free-trade area	L/7130/Add.1	13 Feb. 1992	1 May 1993	Working Party on agreements between Finland and the Baltic countries established on 5 Jan. 1993. Report adopted on 17 Dec. 1993 (L/7339).
76.	Lithuania-Sweden Free Trade Agreement	Lithuania and Sweden	Free-trade area	L/7036	17 Mar. 1992	15 Aug. 1992	Working Party on agreements between Sweden and the Baltic states established on 14 July 1992. Report adopted on 17 Dec. 1993 (L/7338).
77.	Czech and Slovak Federal Republic-EFTA Free Trade Agreement ⁵⁶	EFTA member States (Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland) and Czech and Slovak Federal Republic	Interim agreement for the formation of a free-trade area	L/7041/Add.1	20 Mar. 1992	1 July 1992	Working Party established on 14 July 1992. Report adopted on 8 Dec. 1994 (L/7570).
78.	Estonia-Sweden Free Trade Agreement	Estonia and Sweden	Free-trade area	L/7036	31 Mar. 1992	1 July 1992	Working Party on agreements between Sweden and the Baltic states established on 14 July 1992. Report adopted on 17 Dec. 1993 (L/7338).
79.	Latvia-Sweden Free Trade Agreement	Latvia and Sweden	Free-trade area	L/7036	31 Mar. 1992	1 July 1992	Working Party on agreements between Sweden and the Baltic states established on 14 July 1992. Report adopted on 17 Dec. 1993 (L/7338).

	Name	Participating countries or contracting parties	Presented as	Text of agreement	Date of signature	Date of entry into force	GATT action taken and document references
80.	Finland-Lithuania Protocol Regarding Temporary Arrangements on Trade and Economic Co-operation	Finland and Lithuania	Free-trade area	L/7130/Add.1	5 June 1992	1 May 1993	Working Party on agreements between Finland and the Baltic states established on 5 Jan. 1993. Report adopted on 17 Dec. 1993 (L/7339).
81.	Latvia-Norway Free-Trade Agreement	Latvia and Norway	Free-trade area	L/7104/Add.1	15 June 1992	Provisionally applied from 1 July 1992	Working Party on agreements between Norway and the Baltic states established on 4 Nov. 1992. Report adopted on 17 Dec. 1993 (L/7337).
82.	Estonia-Norway Free-Trade Agreement	Estonia and Norway	Free-trade area	L/7104/Add.1	15 June 1992	Provisionally applied from 1 July 1992	Working Party on agreements between Norway and the Baltic states established on 4 Nov. 1992. Report adopted on 17 Dec. 1993 (L/7337).
83.	Lithuania-Norway Free-Trade Agreement	Lithuania and Norway	Free-trade area	L/7104/Add.1	15 June 1992	Provisionally applied from 1 July 1992	Working Party on agreements between Norway and the Baltic states established on 4 Nov. 1992. Report adopted on 17 Dec. 1993 (L/7337).
84.	EFTA-Israel Free Trade Agreement	EFTA member States (Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland) and Israel	Interim agreement for the formation of a free-trade area	L/7129 and Add.1	17 Sept. 1992	1 Jan. 1993	Working Party established on 9-10 Feb. 1993.
85.	Czech Republic-Slovak Republic Customs Union Agreement	Czech Republic and Slovak Republic	Customs union	L/7212	28 Oct. 1992	1 Jan. 1993	Working Party established on 12 May 1993. Report adopted on 4 October 1994 (L/7501).
86.	Lithuania-Switzerland Free-Trade Agreement	Lithuania and Switzerland	Free-trade area	L/7223/Add.1	24 Nov. 1992	Provisionally applied from 1 Apr. 1993	Working Party established on agreements between Switzerland and the Baltic states on 16-17 June 1993.
87.	Finland-Latvia Protocol Regarding Temporary Arrangements on Trade and Economic Co-operation	Finland and Latvia	Free-trade area	L/7130/Add.1	26 Nov. 1992	1 July 1993	Working Party on agreements between Finland and the Baltic states established on 5 Jan. 1993. Report adopted on 17 Dec. 1993 (L/7339).
88.	EFTA-Romania Free Trade Agreement ⁵⁷	EFTA member States (Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland) and Romania	Interim agreement for the formation of a free-trade area	L/7215/Add.1	10 Dec. 1992	1 May 1993 ⁵⁸	Working Party established on 16-17 June 1993.

	Name	Participating countries or contracting parties	Presented as	Text of agreement	Date of signature	Date of entry into force	GATT action taken and document references
89.	EFTA-Poland Free Trade Agreement ⁵⁹	EFTA member States (Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland) and Poland	Interim agreement for the formation of a free-trade area	L/7372/Add.1	10 Dec. 1992	15 Nov. 1993	Working Party established on 25-26 Jan. 1994.
90.	North American Free Trade Agreement (NAFTA) ⁶⁰	Canada, Mexico and United States	Free-trade area	L/7176/Add.1	17 Dec. 1992	1 Jan. 1994	Working party established on 23 Mar. 1994.
91.	Estonia-Switzerland Free-Trade Agreement	Estonia and Switzerland	Free-trade area	L/7223/Add.1	21 Dec. 1992	Provisionally applied from 1 Apr. 1993	Working Party established on agreements between Switzerland and the Baltic states on 16-17 June 1992.
92.	Central European Free Trade Agreement (CEFTA)	Czech Republic, Hungary, Poland and Slovak Republic	Interim agreement for the formation of a free-trade area	L/7495/Add.1	21 Dec. 1992	Provisionally applied from 1 Mar. 1993	The Council was informed (C/M/261). No subsequent action yet taken.
93.	Latvia-Switzerland Free-Trade Agreement	Latvia and Switzerland	Free-trade area	L/7223/Add.1	22 Dec. 1992	Provisionally applied from 1 Apr. 1993	Working Party established on agreements between Switzerland and Estonia, Latvia and Lithuania on 16-17 June 1992.
94.	EC-Interim agreement with Romania	EC member States (Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain and United Kingdom) and Romania	Interim agreement for the formation of a free-trade area	L/7618/Add.1	1 Feb. 1993	1 May 1993	The Council was informed (C/M/263). No subsequent action yet taken.
95.	EC-Interim agreement with Bulgaria	EC member States (Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain and United Kingdom) and Bulgaria	Interim agreement for the formation of a free-trade area	L/7617/Add.1	8 Mar. 1993	31 Dec. 1993	The Council was informed (C/M/263). No subsequent action yet taken.
96.	EFTA-Hungary Free Trade Agreement ⁶¹	EFTA member States (Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland) and Hungary	Interim agreement for the formation of a free-trade area	L/7360/Add.1	29 Mar. 1993	1 Oct. 1993 ⁶²	Working Party established on 25-26 Jan. 1994.
97.	EFTA-Bulgaria Free Trade Agreement ⁶³	EFTA member States (Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland) and Bulgaria	Interim agreement for the formation of a free-trade area	L/7257 and Add.1	29 May 1993	1 July 1993 ⁶⁴	Working Party established on 27 Oct. 1993.
98.	Costa Rica-Mexico Free Trade Agreement	Costa Rica and Mexico	Free-trade area			1 January 1995	Council informed on 23 March 1994 of signing (C/M/271).

	Name	Participating countries or contracting parties	Presented as	Text of agreement	Date of signature	Date of entry into force	GATT action taken and document references
99.	Czech Republic-Slovenia Free Trade Agreement	Czech Republic and Slovenia	Free-trade area	L/7447/Add.1	Dec. 1993	Provisionally applied since 1 Jan. 1994	Working Party established on 21 June 1994 (C/M/273).
100.	Slovak Republic-Slovenia Free Trade Agreement	Slovak Republic and Slovenia	Free-trade area	L/7448/Add.1	22 Dec. 1993	Provisionally applied since 1 Jan. 1994	Working Party established on 21 June 1994 (C/M/273).
101.	Free-Trade Agreement between Colombia, Venezuela and Mexico	Colombia, Venezuela, Mexico	Free-trade area			1 January 1995	Council informed on 21 June 1994 (C/M/273)
102.	EEC-Estonia Free Trade Agreement	EC member states and Estonia	Free-trade area				Council informed on 20 July 1994 (C/M/274).
103.	EEC-Latvia Free Trade Agreement	EC member states and Latvia	Interim agreement for the formation of a free-trade area				Council informed on 20 July 1994 (C/M/274).
104.	EEC-Lithuania Free Trade Agreement	EC member states and Lithuania	Interim agreement for the formation of a free-trade area				Council informed on 20 July 1994 (C/M/274).
105.	Bolivia-Mexico Free Trade Agreement	Bolivia and Mexico	Interim agreement for the formation of a free-trade area			1 January 1995	Council informed on 4 October 1994 of signing (C/M/275).
106.	EC-Accession of Austria, Finland, Norway and Sweden	Twelve EC member states, Austria, Finland, Norway and Sweden; Norway did not ratify	Customs union	L/7614/Add.1	24 June 1994	1 Jan. 1995	Council informed on 20 July 1994 (C/M/273, 274). Further notification 15 December 1994 (L/7614, PC/SCS/W/13) formal notification and request for initiation of examination, 20 Jan. 1995 (WT/L/7). Working party established.

NOTES

1. Agreement terminated on 1 July 1955 and immediately superseded by a preferential trade agreement notified to GATT (Working Party Report adopted on 3 December 1955 (L/468, 10S/72)), and the subject of a waiver from Article I:1 under the Decision of 3 December 1955 (10S/17).
2. In 1952, the members of the European Coal and Steel Community (ECSC) obtained a waiver from Article I:1 under the Decision of 10 November 1952 (1S/17) which expired in 1958. Denmark, Ireland and the United Kingdom acceded to the EC on 1 January 1973, Greece acceded on 1 January 1981, Portugal and Spain acceded on 1 January 1986.
3. Nicaragua was the only member of the Multilateral Central American Free Trade and Economic Integration Treaty which was a GATT contracting party at the time of its formation. See entry for the participation of Nicaragua in the General Treaty for Central American Integration.
4. Cameroon joined the customs union on 23 June 1961. The common external tariff was implemented on 1 July 1962.

5. Denmark and the United Kingdom withdrew from EFTA on 1 January 1973 upon accession to the EC, and Portugal withdrew on 1 January 1986 upon accession to the EC. Iceland acceded to EFTA on 1 March 1970, Finland acceded on 1 January 1986, and Liechtenstein acceded on 1 September 1991.
6. The GATT Protocol of Accession of Switzerland provides that the customs territory of Switzerland is deemed to include the territory of the Principality of Liechtenstein as long as the customs union treaty with Switzerland is in force.
7. The 1961 Treaty reduced the period for the establishment of a free-trade area among members of the Central American Free Trade Area from 10 to five years and provided for the equalization of import duties within five years.
8. The 1980 Montevideo Treaty establishing the LAIA superseded the 1960 Montevideo Treaty establishing the LAFTA.
9. At the time of the formation of the free trade area, Borneo and Sarawak were dependent territories of the United Kingdom. On 30 October 1963, the government of Malaysia assumed the responsibility for the conduct of the external affairs of the former states of the Federation of Malay, including the states of Borneo and Sarawak (L/2077).
10. The date of signature is not available to the GATT Secretariat.
11. The Association agreement was extended in 1973 to cover the accession of Denmark, Ireland and the United Kingdom to the EC. Greece acceded to the EC on 1 January 1981.
12. On 1 January 1986, Finland acceded to EFTA.
13. The Association agreement was supplemented by an Additional Protocol (with effect from 1 January 1973) establishing conditions, arrangements and a timetable for a transitional stage to the customs union. The Association agreement was extended in 1973 to ECSC products and to new members of the EEC (with effect from 1 March 1986).
14. Superseded by the 1971 Yaoundé II, which was superseded by the 1976 First Lomé Convention and its Second, Third and Fourth successor agreements.
15. Superseded by the 1971 EEC-PTOM II.
16. Ireland and the United Kingdom acceded to the EC on 1 January 1973.
17. Superseded by the 1973 CARICOM.
18. Superseded by the 1983 Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA).
19. Superseded by the 1976 First Lomé Convention and its Second, Third and Fourth successor agreements.
20. Kenya, Tanzania and Uganda concluded the Treaty for East African Co-operation in 1967.
21. Superseded by the 1976 Co-operation Agreement.
22. Superseded by the 1976 First Lomé Convention and its Second, Third and Fourth successor agreements.
23. An Association Agreement between Mauritius and the Yaoundé Convention was signed on 12 May 1972 and entered into force on 1 June 1973.
24. Superseded by the 1976 Co-operation Agreement.
25. Supplemented the 1964 Association Agreement. The Association agreement was extended in 1973 to ECSC products and to new members of the EEC (with effect from 1 March 1986).
26. Superseded the 1964 EEC-PTOM I.
27. Superseded by the 1975 Agreement on the implementation of free-trade area treatment and extended to cover ECSC products.
28. Spain acceded to the EC on 1 January 1986.
29. Superseded by the 1977 Agreement.
30. Other agreements covering trade matters between the EEC and Lebanon include the 1965 Agreement on Trade and Technical Cooperation, and the 1973 Protocol relating to the Agreement. The Agreements notified to the GATT in 1973 include one Agreement between the original six members of the EEC and Lebanon signed in 1972, and a Protocol extending the Agreement to Denmark, Ireland and the United Kingdom, signed in 1973.
31. Denmark and the United Kingdom withdrew from EFTA upon their accession. Ireland and the United Kingdom had concluded a free-trade agreement in 1966. The notification also concerned the proposed accession of EFTA member Norway, which did not subsequently ratify the treaty with the EC.
32. Portugal acceded to the EC on 1 January 1986.
33. Superseded the 1968 CARIFTA.
34. Bahamas, Belize, Dominica, Grenada, Montserrat, St. Lucia and St. Vincent acceded to the Treaty establishing the CARICOM in May 1974; Antigua and Barbuda and St. Kitts and Nevis acceded in July 1974.
35. See also the 1993 EFTA-Hungary Free Trade Agreement. The 1975 Agreement shall remain in force until the substance of its mutual benefits has been fully overtaken by the later Agreement.

36. See also the 1991 EFTA-Czech and Slovak Federal Republic Free Trade Agreement. The 1975 Agreement shall remain in force until the substance of its mutual benefits has been fully overtaken by the later Agreement. Following the dissolution of the former Czech and Slovak Federal Republic as of 1 January 1993, agreements were signed by the two successor states with EFTA that provide for the continuing application of the 1991 Agreement (L/7220).
37. The Agreement is no longer in force following the unification of Germany in 1989.
38. The Working Party had planned to reconvene in 18 months' time after the adoption of the Interim Report to continue its examination of the Agreement.
39. Superseded the 1973 Agreement.
40. Supplemented the 1962 Agreement. Greece acceded to the EC on 1 January 1981.
41. The membership of the Agreement includes that of the 1971 Yaoundé and Arusha Agreements.
42. Accessions to the First Lomé Convention include Cape Verde on 28 March 1977, Comoros on 13 September 1976, Djibouti on 2 February 1978, Dominica on 26 February 1979, Kiribati on 30 October 1979, Papua New Guinea and Sao Tome and Principe on 28 March 1977, St. Lucia on 28 June 1979, St. Vincent and the Grenadines on 27 February 1980, Seychelles on 27 August 1976, Solomon Islands on 27 September 1978, Surinam on 16 July 1976, and Tuvalu, on 17 January 1979.
43. Australia obtained a waiver from Article I:1 for preferences granted to products imported from Papua New Guinea under the Decision of 24 October 1953 (2S/18). PATCRA covers trade and commercial relations between Australia and Papua New Guinea, while Papua New Guinea obtains trade concessions from New Zealand under SPARTECA (see under Enabling Clause in the chapter on Article I).
44. Supplemented the 1973 Agreement. Portugal acceded to the EC on 1 January 1986.
45. Superseded the 1969 Agreement.
46. Superseded the 1969 Agreement. An Interim Agreement allowed for the trade provisions to be implemented with effect from 1 July 1976.
47. See also the 1993 EFTA-Poland Free Trade Agreement. The 1978 Agreement shall remain in force until the substance of the mutual benefits under the earlier Agreement has been fully overtaken by the later Agreement.
48. Spain acceded to the EC on 1 January 1986.
49. Superseded the First Lomé Convention. Successor agreements are the Third and Fourth Lomé Conventions.
50. Greece acceded to the EEC on 1 January 1981. Antigua and Barbuda acceded to the Second Lomé Convention on 30 July 1982, Belize on 5 March 1982, Vanuatu on 18 March 1981 and Zimbabwe on 1 March 1982.
51. Superseded the 1966 Australia-New Zealand Free Trade Agreement.
52. Superseded the Second Lomé Convention. Successor agreement is the Fourth Lomé Convention.
53. Portugal and Spain acceded to the EEC on 1 January 1986.
54. Superseded previous Agreements between the EEC and Portugal and Spain.
55. Superseded the Third Lomé Convention.
56. See also the 1975 Czechoslovakia-Finland Agreement. This Agreement shall remain in force until the substance of its mutual benefits has been fully overtaken by the 1992 Agreement. Following the dissolution of the former Czech and Slovak Federal Republic as of 1 January 1993, agreements were signed by the two successor states with EFTA that provide for the continuing application of the 1991 Agreement (L/7220).
57. See also the Finland-Romania Long-term Trade Agreement signed 30 October 1981 and which entered into force 1 January 1982. The Long-term Agreement was notified under Paragraph 3 of the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (L/5283).
58. Entered into force for Sweden and Romania on 1 May 1993. The Agreement is being provisionally applied by Switzerland and Liechtenstein pending ratification. The Agreement will enter into force for other EFTA member states when ratification is completed.
59. See also the 1978 Finland-Poland Agreement. This Agreement shall remain in force until the substance of its mutual benefits has been fully overtaken by the 1993 Agreement.
60. See 1989 Canada-United States Free Trade Agreement.
61. See also the 1975 Finland-Hungary Agreement. This Agreement shall remain in force until the substance of its mutual benefits has been fully overtaken by the 1993 Agreement.
62. Entered into force for Austria, Hungary, and Sweden on 1 October 1993. The Agreement and arrangements are also being provisionally applied since 1 October 1993 by Switzerland and Liechtenstein pending their ratification. The Agreement and arrangements will enter into force for Finland and Iceland when the ratification process is completed.
63. See also the 1975 Finland-Bulgaria Agreement. This Agreement shall remain in force until the substance of its mutual benefits has been fully overtaken by the 1993 Agreement.
64. Entered into force for Sweden on 1 July 1993. The Agreement and arrangements are being provisionally applied since 1 July 1993 by Norway, Switzerland and Liechtenstein, pending their ratification. The Agreement and arrangements will enter into force for Finland and Iceland when the ratification process is completed.

ARTICLE XXV

JOINT ACTION BY THE CONTRACTING PARTIES

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I. TEXT OF ARTICLE XXV

Article XXV

Joint Action by the Contracting Parties

1. Representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of this Agreement. Wherever reference is made in this Agreement to the contracting parties acting jointly they are designated as the CONTRACTING PARTIES.

2. The Secretary-General of the United Nations is requested to convene the first meeting of the CONTRACTING PARTIES, which shall take place not later than March 1, 1948.

3. Each contracting party shall be entitled to have one vote at all meetings of the CONTRACTING PARTIES.

4. Except as otherwise provided for in this Agreement, decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes cast.

5. In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement; *Provided* that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The CONTRACTING PARTIES may also by such a vote

- (i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and
- (ii) prescribe such criteria as may be necessary for the application of this paragraph.

II. INTERPRETATION AND APPLICATION OF ARTICLE XXV

A. SCOPE AND APPLICATION OF ARTICLE XXV

1. Paragraph 1

(1) *“provisions of this Agreement which involve joint action”*

Authority for joint action by the CONTRACTING PARTIES is provided for in the following provisions of the General Agreement:

Articles II:6(a); VI:6(b) and (c); VII:1 and 4(c); VIII:2; X:3(c); XII:4(b) to (d) and 5; XIII:4; XIV:2; XV:1, 2, 3, 5, 6, 7, 8; XVI:5; XVII:4(c); XVIII:6, 7, 12, 14, 16, 19, 22; XIX:2, 3; XX:(h), (j); XXII:2; XXIII:2; XXIV:7, 10; XXV:1, 5; XXVII; XXVIII:1, 4; XXVIII bis:1; XXIX; XXX:2; XXXIII; XXXVII:2(b); XXXVIII:1, 2; Annex I, Notes Ad Articles XII:4, XVIII:15, 16, and XXVIII:1.

During the Second Session in 1948, in discussion of a proposed waiver decision, the question was raised whether a decision at a meeting of the CONTRACTING PARTIES would be adequate or whether it would be necessary to do a protocol to the General Agreement. The Chairman stated that “an action taken in accordance with the terms of an article could be effected by a decision approved by the CONTRACTING PARTIES and duly recorded”.¹

(2) *“CONTRACTING PARTIES”*

The New York draft of the GATT provided for establishment of an Interim Trade Committee. In discussions at Geneva, in response to reluctance expressed regarding creation of a formal organization in advance of the ITO, it was proposed and accepted that all references to the “Committee” be replaced with references to the “Contracting Parties” and that these words be in initial capitals wherever they refer to joint action. This convention was later changed to “CONTRACTING PARTIES” for the sake of typographical clarity.² The organization created was nevertheless envisioned to be permanent in character.

¹GATT/CP.2/SR.21, p. 4.

²See New York Report p. 78 (New York draft GATT Art. XXII). On Geneva discussions, see EPCT/TAC/PV/11 (discussion regarding powers of the Committee), EPCT/TAC/PV/12 p. 2-5 (discussion and approval of change to “Contracting Parties”), EPCT/135 (draft of the General Agreement including this change), EPCT/209 (Legal and Drafting Committee Report on Part III of the General Agreement), EPCT/TAC/PV/25 p. 2-3, 12 (discussion and approval of change to CONTRACTING PARTIES, suggested in EPCT/209).

(3) “joint action ... with a view to facilitating the operation and furthering the objectives of this Agreement”

(a) Interpretation of the General Agreement

At the Second Session of the CONTRACTING PARTIES in September 1948, a Working Party on Modifications to the General Agreement examined which of the revisions to the ITO Charter which had been made at Havana should be brought into the General Agreement text by amendment. In support of the decision of the Working Party not to pick up every one of the changes, its Report notes that “if difficulties in application were to arise before the entry into force of the Charter, the CONTRACTING PARTIES would still have the possibility under the terms of Article XXV to settle such cases in the light of the provisions of Article XXIX, paragraph 1”.³

In 1949, the Chairman of the CONTRACTING PARTIES interpreted the phrase “with a view to facilitating the operation and furthering the objectives of this Agreement” as “enabling the CONTRACTING PARTIES acting jointly to interpret the Agreement whenever they saw fit. It was open for any government disagreeing with an interpretation to take the dispute which had given rise to such an interpretation to the International Court, although neither a government nor the CONTRACTING PARTIES acting jointly could take a ruling of the CONTRACTING PARTIES to the Court”. The Chairman’s statement was not contested.⁴ In 1961, the Executive Secretary said “that it was within the functions of the CONTRACTING PARTIES, acting jointly under Article XXV, to interpret the Agreement whenever they saw fit. It would be open for any government which disagreed with an interpretation to take the dispute which had given rise to the interpretation to the International Court of Justice, although neither a government nor the CONTRACTING PARTIES acting jointly could take a ruling of the CONTRACTING PARTIES to the Court”.⁵

The Review Session Working Party on Organizational and Functional Questions in 1954-55 negotiated the text of an Agreement on the Organization for Trade Cooperation. Article 3 of this Agreement on “Functions” provided in part that “no decision or other action of the Assembly or any subsidiary body of the Organization shall have the effect of imposing on any Member any new obligation which the Member has not specifically agreed to undertake”. In this connection, the Report of the Working Party notes that “It was ... agreed that an obligation arising from the operation or interpretation of a specific provision of the General Agreement ... including an interpretation that a particular obligation thereunder had become applicable, would not be the imposition of a ‘new obligation’ within the meaning of this paragraph”.⁶

The CONTRACTING PARTIES have followed different procedures for resolving questions of interpretation, such as Chairman’s rulings, Decisions by the CONTRACTING PARTIES, adoptions of reports of panels or working parties including interpretations, and decisions by the Council to interpret the General Agreement or to adopt reports including interpretations.

- *Chairman’s rulings:* Especially in the early days of the GATT, questions of interpretation were often resolved by the Chairman of the CONTRACTING PARTIES giving a ruling, either at the request of a delegate⁷ or at his own initiative towards the end of a discussion⁸. These rulings sometimes did not meet dissenting opinions, and sometimes were expressly accepted⁹ or put to a roll-call vote.¹⁰

³GATT/CP.2/22/Rev.1, adopted on 1 and 2 September 1948, II/39, 40.

⁴GATT/CP.3/SR.37, p. 5. In response to the suggestion of Cuba that the CONTRACTING PARTIES submit the legal aspects in dispute to an international court, the Chairman noted that “he wished to explain that the CONTRACTING PARTIES were not an organization authorized by the United Nations to request advisory opinions from the International Court of Justice. Advisory opinions from the Court may only be sought by the United Nations and by specialized agencies authorized to do so by the Assembly of the United Nations.” See further under Article XXIII concerning referral of disputes to the International Court.

⁵SR.19/7, p. 88. See further under Article XXIII.

⁶L/329, adopted on 28 February, 5 and 7 March 1955, 3S/231, 235, para. 9(e).

⁷E.g., GATT/CP.2/SR.11, p. 7.

⁸GATT/CP.2/SR.11, p. 4.

⁹GATT/CP.2/SR.11, p. 8; CP.3/SR.19, p. 8.

¹⁰SR.10/19, p. 218.

- *Decisions of the CONTRACTING PARTIES:* The CONTRACTING PARTIES have in many instances adopted a decision, resolution or recommendation relating to a specific matter; sometimes such decisions included elements interpreting the General Agreement.¹¹
- *Reports of Panels and Working Parties:* Article XXIII:2 expressly gives the CONTRACTING PARTIES the power to “give a ruling”. This power has been exercised on occasion by the CONTRACTING PARTIES directly without a recommendation from another body.¹² The CONTRACTING PARTIES have adopted many reports of Panels or Working Parties which include interpretations of the General Agreement. Concerning the practice of the CONTRACTING PARTIES in the field of dispute settlement, see Article XXIII.
- *Council action:* The Council did not adopt reports of Panels or Working Parties before 1968, but merely noted them for later adoption by the CONTRACTING PARTIES at their next Session. In November 1968 the CONTRACTING PARTIES at their Twenty-fifth Session agreed that the Council should undertake a wider range of work; since then the Council has directly adopted such reports.¹³
- *Director-General:* In a few cases, a request for a legal opinion has been addressed to the Director-General or his representative.¹⁴

(b) *Consultations under Article XXV:1*

The 1979 “Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance” provides “that Article XXV may, as recognized by the CONTRACTING PARTIES, *inter alia*, when they adopted the report of the Working Party on particular difficulties connected with trade in primary products (L/930) also afford an appropriate avenue for consultation and dispute settlement in certain circumstances”.¹⁵

The Report of the Working Party in 1959 on “Particular Difficulties Connected with Trade in Primary Commodities” considered actions taken to follow up on a 1956 Resolution on “Particular Difficulties Connected with Trade in Primary Commodities,” which had provided for consultations under Article XXII concerning commodity problems. The 1959 Report noted that:

“Paragraph 3 of the basic resolution has not been utilized, perhaps due to a lack of understanding of the potentialities of the General Agreement in facilitating consultations on trade problems of concern to individual contracting parties or the CONTRACTING PARTIES generally. Therefore the Working Party has thought it useful to describe the manner in which contracting parties may have recourse to the facilities of Articles XXII and XXV for dealing with problems in their trade in primary products ... there may be situations in which joint action by the CONTRACTING PARTIES under Article XXV would be more appropriate [than consultations under Article XXII], for example, where a developing situation might lead to commercial policy measures being taken by one or more contracting parties which would be injurious to others unless it is dealt with by co-operative action. For a consultation to be initiated under Article XXV, there must be a prior decision by the CONTRACTING PARTIES which could, if they wished, invite non-contracting parties to participate. Thus under these two Articles there are procedures, for initiating action and a search for solutions, which are well adapted for dealing with many of the special situations arising in the trade in primary products which could be more appropriately handled by GATT techniques than otherwise.

“Accordingly, the Working Party recommends that contracting parties, when contemplating action on problems arising in commodity trade, should consider the possibility of initiating consultations under Article XXII with a view to arriving at mutually acceptable solutions, thus avoiding the need for unilateral action. The CONTRACTING PARTIES are reminded that, when special circumstances are likely to affect the trade in a primary product and to threaten disruption of the market and to cause special difficulties either to

¹¹E.g., Decision of 9 August 1949 on Margins of Preference, II/11; Decisions of 18 November 1968 and 26 March 1980 on Rectification and Modification of Schedules, 16S/16 and 27S/25.

¹²E.g., Decision of 8 June 1949 under Article XXIII:2 to reject the complaint of Czechoslovakia regarding US export controls, II/28.

¹³E.g., Council adoption of the four Panel Reports on tax legislation subject to the understanding in L/5271 (28S/114).

¹⁴See, e.g., legal opinion on application of Article I to the 1967 Agreement on Implementation of Article VI, L/3149, SR.25/3, p. 28.

¹⁵26S/210, footnote.

exporters or to importers which might lead to commercial policy action being taken by one or more countries, they may, at the request of an interested party, decide to arrange for consultations among exporting and importing countries with a view to finding a solution which would avoid resort to measures which would restrict or disrupt trade. These consultations might be arranged pursuant to the provisions of Article XXV which enable them to act jointly with a view to furthering the objectives of the General Agreement.”¹⁶

In 1961 the CONTRACTING PARTIES conducted multilateral consultations under paragraph 1 of Article XXV on the difficulties experienced by New Zealand in marketing butter in the United Kingdom.¹⁷

See also Articles XXXVI:4 and XXXVIII, and material under Article XXII:2 and Article XVIII:5.

(c) *Political questions*

In 1965, during the discussion of the request from the Government of the Republic of China (now known in the GATT and the WTO as the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, or Chinese Taipei¹⁸) to be represented by observers at sessions of the CONTRACTING PARTIES, the Chairman of the CONTRACTING PARTIES stated, *inter alia*, that

“it had been the policy of the CONTRACTING PARTIES to avoid unproductive controversies over political questions which did not bear significantly on the many substantial questions with which the CONTRACTING PARTIES were concerned. For this reason the CONTRACTING PARTIES had followed the policy expressed in Article 86 of the Havana Charter, namely to avoid passing judgment in any way on essentially political matters and to follow decisions of the United Nations on such questions.

“Consistently also with the practice of the United Nations, it was quite clear that for the CONTRACTING PARTIES to admit observers did not prejudice the position of the CONTRACTING PARTIES or of individual contracting parties towards recognition of the government in question. The Executive Secretary had based himself also upon the opinion of the Legal Department of the United Nations, which was that the question of representation in an international organization was distinct from the question of recognition of a government by other members of that organization.”¹⁹

In 1971, at the opening of the Twenty-seventh Session, the Chairman noted that in reaching their decision in 1965 to accede to the request of the Republic of China, the CONTRACTING PARTIES had agreed to follow decisions of the United Nations on essentially political matters, and suggested that the CONTRACTING PARTIES should follow the decision taken in United Nations Resolution 2758 (XXVI). It was agreed that for these reasons, representatives of the Republic of China should no longer attend sessions of the CONTRACTING PARTIES as observers.²⁰

In the Council in 1992, in discussion of the establishment of a working party on accession of Chinese Taipei to the General Agreement, the Chairman of the Council noted that “All contracting parties had acknowledged the view that there was only one China, as expressed in the United Nations General Assembly Resolution 2758 of 25 October 1971”. The Chairman stated that as part of the understanding reached on this matter, the titles carried by the representative of Chinese Taipei would not have any implication on the issue of sovereignty.²¹

The policy of following the decisions of the United Nations on political questions was also referred to in connection with the decision that the GATT observer status previously granted to the former USSR would be continued through the Russian Federation²² and the decision of the Council at its meeting on 16-17 June 1993 that in the light of United Nations General Assembly Resolution 47/1 “the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the contracting party status of the former Socialist Federal Republic

¹⁶L/930, adopted 22 November 1958, 7S/42, 45, para. 7-8.

¹⁷L/1453, Report on consultation held in April 1961, 10S/74; L/1514, Report on consultation held in June 1961, 10S/77.

¹⁸See Statement by Council Chairman at September 1992 Council meeting, C/M/259, p. 3-4.

¹⁹SR.22/3, p. 1-2.

²⁰SR.27/1, p. 1-4.

²¹C/M/259, p. 3-4.

²²Council meeting of 18 February 1992, C/M/254, p. 2; letter in L/6978.

of Yugoslavia in the GATT, and therefore decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for accession to the GATT and that it shall not participate in the work of the Council and its subsidiary bodies. The Council further invites other committees and subsidiary bodies of the GATT, including the Committees of the Tokyo Round Agreements and the Committee on Trade and Development, to take the necessary decisions in accordance with the above”.²³

See also the discussion of territorial claims under Article XXIV:1-2, and the discussion of status as a contracting party under Article XXXII.

(4) Competence of the CONTRACTING PARTIES

(a) Commodity problems

In 1955, the Chairman of the CONTRACTING PARTIES ruled that the CONTRACTING PARTIES were acting properly within the provisions of paragraph 1 of Article XXV in adopting recommendations relating to the study of commodity problems. This ruling was upheld by a formal vote of the CONTRACTING PARTIES.²⁴ This ruling was reaffirmed in a Resolution of 17 November 1956 on “Particular Difficulties Connected with Trade in Primary Commodities” which included the statement that “... the CONTRACTING PARTIES, in conformity with the functions conferred upon them under paragraph 1 of Article XXV and as recognized in the ruling of the tenth session, are competent to deal, upon the request of one or more contracting parties, with special difficulties arising in connexion with international trade in primary commodities ...”.²⁵

(b) Investment

In a Resolution of 4 March 1955 on “International Investment for Economic Development”, the CONTRACTING PARTIES, *inter alia*,

“Recommend that the contracting parties who are in a position to provide capital for international investment and the contracting parties who desire to obtain such capital use their best endeavours to create conditions calculated to stimulate the international flow of capital having regard in particular, to the importance for this purpose of providing by appropriate methods for security for existing and future investment, the avoidance of double taxation, and facilities for the transfer of earnings upon foreign investments, and

“Urge that contracting parties upon the request of any contracting party enter into consultation or participate in negotiations directed to the conclusion of bilateral and multilateral agreements relating to these matters”.²⁶

During the Review Session of 1954-55 the CONTRACTING PARTIES considered a proposal to insert an article in the General Agreement on freedom of establishment.²⁷

On trade-related investment measures, see also the Ministerial Declaration of 1982²⁸, and the Ministerial Declaration on the Uruguay Round²⁹ and the 1984 Report of the Panel on “Canada - Administration of the Foreign Investment Review Act”.³⁰

²³C/M/264, p. 3. Such action was taken by the Committees on Customs Valuation (L/7324), Import Licensing (L/7313), Anti-Dumping Practices (ADP/M/41), and Technical Barriers to Trade (TBT/M/45).

²⁴SR.10/19, p. 218.

²⁵5S/26. See also material on commodity issues under Articles XVIII:5, XX(h), XXII:2, and XXXVII.

²⁶3S/49, 50.

²⁷L/327, adopted on 28 February, 5 and 7 March 1955, 3S/231, 243, para. 36.

²⁸L/5424, adopted on 29 November 1982, 29S/9ff.

²⁹33S/46.

³⁰L/5504, adopted on 7 February 1984, 30S/140, 141, para. 1.4 and 157, para. 5.1; see also C/M/162, p. 25-26.

(c) *Disposal of surpluses*

In a Resolution of 4 March 1955 on “Disposal of Surpluses”³¹ the CONTRACTING PARTIES, *inter alia*, “- Consider that when arranging the disposal of surplus agricultural products in world trade contracting parties should undertake a procedure of consultation with the principal suppliers of those products and other interested contracting parties, which would contribute to the orderly liquidation of such surpluses, including where practicable disposals designed to expand consumption of the products, and to the avoidance of prejudice to the interests of other contracting parties, and that they should give sympathetic consideration to the views expressed by other contracting parties in the course of such consultations.”

(d) *Liquidation of strategic stocks*

In a Resolution of 4 March 1955 on “Liquidation of Strategic Stocks”³² the CONTRACTING PARTIES recommended, *inter alia*:

“1. That, whenever practicable, any contracting party intending to liquidate a substantial quantity of such stocks should give at least forty-five days prior notice of such intention.

“2. That a contracting party, intending to liquidate and giving notice in accordance with paragraph 1, should consult fully with any contracting party which considers itself substantially interested and requests such consultations, with a view to avoiding or minimizing substantial injury to the economic interests of that contracting party and undue disruption of the markets for the product concerned and should give full and sympathetic consideration to the views expressed by such other interested contracting parties.”

(e) *Restrictive business practices*

At the Review Session of 1954-55, the CONTRACTING PARTIES considered and rejected a proposal to add to the General Agreement the provisions of Chapter V of the Havana Charter on cartels.³³ A 1958 Resolution by the CONTRACTING PARTIES on “Restrictive Business Practices”³⁴ appointed a Group of Experts. The 1960 Report of that Group of Experts to the CONTRACTING PARTIES on “Arrangements for Consultations” recommended that the CONTRACTING PARTIES should undertake to deal with restrictive business practices in international trade. The members of the Group agreed “that the CONTRACTING PARTIES should now be regarded as an appropriate and competent body to initiate action in this field ... and should encourage direct consultations between contracting parties with a view to the elimination of the harmful effects of particular restrictive practices”.³⁵ On 18 November 1960 the CONTRACTING PARTIES decided on arrangements for consultations concerning restrictive business practices.³⁶

The Report of the Working Party on the Accession of Poland notes: “It was pointed out in the Working Party that the Decision by the CONTRACTING PARTIES of 18 November 1960 on arrangements for consultations between contracting parties on restrictive business practices would automatically apply in the trade between Poland and other contracting parties”.³⁷

(f) *Market disruption*

In 1959, the United States drew attention to the fact that “sharp increases in imports, over a brief period of time and in a narrow range of commodities, could have serious economic, political and social repercussions in the importing countries. ... The problem was to find the means to alleviate the adverse effects of an abrupt invasion

³¹3S/50.

³²3S/51. See also material on this Resolution under Section III in Article XVII.

³³3S/239. See also the GATT publication *Restrictive Business Practices* (Sales No. GATT/1959-2), which includes a discussion of Chapter V of the Havana Charter, and later discussions in ECOSOC and in the early sessions of GATT. See also CG.18/W/44, Secretariat Note dated 10 October 1980, on “Restrictive Business Practices”.

³⁴Resolution of 5 November 1958, 7S/29.

³⁵L/1015, adopted on 2 June 1960, 9S/170, 171.

³⁶9S/28.

³⁷L/2806, adopted on 26 June 1967, 15S/109, 112, para. 17.

of established markets while continuing to provide steadily enlarged opportunities for trade".³⁸ The Report of a Working Party appointed in 1960 to consider the problems and to suggest solutions³⁹ was submitted to the seventeenth session containing the conclusion "that whether or not safeguards against situations of 'market disruption' were already available within the provisions of the General Agreement, there were political and psychological elements in the problem which rendered it doubtful whether such safeguards would be sufficient to lead some contracting parties which are dealing with these problems outside the framework of the General Agreement or in contravention of its provisions to abandon these exceptional methods at this time. In these circumstances the Working Party did not embark on interpretations of relevant provisions in the General Agreement".⁴⁰

(g) *Minimum price arrangements*

The following minimum price agreements have been reached in the framework of the General Agreement:

Arrangement Concerning Certain Dairy Products of 12 January 1970⁴¹, entered into force on 14 May 1970 and terminated on 11 May 1982;

Protocol Relating to Milk Fat of 2 April 1973⁴², entered into force on 14 May 1973 and terminated on 22 September 1980; and

International Dairy Arrangement of 12 April 1979⁴³, in force since 1 January 1980.

(h) *Taxation and trade*

In the Review Session of 1954-55, the CONTRACTING PARTIES considered a proposal to add to the General Agreement an article on double taxation.⁴⁴

In 1968, the Council, acting under paragraph 1 of Article XXV, established a Working Party to examine the provisions of the General Agreement relevant to border tax adjustments, the practices of contracting parties in relation to such adjustments and the possible effects of such adjustments on international trade.⁴⁵ During its meetings the Working Party examined the nature of direct and indirect taxes and their effects on international trade, and deliberated on standards for their adjustment at the border. See the 1971 Report of the Working Party on "Border Tax Adjustments".⁴⁶ Following the report, the Council introduced on a provisional basis a notification procedure and established a consultation procedure whereby, upon request, a multilateral consultation could take place on changes in tax adjustments. No such consultation has so far been requested.⁴⁷

(i) *Environmental measures and international trade*

On November 1971, the Council established a Group on Environmental Measures and International Trade to examine, upon request, any specific matters relevant to the trade policy aspects of measures to control pollution and protect human environment. The Group was re-activated in 1991 and met from then until early 1994.⁴⁸ Concerning the competence of the CONTRACTING PARTIES in the area of the environment, see the minutes of the

³⁸SR.15/17, p. 156; SR.16/8, p. 99.

³⁹SR.16/10, p. 147.

⁴⁰9S/106, para. 3.

⁴¹17S/5; see also references to this Arrangement under Article XXII:2.

⁴²20S/11.

⁴³26S/91.

⁴⁴3S/242.

⁴⁵C/M/46.

⁴⁶L/3464, adopted on 2 December 1970, 18S/97.

⁴⁷C/M/65.

⁴⁸L/3538, C/M/74. Documents generated by this Group appeared in the TRE series; documents of the Sub-Committee on Trade and Environment of the Preparatory Committee for the WTO appeared in the PC/SCTE series; and documents of the WTO Committee on Trade and Environment appear in the WT/CTE series. The Secretariat also issued derestricted accounts of discussions in the EMIT Group and the Sub-Committee in the TE series.

Council meeting of 8 October 1991 and the statement and proposal of the Chairman of the Council at the Forty-eighth Session in December 1992.⁴⁹

(j) *Government procurement*

The Agreement on Government Procurement of 12 April 1979 was concluded, *inter alia*, in recognition of “the need to establish an agreed international framework of rights and obligations with respect to laws, regulations, procedures and practices regarding government procurement with a view to achieving greater liberalization and expansion of world trade and improving the international framework for the conduct of world trade”.⁵⁰ A new Agreement on Government Procurement was negotiated and concluded on 15 April 1994, appears in Annex IV of the WTO Agreement, and will enter into force on 1 January 1996.

(k) *Services, including transport insurance*

In the Review Session of 1954-55, the CONTRACTING PARTIES considered proposals relating to discrimination in transport insurance⁵¹. A Recommendation by the CONTRACTING PARTIES of May 1959 on “Freedom of Contract in Transport Insurance”⁵² recognized that restrictive measures in regard to transport insurance were a matter that should be regarded as a subject of interest to the CONTRACTING PARTIES.

See the Ministerial Declaration of 1982⁵³ and the Ministerial Declaration on the Uruguay Round, which states that: “Negotiations in this area shall aim to establish a multilateral framework of principles and rules for trade in services, including elaboration of possible disciplines for individual sectors, with a view to expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting economic growth of all trading partners and the development of developing countries. Such framework shall respect the policy objectives of national laws and regulations applying services and shall take into account the work of relevant international organizations.”⁵⁴ A General Agreement on Trade in Services was negotiated in the Uruguay Round and constitutes Annex 1B of the WTO Agreement.

(5) Procedures

A discussion on procedures for decisions by the CONTRACTING PARTIES appears in the chapter herein on Institutions and Procedure.

2. Paragraph 2: “the first meeting of the CONTRACTING PARTIES”

The First Session of the CONTRACTING PARTIES was convened in Havana, Cuba during the Havana Conference, and met from 28 February through 23 March 1948.

3. Paragraph 4: “majority of the votes cast”

This phrase was used in order to permit postal voting by the CONTRACTING PARTIES.⁵⁵ A discussion of voting procedures and practices appears in the chapter on Institutions and Procedure.

⁴⁹C/M/252, SR.48/1 p. 12-16. See also C/M/247, C/M/248, C/M/250, C/M/260.

⁵⁰26S/33.

⁵¹3S/242-3.

⁵²Adopted on 27 May 1959, 8S/26.

⁵³L/5424, adopted on 29 November 1982, 29S/9ff.

⁵⁴33S/28.

⁵⁵EPCT/209, p.8, footnote; EPCT/TA/PV/25, pp. 11-12.

4. Paragraph 5

(1) Scope of the waiver power

At the First Session of the Preparatory Committee in London in October 1946, in Committee V on organizational arrangements, one delegation proposed that the waiver authority in the draft ITO Charter be extended to cover not just the commercial policy obligations, as originally proposed, but all Charter obligations. Queried concerning the purpose of this provision, the United States delegate stated,

“... it was the thought of the U.S. in drafting this section that members would take advantage of such escapes as exist in the rest of the charter first, and this was meant merely to cover cases which were exceptional and caused particular hardship to any particular member and were not covered by the other escapes provided in the charter. This is to cover cases which are not covered elsewhere.”⁵⁶

The discussion is summarized in the London Report:

“In discussing the powers of the Conference to suspend, in exceptional circumstances, obligations undertaken by members under the general commercial policy provisions, it was suggested that this power might be extended to cover all obligations under the Charter. It was stressed that the waiving of such obligations was intended to apply only in cases of an exceptional nature, involving hardship to a particular member, which were not covered by specific escape clauses. It was finally agreed that all the obligations undertaken by members, pursuant to the Charter, should come within the purview of this general provision.”⁵⁷

The Report of the Working Party in 1952 on “The European Coal and Steel Community” notes:

“... The Working Party considered ... whether it would be appropriate to grant a waiver under paragraph 5(a) of Article XXV, in order to permit the six countries to participate in the European Coal and Steel Community without violating their obligations under the General Agreement. The Working Party concluded ... that such action would be appropriate. The Working Party is of the view that the text of paragraph 5(a) of Article XXV is general in character; it allows the CONTRACTING PARTIES to waive any obligations imposed upon the contracting parties by the Agreement in exceptional circumstances not provided for in the Agreement, and places no limitations on the exercise of that right. ...

“The Working Party recognized, however, that it would be appropriate for the CONTRACTING PARTIES, before granting a waiver under paragraph 5(a) of Article XXV, to consider whether the objectives of the European Coal and Steel Community were consistent with those of the General Agreement. The Working Party examined the provisions of the Treaty which define the objectives of the European Coal and Steel Community and it appeared to the Working Party that those objectives were broadly consistent with the objectives of the General Agreement.”⁵⁸

The Report of the 1955 Review Working Party on “Schedules and Customs Administration” records the request by the representative of Cuba for a legal opinion as to whether the CONTRACTING PARTIES could grant, by the majority specified in paragraph 5(a) of Article XXV, a waiver from obligations which a contracting party had assumed under Part I of the Agreement. The Executive Secretary noted that this question had been addressed in the Working Party Report on the European Coal and Steel Community and gave his opinion that the CONTRACTING PARTIES could grant such a waiver by a two-thirds majority.⁵⁹ The considerations which had led the Executive Secretary to this interpretation were subsequently presented in a Secretariat note, which referred to the following arguments:

“In the absence of any other qualification the words ‘may waive an obligation’ [in Article XXV:5(a)] must refer to any obligation under the Agreement. If the drafters had intended this power to be limited to Parts II

⁵⁶EPCT/C.V/PV/9, p. 8; see also EPCT/C.V/25, p. 1-4.

⁵⁷London Report, p. 22, para. D.2 (also cited at 1S/86, para. 2).

⁵⁸G/35, adopted on 10 November 1952, 1S/85, 86, paras. 2-3.

⁵⁹L/329, adopted on 26 February 1955, 3S/205, 208-209, para. 6. See also discussion in W.9/114.

and III of the Agreement it would have been a simple matter to include such a qualification. This was not done.

“The phrase ‘Except where provision for modification is made elsewhere ...’ [in Article XXX:1] provides a clear exception for action taken under the provisions of Article XXV:5(a), for

- (i) if the waiver of an obligation in Part I is not considered to represent a ‘modification’ it can hardly be a change that would require the application of the amendment procedure; and
- (ii) if such a waiver is considered to be a ‘modification’, this phrase provides an explicit exception from the unanimity requirement for amendment for Part I. ...

“From the above analysis it appears -

- (a) that the CONTRACTING PARTIES intentionally made a distinction in the Agreement between an amendment and a waiver granted in exceptional circumstances;
- (b) that they made an effort to avoid the possibility of conflict between Article XXX and other Articles by writing an exception in Article XXX;
- (c) that they explicitly decided that the provisions of Article XXV:5(a) may be applied to any obligation under the Agreement; and
- (d) that they have, in many cases, granted waivers of obligations of Part I by less than a unanimous vote.”⁶⁰

At the Tenth Session in 1955, the representative of Cuba again put forward his Government’s objections to the granting of waivers from obligations under Part I of the General Agreement. The Intersessional Committee considered the matter on the basis, *inter alia*, of the Note cited above, and in its Report recommended that the CONTRACTING PARTIES “should affirm their intention to proceed with caution in considering requests for a waiver from obligations in Part I or from other important obligations of the Agreement, and to take appropriate measures to safeguard the interests of contracting parties”.⁶¹ See below for the Decision of 1 November 1956 adopted as a follow-up to this Report.

(2) Procedures

In recent years a request to the CONTRACTING PARTIES for a waiver has generally been followed by a Council decision as to whether to establish a working party. Except in those cases where consensus had been reached on the waiver text, a working party has been established; after examining the measures for which the waiver was sought (normally through a question and answer process) and the “exceptional circumstances” claimed, the working party has drafted its report and the terms of the waiver decision.⁶² The report has on occasion included additional material interpreting the terms and conditions attached to the waiver. The report and the draft text of the waiver decision have been adopted by the Council which then has recommended the adoption of the decision by the CONTRACTING PARTIES by a vote. The vote has taken place either at a Session or by postal or telegraphic ballot.

At the Eleventh Session, on 1 November 1956 the CONTRACTING PARTIES adopted a Decision on “Article XXV - Guiding Principles to be followed by the CONTRACTING PARTIES in considering applications for waivers from Part I or other important obligations of the Agreement”.⁶³ These procedures provide as follows:

⁶⁰L/403.

⁶¹L/532.

⁶²See, for example, the Report on “United States Caribbean Basin Economic Recovery Act”, L/5708, adopted on 6-8 and 20 November 1984, 31S/180.

⁶³5S/25.

“(a) Applications for waivers from Part I or other important obligations of the General Agreement should be considered only if submitted with at least thirty days’ notice. It is recognized, however, that in exceptional cases calling for urgent action this requirement may, by general agreement, be relaxed.

“(b) In the interval afforded by such notice, the applicant contracting party should give full consideration to representations made to it by other contracting parties and engage in full consultation with them.

“(c) The CONTRACTING PARTIES when examining an application should give careful consideration to any representations that such consultations had proved unsatisfactory, and in general should not grant an application in cases where they are not satisfied that the legitimate interests of other contracting parties are adequately safeguarded.

“(d) Any decision granting a waiver should include procedures for future consultation on specific action taken under the waiver, and, where appropriate, for arbitration by the CONTRACTING PARTIES

“(e) Any such decision should also provide for an annual report and, where appropriate, for an annual review of the operation of the waiver.”⁶⁴

During debate in the GATT Council and in a waiver working party on the United States request for a waiver for duty-free treatment provided under the US Caribbean Basin Economic Recovery Act of 1983, in spite of differences of view as to whether it was appropriate to employ the waiver procedure under Article XXV:5 (as opposed to other procedural approaches) to establish a preferential scheme such as this one, “it was acknowledged that a decision on whether to ask for a waiver ... could only be made by the United States. The United States therefore requested that the draft waiver ... be submitted to the CONTRACTING PARTIES for a vote”.⁶⁵

As for the role of a working party in examining a waiver request and drafting the waiver decision, the 1993 Report of the Working Party on “German Unification - Transitional Measures Adopted by the European Communities” provides as follows:

“... The Working Party noted that the established practice of the CONTRACTING PARTIES with respect to waiver working parties had been either to establish a working party to examine the waiver request and to draft the text of the waiver decision, or (when such an examination was deemed unnecessary or inappropriate) to make a decision without establishing any working party. The Working Party recalled that its establishment had been a departure from this practice; as a result its work had consisted essentially of increasing transparency, and its conclusions were necessarily limited. Some members of the Working Party regretted this departure and emphasised that they did not regard it as establishing a precedent.”⁶⁶

The 1993 Report of the Working Party on “United States Andean Trade Preference Act” also noted the view of members of the Working Party that “working party examination of the appropriateness of a waiver and its terms should take place prior to the granting of a waiver.”⁶⁷

In May 1993, in discussion of a waiver request, the Council approved the text of the draft decision directly without referring the request to a working party, and recommended its adoption by the CONTRACTING PARTIES by a vote by postal ballot. In this connection the Council Chairman noted that “the decision, when and if adopted by a vote by postal ballot, would be circulated as usual in an L/ series document ... Furthermore, the effective date of the Waiver Decision would be the date of its adoption. As representatives were aware, when voting by postal ballot, contracting parties were customarily given 30 days in which to cast their votes. Accordingly, the effective date of this decision would be the date at which the requisite majority was obtained, but not later than the

⁶⁴However, the following year the Working Party on “Consultations under Article XII:4(b)” examined the waivers of Article XV:6 which had been granted to Czechoslovakia and New Zealand, and “came to the conclusion that the nature of the subject-matter of these waivers being somewhat distinct from other matters covered by waivers, did not seem to require regular consultations”. The Working Party recommended that these waivers be amended so as to dispense with the annual consultation requirement. L/769, adopted on 30 November 1957, 6S/36, 38, paras. 8-10.

⁶⁵Working Party Report on “United States - Caribbean Basin Economic Recovery Act (CBERA),” L/5708, adopted on 6-8 and 20 November 1984, 31S/180, 197-198, para. 62; see also C/M/183, p. 58.

⁶⁶L/7119, adopted on 9-10 February 1993, para. 19.

⁶⁷L/7190, adopted on 24 March 1993, para. 11; see also *ibid.*, para. 29 and statements to the same effect at C/M/262 p. 2-5.

thirtieth day following the present Council meeting”.⁶⁸ Further concerning voting procedures, see the chapter on Institutions in this Index. See also the reference above at page 874 concerning the confirmation by the Chairman during the Second Session in 1948 that in the case of a waiver under Article XXV:5, a decision of the CONTRACTING PARTIES is sufficient, and a Protocol is not required.

(3) “*In exceptional circumstances*”

In 1970, Greece requested a waiver of its obligations under Article I for preferential tariff quotas granted to the USSR. The purpose of the tariff quotas was to offset the competitive disadvantage which imports of USSR products faced vis-a-vis imports of EEC products due to tariff reductions under the EEC-Greece Association Agreement, and thus to facilitate Greek exports to the USSR under a bilateral payments agreement. The Report of the Working Party on “Greece— Preferential Tariff Quotas to the USSR” notes that “it was considered that the Greek bilateral payments position with the USSR did not constitute ‘exceptional circumstances’ in the sense of Article XXV:5.”⁶⁹

“The Working Party, with the exception of one member, expressed serious concern over the action taken by Greece which had led it to request a waiver from its obligations under Article I. The members concerned considered that the question of principle and precedent was of utmost importance. While expressing sympathy for and understanding the difficulties encountered by Greece, they were not convinced that exceptional circumstances as required under Article XXV:5 existed and therefore were opposed to granting of a waiver. In their view, Greece should consider terminating the Special Protocol or extending the tariff concessions on a most-favoured-nation basis, at an early date.”⁷⁰

“A large majority of the members of the Working Party does not recommend that a waiver be granted as requested by the Government of Greece.”⁷¹

The Report of the Working Party on “United States Caribbean Basin Economic Recovery Act” notes, *inter alia*, the following views:

“Some members stated that in their view the exceptional circumstances referred to in paragraph 5 of Article XXV had not been established. A deviation from the m.f.n. principle on the basis of geographical and non-economic considerations had to be well justified. These members considered that compliance with the criteria specified in paragraph 3 of the Enabling Clause was *per se* not sufficient to warrant the granting of a waiver. One member noted that the CONTRACTING PARTIES had not defined what constituted the exceptional circumstances referred to in Article XXV:5 and that each contracting party would consider the question individually when deciding how to vote on the proposed waiver. The representative of the United States said that the exceptional circumstances justifying the waiver were basically economic and legal: (i) the economic recovery of the fragile economies of the region required trade policies aimed at achieving sustained investment and growth rates, and (ii) the CBERA established a programme not covered by the provisions of the Enabling Clause, though consistent with its objectives, which required a GATT framework.”⁷²

“The Working Party recognized that there are a number of different approaches within the GATT framework to the establishment of preferential schemes and that each case must be analysed on the basis of all the circumstances peculiar to it. Having considered these alternative approaches in this case, a number of members of the Working Party concluded that the waiver procedure under paragraph 5 of Article XXV was the most appropriate alternative with respect to the CBERA. However, others were of the view that this was not the case. Notwithstanding these differing views, it was acknowledged that a decision on whether to request a waiver for the CBERA could only be made by the United States. The United States therefore

⁶⁸C/M/263, p. 23.

⁶⁹L/3447, adopted on 2 December 1970, 18S/179, 181, para. 6.

⁷⁰*Ibid.*, 18S/183, para. 13.

⁷¹*Ibid.*, 18S/183, para. 16.

⁷²L/5708, adopted on 6-8 and 20 November 1984, 31S/180, para. 30.

requested that the draft waiver annexed to this report be submitted to the CONTRACTING PARTIES for a vote.”⁷³

The waiver requested by the United States was granted in a Decision of 15 February 1985.⁷⁴

(4) *Effect of waivers*

The 1962 Panel Report on the “Uruguayan Recourse to Article XXIII” includes the following footnote regarding “prima facie nullification or impairment”:

“It may be noted in this connexion that the status of a measure (that is, whether or not it is consistent with GATT) is not to be affected by a waiver decision taken subsequently. In fact, Decisions taken under Article XXV:5 granting waivers from GATT obligations have normally expressly provided for the continued validity of the procedures of Article XXIII in respect of the otherwise ‘waived’ obligations (cf. *inter alia* BISD, Third Supplement, pages 35-41; Eighth Supplement, page 22)”⁷⁵.

The 1990 Panel Report on “United States - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions”⁷⁶ examined quantitative restrictions on sugar-containing products, which it found were inconsistent with the obligations of the United States under Article XI:1 but in conformity with the terms of a decision of the CONTRACTING PARTIES waiving that obligation in accordance with Article XXV:5. The Panel found that

“Since both Article XI:1 and Article XXV:5 form part of the General Agreement, the imposition of the restrictions in conformity with the Waiver cannot constitute a ‘failure of [the United States] to carry out its obligations under this Agreement’ within the meaning of Article XXIII:1(a).

...

“... the fact that the restrictions found to be inconsistent with Article XI:1 conform to the terms of the Waiver does not prevent the EEC from bringing a complaint under Article XXIII:1(b) of the General Agreement but it is up to the EEC to demonstrate that a nullification or impairment of benefits accruing to it under the General Agreement has resulted from these restrictions.”⁷⁷

The same Panel Report also discusses arguments made by the parties concerning the significance of the Uruguayan Recourse footnote above. The Panel findings provide:

“The Panel ... examined the implication of the note in the report on the Uruguayan Recourse to Article XXIII, according to which ‘... the status of a measure (that is, whether or not it is inconsistent with GATT) is not affected by a waiver decision ...’. The Panel noted that the panel which submitted this report had examined import restrictions imposed by Germany and that Germany had obtained a waiver for the restrictions but nevertheless insisted that they were covered by the existing legislation clause in the protocol by which it acceded to the General Agreement (BISD 8S/31 and 10S/126). Against this background the footnote can be understood to suggest that a decision by the CONTRACTING PARTIES to waive an obligation for a particular measure does not constitute a ruling by the CONTRACTING PARTIES that the measure is inconsistent with the General Agreement and that, consequently, a contracting party having obtained a waiver for a particular measure is not barred from arguing in proceedings under Article XXIII:2 that the measure would be consistent with the General Agreement even in the absence of the waiver. The footnote therefore does not support the conclusion that a contracting party imposing a measure inconsistent with a particular provision of the General Agreement but covered by the terms of a decision waiving the obligations under that provision in accordance with Article XXV:5 nevertheless fails to carry out its obligations under the General Agreement within the meaning of Article XXIII:1(a). The footnote can in the view of the Panel however be taken as an indication of the fact that a measure inconsistent with a particular

⁷³*Ibid.*, 31S/197-198, para. 62.

⁷⁴L/5779, 31S/20.

⁷⁵L/1923, adopted on 16 November 1962, 11S/95, 100, footnote 1.

⁷⁶L/6631, adopted on 7 November 1990, 37S/228.

⁷⁷*Ibid.*, 37S/260-261, paras. 5.18, 5.20.

provision of the General Agreement remains inconsistent with that particular provision even if the CONTRACTING PARTIES authorized in accordance with Article XXV:5 in exceptional circumstances the maintenance of the measure subject to specified conditions.”⁷⁸

See also the material under Article XXIII on relationship with Article XXV:5.

(5) Notification, consultation and dispute settlement with respect to waivers

The 1956 Procedures for considering waivers referred to above at page 883 provide that “Any decision granting a waiver should include procedures for future consultation on specific action taken under the waiver, and, where appropriate, for arbitration by the CONTRACTING PARTIES. ...”⁷⁹ Some waiver decisions explicitly provide for the possibility of “recourse to the appropriate provisions of Article XXIII”.⁸⁰ Other waiver decisions include special provisions on consultation and dispute settlement which do not explicitly refer to Article XXIII.⁸¹ There have been some cases of invocation of such special dispute settlement procedures, for instance in connection with the waiver to the United Kingdom in connection with items traditionally admitted duty-free from countries of the Commonwealth.⁸²

See also under Article II on the December 1993 Decision of the Committee on Tariff Concessions regarding progress reports on implementation under waivers of Article II granted in connection with introduction of the Harmonized System. See also material under Article XXIII concerning the relationship between Article XXIII and Article XXV.

(6) Waivers granted under Article XXV:5

As of 1 January 1995, there had been 115 original waiver decisions by the CONTRACTING PARTIES, as well as many other waiver decisions extending or amending a prior waiver decision. A list of all waiver decisions appears at the end of this chapter.

There are two instances when a waiver was requested but not granted by the CONTRACTING PARTIES. One concerned a request in 1969 by the EEC for a waiver from its obligations under Article I in order to reduce the customs duties in respect of certain citrus fruit originating from Israel and Spain.⁸³ Another case concerned the request (referred to above) by Greece in 1970 for a waiver from Article I in connection with tariff preferences for certain manufactured products imported from the USSR within specific quota limits.⁸⁴

(7) Extension of a waiver under Article XXV:5

The 1993 Report of the Working Party on the “Andean Trade Preference Act” notes the view of the Working Party that “any extension of the ATPA to new beneficiary countries and to additional products would require a new waiver request”.⁸⁵

⁷⁸*Ibid.*, 37S/260-261, para. 5.19.

⁷⁹5S/25, adopted 1 November 1956, para. (d).

⁸⁰See, e.g., Waiver granted to the US in connection with import restrictions imposed under Section 22 of the US Agricultural Adjustment Act (of 1933) as amended, Decision of 5 March 1955, 3S/32, 35; Problems raised for contracting parties in eliminating import restrictions maintained during a period of balance-of-payments difficulties (“hard-core waiver decision”), Decision of 5 March 1955, 3S/38, 41; German Import Restrictions, Decision of 30 May 1959, 8S/31, 33; Caribbean Basin Economic Recovery Act, L/5779, Decision of 15 February 1985, 31S/20, 23.

⁸¹See, e.g., 7S/37, 39; 8S/29, 31; 10S/51, 53; 14S/37, 39.

⁸²Waiver at 2S/20, amended at 3S/25; see disputes brought by Germany regarding an increase in the margin of preference on ornamental pottery, IC/SR/44, SECRET/44; and brought by Brazil regarding margin of preference on bananas, C/M/9, L/1749, C/M/10, SR.20/2.

⁸³See 17S/61 and C/M/59 and 61.

⁸⁴See 18S/179 and C/M/63 and 65.

⁸⁵L/7190, adopted on 24 March 1993, para. 29; see also discussion at C/M/262, p. 2-5.

(8) Termination of a waiver under Article XXV:5

Concerning the possibility of modifying or terminating a waiver that does not contain an expiration date, the Panel Report on “United States - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions” includes the following finding:

“The Panel, while concluding that the United States had not acted in contradiction with the terms, conditions and procedures of the Waiver by imposing quantitative limitations on imports of sugar-containing products, considered that the CONTRACTING PARTIES, when they granted the Waiver in 1955, may not have expected that the United States would make use of Section 22 in the manner described in paragraphs 5.10 to 5.12 above nor that the United States would pursue a sugar policy of the kind currently pursued, given the assurances analysed in paragraphs 5.14 to 5.15 above. The power of the CONTRACTING PARTIES to grant waivers under Article XXV:5 implies the power to withdraw or modify the waivers granted. The questions of whether the United States uses Section 22 in a manner expected by the CONTRACTING PARTIES when they granted the Waiver and of whether it acts in accordance with the assurances in consideration of which the CONTRACTING PARTIES granted the Waiver may be relevant for a decision of the CONTRACTING PARTIES to withdraw or modify the Waiver. However, it is not the mandate of panels established under Article XXIII:2 to propose changes in GATT provisions, but to make findings regarding the interpretation and application of the existing provisions (cf. BISD 35S/241; L/6568, page 21), and the Panel therefore did not address the question of a withdrawal or modification of the Waiver.”⁸⁶

Termination of an existing waiver was also discussed in the 1984 Report of the Working Party on “US Import Restrictions on Agricultural Products”.⁸⁷

B. RELATIONSHIP BETWEEN ARTICLE XXV:5 AND OTHER GATT PROVISIONS

1. Article XXX

See the discussion at page 882 regarding the issue raised by Cuba in the Ninth and Tenth Sessions, regarding whether the granting of waivers with respect to obligations under Part I was inconsistent with the amendment provisions of Article XXX, which provide that amendments to the provisions of Part I may only become effective upon acceptance by all the contracting parties.

2. The “Enabling Clause”

The 1983 request by the USA for a waiver for the Caribbean Basin Economic Recovery Act (CBERA)⁸⁸ notes that “the United States’ request is made in accordance with footnote 2 of paragraph 2 of the Framework Agreement and paragraph 5 of Article XXV of the General Agreement”. In reply to a question, this reference to the 1979 GATT Decision on “Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries” was explained by the US as follows:

“The United States has interpreted ‘the GATT provisions for joint action’ in footnote 2 of paragraph 2 of the Enabling Clause as referring to provisions of the GATT, including the general waiver provision contained in paragraph 5 of Article XXV which deals with joint action by contracting parties. It was for this reason that the United States cited both footnote 2 of paragraph 2 of the Enabling Clause and paragraph 5 of Article XXV in its waiver request.”⁸⁹

During the meeting of the Working Party on the US Caribbean Basin Economic Recovery Act on 10 April 1984, the Legal Advisor to the Director-General pointed out in response to a request for clarification

⁸⁶L/6631, adopted on 7 November 1990, 37S/228, 259, para. 5.16.

⁸⁷L/5707, adopted on 6-8 and 20 November 1984, 31S/198, paras. 27ff.

⁸⁸L/5573, p. 1.

⁸⁹L/5620, p. 4.

“that the interpretation of GATT provisions was not within the competence of the Secretariat; only the CONTRACTING PARTIES could give legally valid interpretations. On that understanding he said that, although in his opinion the words ‘the GATT provisions for joint action’ in footnote 2 could be interpreted as referring to the provisions of Article XXV, paragraph 1, he had been assured that the drafters of the text had intended the phrase to refer to the waiver procedure in Article XXV, paragraph 5, as being appropriate to cover such special and differential treatment. He recalled, however, that the only agreement which had previously been notified with reference to the footnote, SPARTECA, had not been dealt with as a waiver case. He did not think that the footnote should be interpreted as referring to Article XXXVIII which did not contain any procedural provisions.”⁹⁰

The Report of the Working Party on “United States Caribbean Basin Economic Recovery Act” notes:

“At the request of the Working Party, the representative of the secretariat described the Secretariat’s understanding of the meaning of footnote 2 of paragraph 2 of the Enabling Clause. In brief, the Enabling Clause provided authority or cover only for the kinds of preferential treatment described therein. Footnote 2 of paragraph 2 of the Enabling Clause recognized that there could be other situations involving preferential treatment not falling within the scope of paragraph 2 which the CONTRACTING PARTIES might wish to cover under the GATT provisions for joint action. The provisions in question could not be those of Part IV, including Article XXXVIII thereof, as these did not provide authority for preferential treatment. The joint action envisaged had to be in terms of paragraph 5 of Article XXV irrespective of whether this was specifically mentioned or not.”⁹¹

The Report of the Working Party on the “Third ACP-EEC Convention of Lomé” records the response of the spokesman for the ACP States to the question of why the EC had not sought a waiver from Article XXV obligations for the Lomé Convention as the United States had done for the Caribbean Basin Initiative. The ACP spokesman stated that the Convention had been agreed on the basis of full equality between the ACP States and the EC and that all the parties believed that the Convention was in full conformity with the General Agreement including Part IV thereof.⁹²

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

Institutional provisions: The institutional provisions of the US Charter appear in Chapter VII; in the London Draft Charter in Chapter VIII; in the New York Draft Charter in Chapter VIII; in the Geneva Draft Charter in Chapter VII; and in the Havana Charter in Chapter VII. All Charter drafts except the Havana Charter included provision for a committee within the ITO which would be composed of Members having made effective the General Agreement. The concept of a body to administer the General Agreement appeared first in Annexure 10 of the London Report, on giving effect to certain provisions of the Charter by means of a General Agreement on Tariffs and Trade among the members of the Preparatory Committee. Annexure 10 noted that certain provisions of such an agreement required for their successful operation the existence of an international body, and proposed that a provisional international agency be created which would go out of existence upon establishment of the ITO.⁹³ The New York draft of the GATT provided for establishment of an Interim Trade Committee.⁹⁴ In discussions at Geneva the references were changed to “CONTRACTING PARTIES”: see page 874.⁹⁵ The organization created was nevertheless envisioned to be permanent in character. Although Article XXIX provides for suspension of Part II upon entry into force of the Havana Charter, Article XXV would not be thus suspended, and the CONTRACTING PARTIES were intended to have a continuing role in the oversight of Parts I and III.

⁹⁰Spec(84)23, p. 3.

⁹¹L/5708, adopted on 6-8 and 20 November 1984, 31S/180, 189-90, para.31.

⁹²L/6382, adopted on 22 September 1988, 35S/321, 327, para. 19.

⁹³London Report, p. 51.

⁹⁴New York Report p. 78 (New York draft GATT Art. XXII).

⁹⁵See EPCT/TAC/PV/11 (discussion regarding powers of the Committee), EPCT/TAC/PV/12 p. 2-5 (discussion and approval of change to “Contracting Parties”), EPCT/135 (draft of the General Agreement including this change), EPCT/209 (Legal and Drafting Committee Report on Part III of the General Agreement), EPCT/TAC/PV/25 p. 2-3, 12 (discussion and approval of change to CONTRACTING PARTIES, suggested in EPCT/209).

Waiver provisions: In the 1946 US Draft Charter, Article 55:2 provided for waiver authority, by two-thirds vote, for the obligations in Chapter IV of the Draft Charter (general commercial policy). Article 66(2) of the London Draft Charter provided for waiver authority for any obligation in the Charter. This provision was kept, with no substantive changes as to scope, as Article 66:2 of the New York Draft Charter. The New York draft of the General Agreement on Tariffs and Trade included an Article XXII on the functions and structure of the Interim Trade Committee, including a provision on waiver of any obligation by two-thirds vote.⁹⁶ The waiver provision was then reformulated in GATT Article XXV:5(a) and the parallel provisions of Article 74:3 of the Geneva Draft Charter, to provide that the exceptional circumstances in which a waiver may be granted are those “not elsewhere provided for” in GATT or the Charter.⁹⁷ An almost-identical text on waivers appears in Article 77:3 of the Havana Charter.

The text of Article XXV in the General Agreement as agreed on 30 October 1947 was identical to the present text. During the first session of the CONTRACTING PARTIES, which was held at the Havana Conference, it was agreed (in connection with changes in Articles XXXII, XXXIII and XXXV, described *infra* under Article XXXV) to add subparagraphs 5(b) through (d), which permitted the CONTRACTING PARTIES to authorize one contracting party to withhold the benefit of concessions in its Schedule from another contracting party determined to have “failed without sufficient justification to carry out with [the complaining] contracting party negotiations of the kind described in paragraph 1 of Article 17 of the Havana Charter”. If concessions referred were withheld, the contracting party subject to such withholding would then be free to withdraw from the General Agreement on sixty days’ notice. This provision would not apply as between any two contracting parties the Schedules of which contained concessions initially negotiated between them.⁹⁸ Paragraph 17:1 of the Havana Charter referred to “negotiations directed to the substantial reduction of the general levels of tariffs and other charges on imports and exports, and to the elimination of the preferences referred to in paragraph 2 of Article 16 [corresponding to GATT Article I:2] on a reciprocal and mutually advantageous basis”. At the Review Session in 1954-55 it was agreed to delete subparagraphs 5(b)-(d). This deletion was effected through the Protocol Amending the Preamble and Parts II and III of the General Agreement, which entered into force October 1957. The Report of the Review Working Party on “Schedules and Customs Administration” noted in this connection:

“The Working Party recommends the deletion of paragraphs 5(b), (c) and (d). During the six years that the provision of sub-paragraphs (b) and (c) had been applicable, no contracting party has had recourse to them and, with one exception, no member of the Working party supported their retention. The representative of Cuba opposed their deletion on the ground that they constitute a right which contracting parties have under the Agreement and this right should not be withdrawn and reserved the position of his government. As a consequential amendment the words ‘without prejudice to the provisions of paragraph 5(b) of Article XXV’ should be deleted from Article XXXV.”⁹⁹

⁹⁶See successive drafts of waiver provision at EPCT/C.6/65/Rev.2 p. 2-3, EPCT/C.6/79 p. 3, EPCT/C.6/85/Rev. 1 p. 34.

⁹⁷Geneva Report p. 48. For adoption by the Trade Agreements Committee see EPCT/TAC/SR/12 p. 1-2, EPCT/TAC/PV/19 p. 35; for adoption of later text in EPCT/209 p. 8, see EPCT/TAC/PV/25 p. 11.

⁹⁸Protocol Modifying Certain Provisions of the General Agreement on Tariffs and Trade, 24 March 1948.

⁹⁹L/329, adopted on 26 February 1955, 3S/205, 216, para. 25.

IV. RELEVANT DOCUMENTS*London*

Discussion: EPCT/C.V/PV/9 (waivers)
 Reports: EPCT/C.V/25, London Report p. 22 (waivers)

New York

Reports: EPCT/C.6/65/Rev.2,
 EPCT/C.6/79, EPCT/C.6/85/Rev.1

Geneva

Discussion: EPCT/TAC/SR/11,12
 EPCT/TAC/PV/12, 19, 21, 25
 Reports: EPCT/135, 189, 196, 209,
 214/Add.1/Rev.1
 Other: EPCT/W/272, 273, 274, 277, 285,
 312, 322, 330

Havana

Reports: E/CONF.2/45

CONTRACTING PARTIES

Discussion: GATT/CP.3/SR.37
 GATT/CP.5/SR.24
 GATT/CP.6/SR.20
 Reports: GATT/CP.5/9
 GATT/CP.6/35, 54
 GATT/CP/1, 32, 61
 L/35, L/39

Review Session

Discussion: SR.9/36, 38, 47
 Reports: W.9/114, 212, 215, 236
 Other: L/189, L/261/Add.1, L/273,
 L/276, L/292
 W.9/62, 93, 114, 179, 236

V. WAIVERS GRANTED BY THE CONTRACTING PARTIES UNDER ARTICLE XXV:5

Updated to 1 January 1995. Notes appear following the table. For those waivers which were still in effect on 1 January 1995, the "date of expiry" cell is shaded. In certain instances, measures covered by a waiver may also fall within the scope of a later decision of the CONTRACTING PARTIES, such as the Decision of 29 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries ("Enabling Clause").

N°	Contracting party	Title	Article(s) waived	Date of Decision	Type of Decision	Reference	Date of expiry	Reporting requirement/Remarks
(a) Waivers for measures of one contracting party								
1.	Argentina	Establishment of a new Schedule LXIV ("Harmonized System")	II	03.12.1992 19.07.1993 17.01.1994 21.07.1994 09.12.1994	Original decision Extension Extension Extension Extension	L/7150 L/7271 L/7381 L/7505 L/7592	30.06.1993 31.12.1993 30.06.1994 31.12.1994 30.06.1995	
2.	Australia (1)	Treatment of products of Papua New Guinea	I	24.10.1953 25.11.1955 13.11.1956 30.05.1959	Original decision Amendment decision Amendment decision Amendment decision	2S/18 4S/14 5S/34 8S/28	No time limit	Annual
3.	Australia	Base dates under Article I:4 (for products of Malawi and Zimbabwe only)	I	19.11.1960	Original decision	9S/46	No time limit	
4.	Australia	Tariff preference for less-developed countries	I	28.03.1966	Original decision	14S/23	No time limit	Annual
5.	Bangladesh	Establishment of a new Schedule LXX ("Harmonized System")	II	18.07.1988 24.07.1989 05.12.1989 16.07.1990 13.12.1990 01.07.1991 14.12.1991 20.07.1992 03.12.1992 19.07.1993 17.01.1994 21.07.1994 09.12.1994	Original decision Extension Extension Extension Extension Extension Extension Extension Extension Extension Extension Extension Extension	35S/348 L/6544 L/6616 L/6702 L/6790 L/6898 L/6951 L/7053 L/7142 L/7272 L/7382 L/7506 L/7593	30.06.1989 31.12.1989 30.06.1990 31.12.1990 30.06.1991 31.12.1991 30.06.1992 31.12.1992 30.06.1993 31.12.1993 30.06.1994 31.12.1994 30.06.1995	
6.	Belgium	Certain agricultural products (under "hard-core" waiver)	XI	03.12.1955	Original decision	4S/22	03.12.1960 and 31.12.1962	Annual
7.	Bolivia	Establishment of a new Schedule LXXXIV	II	03.12.1992 17.01.1994 21.07.1994 09.12.1994	Original decision Extension Extension Extension	L/7151 L/7383 L/7507 L/7594	31.12.1993 30.06.1994 31.12.1994 30.06.1995	

N°	Contracting party	Title	Article(s) waived	Date of Decision	Type of Decision	Reference	Date of expiry	Reporting requirement/Remarks
8.	Brazil	Withdrawal of certain concessions	II	07.08.1948 22.04.1949	Original decision Extension	GATT/CP/1, p. 29 GATT/CP/32, p. 19	15.12.1948 15.06.1949	
9.	Brazil	New customs tariff	II	16.11.1956 10.07.1958 29.05.1959 06.11.1959 03.06.1960 03.08.1960	Original decision Extension Extension Extension Extension Extension	5S/36 7S/129 8S/179 8S/179 9S/267 9S/267	12 months after new tariff enactment 31.07.1959 20.11.1959 04.06.1960 03.08.1960 02.09.1960	
10.	Brazil	New Schedule III	II	19.11.1960	Original decision	9S/36	01.05.1961	
11.	Brazil	Renegotiation of schedule revision	II	27.02.1967 29.02.1968 25.11.1968 19.05.1969 20.02.1970 19.11.1971 30.01.1973 01.02.1974 30.04.1974 26.11.1975 31.03.1977 17.04.1978	Original decision Extension Extension Extension Extension Extension Extension Extension Extension Extension New decision (susp. of Art. II) Extension Extension	15S/75 16S/19 16S/20 17S/23 17S/24 18S/28 20S/25 21S/24 21S/24 22S/10 24S/13 25S/10	29.02.1968 25th CP Sess. 30.03.1969 26th CP Sess. 27th CP Sess. 31.12.1972 31.12.1973 31.03.1974 30.04.1974 31.03.1977 31.03.1978 31.03.1979	
12.	Brazil	Establishment of a new Schedule III ("Harmonized System")	II	08.11.1988 05.12.1989 16.07.1990 07.12.1990 01.07.1991 04.12.1991 20.07.1992 03.12.1992 19.07.1993	Original decision Extension Extension Extension Extension Extension Extension Extension Extension	35S/17 36S/431 L/6703 L/6776 L/6874 L/6952 L/7054 L/7149 L/7273	30.12.1989 30.06.1990 31.12.1990 30.06.1991 31.12.1991 30.06.1992 31.12.1992 30.06.1993 31.12.1993	
13.	Canada	Delay in implementation of certain concessions in Geneva (1967) Protocol	II	25.07.1968	Original decision	16S/20	01.01.1969	
14.	Canada	CARIBCAN	I	26.11.1986	Original decision	L/6102, SR.42/4	15.06.1998	Annual

N°	Contracting party	Title	Article(s) waived	Date of Decision	Type of Decision	Reference	Date of expiry	Reporting requirement/Remarks
15.	Chile	Import surcharges	II	27.05.1959 18.11.1960 08.12.1961 13.11.1962 21.06.1963 15.03.1965	Original decision Extension Extension Extension Extension Extension	8S/29 9S/38 10S/43 11S/68 12S/52 13S/22	31.12.1960 31.12.1961 31.12.1962 31.12.1963 31.12.1964 31.12.1966	
16.	Chile	Renegotiation of schedule	II	31.12.1966 20.11.1967 25.11.1968 23.06.1969 20.02.1970	Decision on new schedule Extension Extension Extension Extension	15S/83 15S/85 16S/27 17S/25 17S/26	31.12.1967 25th CP Sess. 30.06.1969 26th CP Sess. 31.12.1970	
17.	Chile	Establishment of a new Schedule VII	II	05.12.1989 24.05.1991 04.12.1991 20.07.1992 03.12.1992 19.07.1993	Original decision Extension Extension Extension Extension Extension	L/6614 L/6857 L/6953 L/7055 L/7140 L/7399	30.04.1991 31.12.1991 30.06.1992 31.12.1992 30.06.1993 31.12.1993	
18.	Colombia	Establishment of a new schedule LXXVI ("Harmonized System")	II	13.12.1990 04.01.1991 20.07.1991 03.12.1992	Original decision Extension Extension Extension	L/6791 L/6954 L/7056 L/7146	31.12.1991 30.06.1992 31.12.1992 30.06.1993	
19.	Costa Rica	Establishment of a new Schedule LXXXV	II	26.01.1994	Original decision	L/7403	31.12.1994	
20.	Cuba	Import restrictions	XVIII	14.09.1948	Original decision	GATT/CP/1, p. 34	3rd CP Sess.	
21.	Cuba (2)	Negotiations under Article XXVIII:1	XXVIII	22.11.1951	Original decision	GATT/CP/130, p. 5	7th CP Sess.	Report on negotiations
22.	Cuba (3)	Import controls during renegotiation of Schedule IX	XI	30.11.1957	Original decision	6S/27	Until 30th day after negotiations concluded	
23.	Cuba	Provisions of Article XV:6	XV	07.08.1964	Original decision	13S/23	No time limit	No regular reporting
24.	Czech and Slovak Federal Republic	Renegotiation of Schedule X	II	04.12.1991	Original decision	L/6968	31.12.1992	
25.	Czech and Slovak Federal Republic	Provisions of Article XV:6	XV	05.03.1955 30.11.1957	Original decision Amendment	3S/43 6S/28	See endnote (4)	No regular reporting
26.	Egypt	Renegotiation of Schedule LXIII	II	13.08.1992 19.07.1993 17.01.1994 21.07.1994	Original decision Extension Extension Extension	L/7071 L/7231 L/7391 L/7517	30.06.1993 31.12.1993 30.06.1994 WTO entry into force	
27.	El Salvador	Establishment of a new Schedule LXXXVII	II	26.01.1994 09.12.1994	Original decision Extension	L/7404 L/7595	31.12.1994 30.06.1995	

N°	Contracting party	Title	Article(s) waived	Date of Decision	Type of Decision	Reference	Date of expiry	Reporting requirement/Remarks
28.	Finland	Adjustment of specific duties	II	03.03.1955	Original decision	3S/28	04.04.1955	
29.	France (5)	Customs union with Italy	XXIV	20.03.1948	Original decision	GATT/1/53 pp. 7-8	No time limit	
30.	France (6)	Trade with the Saar	I	22.11.1957	Original decision	6S/30	When EEC intra-trade is duty-free	Annual
31.	France (7)	French trading arrangements with Morocco	I	19.11.1960	Original decision	9S/39	No time limit	
32.	Germany (6)	Trade with the Saar	I	22.11.1957	Original decision	6S/30	When EEC intra-trade is duty-free	Annual
33.	Germany	Import restrictions	XI	30.05.1959	Original decision	8S/31	Nov. 1962	Annual
34.	Greece	Renegotiation of concessions	II	12.11.1959 02.06.1960	Original decision Extension	8S/51 9S/40	16th CP Sess. 17th CP Sess.	
35.	Guatemala	Establishment of a new Schedule LXXXVIII	II	26.01.1994 09.12.1994	Original decision Extension	L7/405 L7/596	31.12.1994 30.06.1995	
36.	Haiti	Extension of time limit for submission of statement under Article XVIII:12	XVIII	21.03.1950	Original decision	GATT/CP/61, p. 5	27.11.1950	
37.	Hungary	Establishment of a new schedule LXXI ("Harmonized System")	II	07.12.1990 04.12.1991 20.07.1992 03.12.1992	Original decision Extension Extension Extension	L/6777 L/6955 L/7057 L/7148	31.12.1991 30.06.1992 31.12.1992 30.06.1993	
38.	India	Regulatory duty	II	18.04.1972 29.07.1972	Original decision New decision	19S/7 19S/7	30.06.1972 15.05.1973	
39.	India	Auxiliary duty of customs	II	15.11.1973 30.04.1974 05.05.1974 30.07.1976 31.08.1977 28.06.1978 30.04.1979 30.04.1980 13.04.1981 03.05.1982 11.04.1983 16.04.1984 03.06.1985	Original decision Extension Extension Extension Extension Extension Extension Extension Extension Extension Extension Extension Extension	20S/26 21S/25 22S/12 23S/6 24S/14 25S/11 26S/226 27S/11 28S/19 29S/25 30S/9 31S/18 32S/16	31.03.1974 31.03.1975 30.06.1976 30.06.1977 31.03.1978 31.03.1979 31.03.1980 31.03.1981 31.03.1982 31.03.1983 31.03.1984 31.03.1985 31.03.1986	
40.	India	Renegotiation of Schedule XII	II	16.03.1973 31.03.1974 30.03.1976	Original decision Extension New decision	20S/26 21S/26 23S/17	30.06.1974 30th CP Sess. 31.12.1977	
41.	Indonesia	Renegotiation of Schedule	II	10.04.1961 25.07.1961	Original decision Amendment	10S/43 10S/45	09.12.1961 09.12.1961	Annual

N°	Contracting party	Title	Article(s) waived	Date of Decision	Type of Decision	Reference	Date of expiry	Reporting requirement/ Remarks
42.	Indonesia	Provisions of Article XVI.6	XV	28.02.1966	Original decision	14S/33	See endnote (8)	No regular reporting
43.	Indonesia	Renegotiation of Schedule XXI	II	13.11.1973 26.11.1975	Original decision Extension	20S/28 22S/13	31.12.1975 31.12.1976	
44.	Indonesia	Establishment of a new Schedule XXI	II	22.11.1976 29.11.1977 27.11.1978 29.02.1980 25.11.1980 24.11.1981 22.04.1988 08.11.1988 13.11.1989 16.07.1990	New decision Extension Extension Extension Extension Extension Extension Extension Extension Extension	23S/9 24S/15 25S/12 27S/12 27S/13 28S/20 35S/347 35S/18 36S/431 L/6704	31.12.1977 31.12.1978 31.12.1979 31.12.1980 31.12.1981 31.12.1982 31.12.1988 31.10.1989 30.06.1990 31.12.1990	Regular reporting
45.	Israel	Establishment of a new Schedule XLII ("Harmonized System")	II	03.12.1987 18.07.1988 08.11.1988 16.07.1990 07.12.1990 01.07.1991 04.12.1991 20.07.1992 03.12.1992 19.07.1993 17.01.1994 21.07.1994 09.12.1994	Original decision Extension Extension Extension Extension Extension Extension Extension Extension Extension Extension Extension Extension	34S/29 35S/349 35S/19 L/6705 L/6778 L/6897 L/6956 L/7058 L/7136 L/7275 L/7384 L/7508 L/7597	30.06.1988 31.12.1988 30.06.1989 31.12.1990 30.06.1991 31.12.1991 30.06.1988 31.12.1992 30.06.1993 31.12.1993 30.06.1994 31.12.1994 30.06.1995	
46.	Italy	Measures notified under Article XVIII.11	XVIII	13.08.1949	Original decision	GATT/CP/32, p. 23	12.1950 (9)	
47.	Italy	Imports from Libya	I	26.10.1951 09.10.1952 17.11.1954 25.11.1955 20.11.1958 16.11.1961 25.01.1965 21.11.1967	Original decision Extension Amendment Extension Extension Extension Extension Extension	II/10 1S/14 3S/21 4S/16 7S/34 10S/45 13S/24 15S/85	30.09.1952 31.12.1955 31.12.1958 31.12.1961 31.12.1964 31.12.1967 31.12.1969	Annual

N°	Contracting party	Title	Article(s) waived	Date of Decision	Type of Decision	Reference	Date of expiry	Reporting requirement/ Remarks
48.	Italy	Imports from Somalia	I	19.11.1960 01.04.1966 21.11.1967	Original decision Extension Extension	9S/40 14S/34 15S/87	31.12.1965 31.12.1967 30.06.1968 and 31.12.1969 28.02.1970 31.12.1970	
49.	Jamaica	Margins of preference	I	02.03.1971	Original decision	18S/33	No time limit	
50.	Jamaica	Establishment of new Schedule LXVI	II	20.08.1993 21.07.1994 09.12.1994	Original decision Extension Extension	L7/291 L7/509 L7/598	31.07.1994 31.12.1994 30.07.1995	
51.	Luxembourg (10)	Import restrictions on certain agricultural products	XI	03.12.1956	Original decision	4S/27	To be reviewed in 1960	Annual
52.	Malawi (11)	Base dates under Article I:4	I	19.11.1960	Original decision	9S/46	No time limit	
53.	Malawi	Renegotiation of schedule	I II	20.11.1967 19.11.1968	Original decision Extension	15S/89 16S/27	31.12.1968 30.06.1969	
54.	Malawi	Renegotiation of Schedule LVIII	II	03.12.1992 17.01.1994 21.07.1994 09.12.1994	Original decision Extension Extension Extension	L7/152 L7/392 L7/518 L7/589	31.12.1993 30.06.1994 31.12.1994 30.06.1995	
55.	Malaysia	Establishment of a new Schedule XXXIX ("Harmonized System")	II	03.12.1987 18.07.1988 08.11.1988 24.07.1989 05.12.1989 16.07.1990 13.12.1990 01.07.1991 04.12.1991 20.07.1992 03.12.1992	Original decision Extension Extension Extension Extension Extension Extension Extension Extension Extension Extension Extension	34S/30 35S/350 35S/20 36S/431 36S/431 L/6706 L/6789 L/6875 L/6957 L/7059 L/7143	30.06.1988 31.12.1988 30.06.1989 31.12.1989 30.06.1990 31.12.1990 30.06.1991 31.12.1991 30.06.1992 31.12.1992 30.06.1993	

N°	Contracting party	Title	Article(s) waived	Date of Decision	Type of Decision	Reference	Date of expiry	Reporting requirement/Remarks
56.	Mexico	Establishment of a new Schedule LXXVII ("Harmonised System")	II	18.07.1988 08.11.1988 24.07.1989 05.12.1989 16.07.1990 07.12.1990 01.07.1991 04.12.1991 20.07.1992 03.12.1992 19.07.1993 17.01.1994 21.07.1994	Original decision Extension Extension Extension Extension Extension Extension Extension Extension Extension Extension Extension Extension	35S/351 35S/21 36S/431 36S/431 L/6707 L/6779 L/6876 L/6958 L/7060 L/7152 L/7276 L/7385 L/7510	31.12.1988 01.07.1989 31.12.1989 30.06.1990 31.12.1990 30.06.1991 31.12.1991 30.06.1992 31.12.1992 30.06.1992 31.12.1993 30.06.1994 31.12.1994	
57.	Morocco	Establishment of a new Schedule LXXXI	II	08.11.1988	Original decision	35S/21	30.06.1989	
58.	Morocco	Establishment of a new Schedule LXXXI	II	20.07.1992 19.07.1993 17.01.1994 21.07.1994 09.12.1994	Original decision Extension Extension Extension Extension	L/7068 L/7277 L/7386 L/7511 L/7599	30.06.1993 31.12.1993 30.06.1994 31.12.1994 30.06.1995	
59.	Netherlands	Waiver of requirements regarding dates in Article XVIII:6	XVIII	14.09.1948	Original decision	GATT/CP1, p. 33	See table endnote (12)	
60.	New Zealand (13)	Provisions of Article XVI:6	XV	20.01.1955 30.11.1957	Original decision Amendment	3S/42 6S/32	See endnote (14)	No regular reporting
61.	New Zealand	Renegotiations of Schedule XIII	II	30.11.1957 10.11.1958 04.06.1960 18.11.1960 06.12.1961 31.10.1962 31.01.1964	Original decision Extension New decision Extension Extension Extension Extension	6S/34 7S/36 9S/42 9S/44 10S/46 11S/69 12S/53	Nov. 1958 (end, 13th CP Sess.) Nov. 1959 (end, 15th CP Sess.) 31.12.1960 31.12.1961 31.12.1962 31.12.1963 31.12.1964	
62.	New Zealand (15)	Tariff-free quotas for handicrafts from South Pacific Islands	I	13.11.1973	Original decision	20S/30	31.12.1976	Annual
63.	Nicaragua (16)	Temporary increase in import duties	II	20.11.1959 09.11.1962	Original decision Extension	8S/52 11S/70	30.06.1962 30.11.1963	Annual
64.	Nicaragua (17)	Increase in rates of duty specified in Schedule XXIX	II	23.11.1961 17.03.1965	Original decision Extension	10S/48 13S/26	22.11.1964 23.11.1967	
65.	Nicaragua	Establishment of a new Schedule XXIX	II	26.01.1994 09.12.1994	Original decision Extension	L/7406 L/7600	31.12.1994 30.06.1995	

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N°	Contracting party	Title	Article(s) waived	Date of Decision	Type of Decision	Reference	Date of expiry	Reporting requirement/ Remarks
72.	Philippines	Establishment of a new Schedule LXXV ("Harmonized System")	II	13.03.1989 05.12.1989 16.07.1990 13.12.1990 01.07.1991 04.12.1991 20.07.1992	Original decision Extension Extension Extension Extension Extension Extension	36S/431 L/6613 L/6709 L/6788 L/6878 L/6960 L/7062	31.12.1989 30.06.1990 31.12.1990 30.06.1991 31.12.1991 30.06.1992 31.12.1992	
73.	Romania	Renegotiation of Schedule LXIX	II	04.12.1991	Original decision	L/6967	31.12.1992	
74.	Senegal	Establishment of a new schedule XLIX	II	07.12.1990 04.12.1991 20.07.1992 03.12.1992 19.07.1993 17.01.1994 21.07.1994 09.12.1994	Original decision Extension Extension Extension Extension Extension Extension Extension	L/6784 L/6963 L/7063 L/7141 L/7282 L/7393 L/7519 L/7590	31.12.1991 30.06.1992 31.12.1992 30.06.1993 31.12.1993 30.06.1994 31.12.1994 30.06.1995	
75.	South Africa (18)	Base dates under Article I:4	I	19.11.1960	Original decision	9S/46	No time limit	
76.	South Africa	Treatment of Rhodesia and Nyasaland products	I	04.06.1960	Original decision	9S/51	30.06.1965	Annual
77.	Sri Lanka (Ceylon)	Release under Article XVIII:8	XVIII	13.08.1949	Original decision	II/26	4th CP Sess.	
78.	Sri Lanka (Ceylon) (19)	Temporary duty increases; increase in margins of preference	II, I	10.04.1961 15.11.1962 25.03.1965 06.04.1966 21.01.1967 25.11.1968 21.05.1971	Original decision New decision Extension Extension New decision Decision Extension	10S/35 11S/60 13S/21 14S/31 15S/76 16S/22 18S/29	31.12.1962 31.12.1964 31.12.1966 31.12.1966 31.12.1968 31.12.1970 31.12.1971	Annual
79.	Sri Lanka	Establishment of a new Schedule VI ("Harmonized System")	II	08.11.1988 24.07.1989 05.12.1989 16.07.1990 07.12.1990 01.07.1991 04.12.1991 20.07.1992 03.12.1993 19.07.1993 17.01.1994 21.07.1994 09.12.1994	Original decision Extension Extension Extension Extension Extension Extension Extension Extension Extension Extension Extension Extension	35S/22 36S/431 36S/431 L/6710 L/6781 L/6879 L/6961 L/7064 L/7138 L/7279 L/7389 L/7514 L/7602	30.06.1989 29.12.1989 30.06.1990 31.12.1990 30.06.1991 31.12.1991 30.06.1992 31.12.1992 30.06.1993 31.12.1993 30.06.1994 31.12.1994 30.06.1995	

N°	Contracting party	Title	Article(s) waived	Date of Decision	Type of Decision	Reference	Date of expiry	Reporting requirement/Remarks
80.	Trinidad and Tobago	Establishment of a new Schedule LXVII	II	20.8.1993 21.07.1994 09.12.1994	Original decision Extension Extension	L/7399 L/7515 L/7603	31.07.1994 31.12.1994 30.06.1995	
81.	Thailand	Establishment of a new Schedule LXXIX	II	03.12.1987	Original decision	34S/31	30.06.1988	
82.	Tunisia	Temporary suspension of bound duties	II	17.01.1994	Original decision	L/7380	31.12.1996	
83.	Turkey	Renegotiation of Schedule XXXVII	II	19.11.1960 19.05.1961	Original decision Extension	9S/49 10S/51	18th CP Sess. 19th CP Sess.	
84.	Turkey	Renegotiation of Schedule XXXVII	II	22.08.1964 01.04.1966	Original decision Extension	13S/29 14S/36	31.10.1965 30.09.1966	
85.	Turkey	Stamp duty	II	20.07.1963 11.11.1967 24.08.1969 30.01.1973 03.07.1973 15.05.1975 17.04.1978 27.11.1979 24.11.1981 21.11.1983 26.11.1985 09.11.1987 05.12.1988 04.11.1991	Original decision Amendments to extension Amendment Extension Extension Extension Extension Extension Extension Extension Extension Extension Extension Extension Extension	12S/55 15S/90 17S/28 20S/31 20S/32 22S/13 25S/12 26S/228 28S/22 30S/11 32S/18 34S/35 36S/433 L/6964	31.12.1967 31.12.1972 - 31.05.1973 30.06.1975 31.12.1977 31.12.1979 31.12.1981 31.12.1983 31.12.1985 31.12.1987 31.12.1989 31.12.1991 31.12.1992	Annual. Stamp duty terminated; see L/7072
86.	Turkey	Establishment of a new Schedule XXXVII ('Harmonized System')	II	08.11.1988 05.12.1989 07.12.1990 01.07.1991 04.12.1991 20.07.1992 03.12.1992	Original decision Extension Extension Extension Extension Extension Extension	35S/24 L/6623 L/6782 L/6881 L/6962 L/7065 L/7135	31.12.1989 31.12.1990 30.06.1990 31.12.1991 30.06.1992 31.12.1992 30.06.1993	
87.	United Kingdom	Waiver of date requirements in Article XVIII/a with respect to restrictions on imports of tea into Mauritius and on imports of filled soap into Northern Rhodesia in force on 1 September 1947	XVIII	14.09.1948	Original decision	GATT/GP/1, p. 33	See endnote (20)	
88.	United Kingdom	Increase in margins of preference for items traditionally imported duty-free from Commonwealth	I	24.10.1953 05.03.1955	Original decision Amendment	2S/20 3S/25	No time limit	Annual. Special dispute settlement procedure.
89.	United Kingdom	Special problems of dependent overseas territories: increase in margins of preference etc.	I, VI, XVI, XIX	05.03.1955	Original decision	3S/21	No time limit	Annual. Special dispute settlement procedure.

N°	Contracting party	Title	Article(s) waived	Date of Decision	Type of Decision	Reference	Date of expiry	Reporting requirement/Remarks
90.	United States	Trust territory of Pacific Islands	I	08.09.1948	Original decision	II/9	No time limit	
91.	United States	Temporary modification of a concession on potatoes	II	03.04.1950	Original decision	GATT/CP/61, p. 10	15.09.1951	
92.	United States	Section 22 of Agricultural Adjustment Act	II, XI	05.03.1955	Original decision	3S/32	No time limit	Annual
93.	United States	Imports of automotive products	I	20.12.1965	Original decision	14S/37	No time limit	Annual
94.	United States	Tariff classification	II	20.07.1963 20.06.1964 30.06.1965 01.12.1965	Original decision Extension Extension Amendment	12S/57 13S/30 14S/43 14S/43	30.06.1964 30.06.1965 30.06.1966	
95.	United States	Caribbean Basin Economic Recovery Act	I	15.02.1985	Original decision	31S/20	30.09.1995	Annual
96.	United States	Andean Trade Preference Act	I	19.05.1992	Original decision	L/6991	04.12.2001	
97.	Uruguay	Import surcharges	II	08.05.1961 18.03.1964 23.03.1965 14.12.1965 17.11.1967 26.07.1968 20.02.1970 28.08.1970 10.08.1971 19.11.1971 15.07.1972	Original decision Extension Extension Extension Extension Extension Extension Extension Extension Extension	10S/51 12S/59 13S/31 14S/44 15S/93 16S/28 17S/31 18S/34 18S/35 18S/36 19S/8	01.07.1963 31.03.1965 31.12.1965 24th CP Session 30.06.1968 End of last CP Session in 1969 01.08.1970 30.06.1971 27th CP Session 31.05.1972 30.09.1972	Annual

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N°	Contracting party	Title	Article(s) waived	Date of Decision	Type of Decision	Reference	Date of expiry	Reporting requirement/Remarks
103.	Zimbabwe (21)	Customs tariff and agreements with South Africa and Australia	I	03.12.1955 13.11.1956 20.11.1958 29.05.1959	Original decision Resolution Extension Extension	4S/17 5S/39 7S/40 L/1012	01.07.1958 - 01.07.1959 01.07.1960	
104.	Zimbabwe (22)	Customs treatment for products of United Kingdom territories	I	19.12.1960	Original decision	9S/47	No time limit	Annual
105.	Zimbabwe (23)	Base dates under Article I:4	I	19.11.1960	Original decision	9S/46	No time limit	
(b) Waivers for measures of more than one contracting party								
106.	Lebanon and Syria	Measures notified under Article XVIII:11	XVIII	10.08.1949	Original decision	GATT/CP/32, p. 10	21.03.1950	
107.	Cuba; France; Haiti	Negotiations under Article XXVIII:1 - extension of deadline for completion of negotiations by each at Torquay	XXVIII	03.04.1951	Original decision	GATT/CP/130, pp. 3-4	01.07.1951	Report on negotiations
108.	All contracting parties (24)	Extension of time limit in Article XX:II	XX	30.11.1950 22.10.1951	Original decision Extension	GATT/CP/94, p.5 II/28	01.01.1952 01.01.1954	
109.	Members of the European Coal and Steel Community	Coal and steel products	I	10.11.1952	Original decision	1S/17	10.02.1958	Annual
110.	All contracting parties which had maintained import restrictions for balance-of-payments reasons	"Hard core" waiver	XI	05.03.1955 01.11.1957 05.11.1958 19.11.1959 19.11.1960 08.12.1961	Original decision Extension Extension Extension Extension Extension	3S/38 6S/32 7S/33 8S/27 9S/35 10S/35	31.12.1957 31.12.1958 31.12.1959 31.12.1960 31.12.1961 31.12.1962	
111.	European Communities	Transitional measures to take account of the external economic impact of German Unification	I	13.12.1990 14.06.1993	Original decision Extension	L/6792, 37S/296 L/7246	31.12.1992 31.12.1993	Report on use of waiver
112.	European Communities	Transitional measures to take account of the external economic impact of German Unification	I	09.12.1994	Original decision (different scope than previous waiver)	L/7605	31.12.1995	Reports on use of waiver
113.	European Communities	Fourth ACP-EEC Convention of Lomé	I:1	09.12.1994	Original decision	L/7604	29.02.2000	Annual report on implementation of preferential treatment
114.	All developed contracting parties (25)	Generalized system of preferences	I	25.06.1971	Original decision	18S/24	25.06.1981	
115.	Participants in the "Protocol relating to Trade Negotiations among Developing Countries" (26)	Trade negotiations among developing countries	I	26.11.1971	Original decision	18S/26	No time limit	Annual

NOTES:

1. These tariff preferences are now granted within the framework of the Papua New Guinea/Australia Trade and Commercial Relations Agreement, which entered into force on 1 February 1977 and was notified under Article XXIV (L/5138).
2. Article XXVIII:1, as amended by paragraph 6 of the Torquay Protocol, did not permit modification or withdrawal of concessions prior to 1 January 1954; this waiver permitted earlier renegotiation.
3. Renegotiation under Article XXVIII (conversion of nomenclature) was notified in 1958 (SECRET/101, Rev.1 and Add.1-2). Cuba completed renegotiation of Part I of its Schedule IX in connection with its conversion to HS nomenclature: renegotiation of Part II of Schedule IX has not yet been completed.
4. The Czech and Slovak Republic ceased to exist on 31 December 1993.
5. France was granted a waiver from the provisions of Article XXIV:5 in order to permit France to enter a customs union with Italy, which was not a contracting party. At the time of the waiver, Article XXIV did not include the changes made at Havana: see Section III in the chapter on Article XXIV.
6. Waiver was granted to France and Germany for special treatment applied in their trade relations with the Saar, and expired when EEC intra-trade became duty-free in 1970 (C/M60).
7. Waiver applies to those products not covered by the Cooperation Agreement between the EEC and Morocco (Exchange of letters attached to Final Act, L/4381).
8. Waiver was required because Indonesia ceased to be a member of the IMF; however, Indonesia resumed IMF membership in 1967. See Article XV:6 in this Index.
9. The waiver in question permitted retention of import restrictions notified by Italy under Article XVIII:11 (as amended in 1948) pending a decision by the CONTRACTING PARTIES under Article XVIII:12. The notification was withdrawn by Italy in late 1950: see GATT/CP.5/SR.23 p. 3, GATT/CP.5/29.
10. Luxembourg liberalized all products covered by the waiver as from 1 May 1970 (L/3452).
11. The waiver from the base dates under Article I:4, which was granted to the Federation of Rhodesia and Nyasaland, is now applicable to Malawi: Malawi acceded to the GATT under Article XXVI:5(c) and thereby committed itself to the tariff concessions specified in Schedule XVI - Federation of Rhodesia and Nyasaland, which constituted from that time Schedule LVIII - Malawi.
12. Article XVIII:6 in the 30 October 1947 text of the General Agreement (prior to the replacement of Article XVIII which took place in 1949) permitted retention of any non-discriminatory measure if it affected unbound items only and had been in force as of 1 September 1947, and if the contracting party had by 10 October 1947 notified the products to which the measure applied as well as its nature and purpose, and if it had notified the measure to the CONTRACTING PARTIES within sixty days after it had become a contracting party. The decisions of 14 September 1948 granted waivers to the UK and the Netherlands in respect of the dates of notification and operation: see GATT/CP.2/38, GATT/CP.2/SR.25. This provision of Article XVIII became paragraph 11 in the text as amended in 1948, and was eliminated when Article XVIII was revised in the 1954 Review Session.
13. Waiver was required because New Zealand was neither a member of the IMF nor had entered into a special exchange agreement. New Zealand became a member of the IMF in 1961; see material under Article XV:6 in this Index.
14. Waiver was required when New Zealand was not a member of the IMF. New Zealand became a member of the Fund effective 31 August 1961. See under Article XV:6 in this book.
15. Waiver has expired and products concerned have been included in New Zealand's GSP scheme (L/4444 and L/4366).
16. The temporary duty increase was terminated for all but two items, in the process of alignment of external customs duties under the Central American Economic Integration (L/2256).
17. The renegotiations required as a consequence of the tariff changes were not carried out.
18. The waiver from the base dates under Article I:4, granted to Australia and South Africa, applied only in respect of imports from the Federation of Rhodesia and Nyasaland.
19. Prior to the Decision of 25 November 1968, the waiver included temporary duty increases inconsistent with Article II. As some of these changes resulted in margins of preference higher than those existing on 10 April 1947, the scope of the waiver was increased to include Article I:4.
20. See note above concerning Netherlands waiver of 14 September 1948.
21. The waiver decision of 20 November 1958 permitted extension of preferences granted in the original decision to the Portuguese territories of Mozambique and Angola.
22. It is not clear whether the Government of Zimbabwe continues to grant tariff preferences for these products.
23. This waiver, granted to the Federation of Rhodesia and Nyasaland covered all imports specified in the Decision of 1 July 1955, which introduced new tariff levels.

24. The original text of Part II of Article XX, a group of three transitional exceptions intended for the immediate postwar period, permitted maintenance of measures inconsistent with other provisions of the General Agreement, until such time as the conditions giving rise to them had ceased, and not later than 1 January 1951. The waiver extended the time limit contained in this provision of the Article. See Section III under Article XX and the discussion in that chapter of Article XX(j).
25. The "GSP Waiver" expired on 25 June 1981, but was not renewed in view of the 1979 Enabling Clause decision: see under Article I in this Index.
26. The most recent annual report of the Committee of Participating Countries under this Protocol (L/7106) states: "The Protocol is applied under the provisions of the Enabling Clause, and in particular under the terms of its paragraph 2(c)." See discussion of this Protocol under Article I in this Index.

ARTICLE XXVI

ACCEPTANCE, ENTRY INTO FORCE AND REGISTRATION

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I. TEXT OF ARTICLE XXVI AND ANNEX H

Article XXVI

Acceptance, Entry into Force and Registration

1. The date of this Agreement shall be 30 October 1947.
2. This Agreement shall be open for acceptance by any contracting party which, on 1 March 1955, was a contracting party or was negotiating with a view to accession to this Agreement.

3. This Agreement, done in a single English original and a single French original, both texts authentic, shall be deposited with the Secretary-General of the United Nations, who shall furnish certified copies thereof to all interested governments.

4. Each government accepting this Agreement shall deposit an instrument of acceptance with the Executive Secretary to the CONTRACTING PARTIES, who will inform all interested governments of the date of deposit of each instrument of acceptance and of the day on which this Agreement enters into force under paragraph 6 of this Article.

5. (a) Each government accepting this Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility, except such separate customs territories as it shall notify to the Executive Secretary to the CONTRACTING PARTIES at the time of its own acceptance.

(b) Any government, which has so notified the Executive Secretary under the exceptions in subparagraph (a) of this paragraph, may at any time give notice to the Executive Secretary that its acceptance shall be effective in respect of any separate customs territory or territories so excepted and such notice shall take effect on the thirtieth day following the day on which it is received by the Executive Secretary.

(c) If any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party.

6. This Agreement shall enter into force, as among the governments which have accepted it, on the thirtieth day following the day on which instruments of acceptance have been deposited with the Executive Secretary to the CONTRACTING PARTIES on behalf of governments named in Annex H, the territories of which account for 85 per centum of the total external trade of the territories of such governments, computed in accordance with the applicable column of percentages set forth therein. The instrument of acceptance of each other government shall take effect on the thirtieth day following the day on which such instrument has been deposited.

7. The United Nations is authorized to effect registration of this Agreement as soon as it enters into force.

ANNEX H
PERCENTAGE SHARES OF TOTAL EXTERNAL TRADE TO BE USED FOR THE
PURPOSE OF MAKING THE DETERMINATION REFERRED TO IN ARTICLE XXVI

(based on the average of 1949-1953)

If, prior to the accession of the Government of Japan to the General Agreement, the present Agreement has been accepted by contracting parties the external trade of which under Column I accounts for the percentage of such trade specified in paragraph 6 of Article XXVI, Column I shall be applicable for the purposes of that paragraph. If the present Agreement has not been so accepted prior to the accession of the Government of Japan, Column II shall be applicable for the purposes of that paragraph.

	<u>Column I</u>	<u>Column II</u>
	(Contracting parties on 1 March 1955)	(Contracting parties on 1 March 1955 and Japan)
Australia	3.1	3.0
Austria	0.9	0.8
Belgium-Luxembourg	4.3	4.2
Brazil	2.5	2.4
Burma	0.3	0.3
Canada	6.7	6.5
Ceylon	0.5	0.5
Chile	0.6	0.6
Cuba	1.1	1.1
Czechoslovakia	1.4	1.4
Denmark	1.4	1.4
Dominican Republic	0.1	0.1
Finland	1.0	1.0

France	8.7	8.5
Germany, Federal Republic of	5.3	5.2
Greece	0.4	0.4
Haiti	0.1	0.1
India	2.4	2.4
Indonesia	1.3	1.3
Italy	2.9	2.8
Netherlands, Kingdom of the	4.7	4.6
New Zealand	1.0	1.0
Nicaragua	0.1	0.1
Norway	1.1	1.1
Pakistan	0.9	0.8
Peru	0.4	0.4
Rhodesia and Nyasaland	0.6	0.6
Sweden	2.5	2.4
Turkey	0.6	0.6
Union of South Africa	1.8	1.8
United Kingdom	20.3	19.8
United States of America	20.6	20.1
Uruguay	0.4	0.4
Japan	—	2.3
	100.0	100.0

Note: These percentages have been computed taking into account the trade of all territories in respect of which the General Agreement on Tariffs and Trade is applied.

II. INTERPRETATION AND APPLICATION OF ARTICLE XXVI

A. INTERPRETATION AND APPLICATION OF ARTICLE XXVI

1. Paragraph 1: “date of this Agreement”

References to the “date of this Agreement” appear in:

- Articles II:1(b) and II:1(c) (specifying the operative date for the binding of “other duties and charges” with respect to items in regular or preferential schedules of concessions);
- Article II:6 (fixing the base date for par values of currencies, for application of provisions on adjustment of specific duties in the event of a reduction in par value); and
- Articles V:6, VII:4(d), and X:3(c) (permitting retention of measures existing on the “date of this Agreement” with respect to direct consignment requirements, currency conversion for customs valuation purposes, or review of administrative action relating to customs matters).

The date specified in Article XXVI:1, 30 October 1947, applies for the purposes of Article II to concessions made in the round of tariff negotiations held in 1947. The same date applies to the obligations under Articles V:6, VII:4(d) and X:3(c) of the original contracting parties; of the former territories of the original contracting parties which, after attaining independence or commercial autonomy, acceded to the General Agreement under Article XXVI:5(c); and of Chile.

When the modalities of accession to the General Agreement were considered for the first time at the Third Session in Annecy in 1949, the Working Party on this subject decided that in the Annecy Protocol of Terms of Accession, the “date of this Agreement” for the purposes of Article II would be changed “with the object of placing acceding governments in a comparable position to that in which the present contracting parties were at Geneva ...”.¹ The Annecy Protocol of Terms of Accession in October 1949 therefore provided that “In each case in which Article II of the General Agreement refers to the date of that Agreement, the applicable date in respect

¹Report of the Working Party on “Accession at Annecy,” GATT/CP.3/37, adopted on 9 June 1949, II/148, 153-154, para. 26.

of the Schedules annexed to this Protocol shall be the date of this Protocol”.² This approach has guided subsequent protocols of accession and tariff protocols; see the discussion of “date of this Agreement” under Article II.

For the purposes of Articles V:6, VII:4(d) and X:3(c), the Working Party at Annecy decided to substitute the date of the Havana Final Act, 24 March 1948, and this approach was followed for the next group of accessions in the Torquay Protocol of 1951.³ Since the next accession thereafter, which was the accession of Japan in 1955, the standard terms in accession protocols have provided that the “date of this Agreement” for the purposes of these articles shall be the date of the protocol of accession or (where the acceding government had previously acceded provisionally) the date of the declaration on provisional accession.⁴

Hence, the “date of this Agreement” is different for different contracting parties; in the case of concessions under Article II, the “date of this Agreement” may be different for different tariff concessions of the same contracting party. See also the material on “date of this Agreement” under Articles II, V, VII and X.

2. Paragraph 2

(1) “open for acceptance”

Article XXVI provides for definitive acceptance of the General Agreement by those contracting parties specified in Article XXVI:2. All others must accede under Article XXXIII. Protocols of accession provide that the acceding government, having become a contracting party by agreeing to apply provisionally the General Agreement, will have the right to accede definitively to the General Agreement on the terms specified in the accession protocol; see also below at page 916. This formulation dates from the Third Session, held at Annecy in 1949, which first considered the modalities of accession to the General Agreement. The Annecy Protocol of Terms of Accession has served as the model for all subsequent accession protocols. The 1949 Report on “Accession at Annecy” notes that “Upon the entry into force of the General Agreement, under Article XXVI, an acceding government will be entitled to accede definitively to the Agreement in much the same way as a present contracting party can accept it definitively under that article”.⁵ Concerning the Annecy Protocol, the Working Party Report notes:

“Paragraph 8(a) of the protocol provides for accession to the Agreement when it enters into force pursuant to Article XXVI or thereafter. By the deposit of an instrument of accession, the acceding governments may accede, upon the terms of the protocol, to the Agreement in the form in which it enters into force pursuant to Article XXVI. This may or may not be identical with that provisionally applied by acceding governments ...

“The procedure for such definitive accession is similar to the procedure contained in Article XXVI ... it envisages that the deposit of an instrument of accession may take place either prior to or following the entry into force of the Agreement, but that such accession would not take effect until the definitive entry into force of the Agreement.”⁶

The General Agreement has been accepted definitively only by Liberia and Haiti, and Liberia subsequently withdrew. Instead, the General Agreement is applied provisionally by contracting parties under the Protocol of Provisional Application or subsequent Protocols of Accession to the General Agreement; see the chapter of this Index on provisional application.

(2) *Reservations on acceptance*

During the negotiation of the General Agreement in the Tariff Agreement Committee at Geneva in 1947, the initial proposal, to have a protocol of signature of the General Agreement, was deleted in favour of adoption

²Annecy Protocol, dated 10 October 1949, I/79, 81, para. 5(a).

³Annecy Protocol, *ibid.*, I/81, para. 5(b); Torquay Protocol, dated 21 April 1951, I/86, 88, para. 5(b).

⁴E.g. Protocol for the Accession of Bolivia, L/6562, 37S/5.

⁵GATT/CP.3/37, adopted on 9 June 1949, II/148, 150-151, para. 15.

⁶*Ibid.*, II/154, paras. 29-30.

of the Protocol of Provisional Application combined with changes in the text of the General Agreement. It was stated in this connection that:

“... there being no provision for signature of the Agreement, there is, of course, no occasion for any country to reserve its position upon signature. However, it would still be open for any country to reserve its position upon acceptance of the Agreement. ... In that event, of course, the acceptance, to be valid under international law ... must be then agreed to by the other countries which have then accepted the Agreement...”

“... signature of the Protocol of Provisional Application ... commits the signatory Government, and it is on a par with the acceptance of the Trade Agreement. Therefore, any reservations to the signature of the Protocol of Provisional Application must be accepted and agreed to by all other countries signing the Protocol of Provisional Application. ... I should not think it would be necessary for any country to reserve its position with respect to the signature of the Protocol because, after all, it is a protocol of *provisional* application. Part I of the Agreement, that is the tariff part, is to be applied provisionally, and Part II, that is the general provisions, with respect to which I think most of the reservations apply, is to be applied to the fullest extent not inconsistent with existing legislation.”⁷

See also Article XXXIII (concerning reservations to accession protocols) and Article XXX (concerning reservations to protocols of amendment).

(3) *Reservation on acceptance accepted 7 March 1955*

During the Review Session of 1954-55, discussions took place regarding the possibility of definitive application of the General Agreement within an institutional framework including the establishment of an Organization for Trade Cooperation. In response to concerns expressed by certain contracting parties regarding existing legislation, the Working Party on Organizational and Functional Questions recommended “that it should be open to contracting parties to accept the definitive application of the Agreement under the provisions of Article XXVI subject to a reservation in respect of existing legislation similar to that covering such legislation in the Protocol of Provisional Application and other Protocols. Such a reservation would have to be accepted by all the contracting parties. Accordingly the Working Party proposed that the contracting parties should, at this Session, agree unanimously that acceptance subject to such a reservation will be valid”.⁸ The “Resolution of 7 March Expressing the Unanimous Agreement of the Contracting Parties to the Attaching of a Reservation on Acceptance Pursuant to Article XXVI”⁹ provides that “The contracting parties unanimously agree

“1. that an acceptance pursuant to Article XXVI shall be valid even if accompanied by a reservation to the effect that Part II of the General Agreement will be applied to the fullest extent not inconsistent with legislation which existed on 30 October 1947 or, in the case of a contracting party which since 30 June 1949 has acceded to the Agreement, the date of the Protocol providing for such accession,

“2. that any contracting party attaching such a reservation shall submit as soon as possible after its acceptance of the General Agreement pursuant to Article XXVI a list of the principal legislative provisions covered by such reservation,

“3. that the CONTRACTING PARTIES shall review annually progress made in bringing such legislation into conformity with the General Agreement,

“4. that three years from the entry into force of the General Agreement under Article XXVI the CONTRACTING PARTIES shall review the situation then prevailing with respect to such reservations with a view to assessing the progress achieved towards the full application of the General Agreement by all contracting parties and to make appropriate recommendations”.

⁷EPCT/207 (statement of J.M. Leddy); see also EPCT/TAC/PV/21, EPCT/TAC/PV/17 p. 20ff.

⁸L/327, adopted 28 February, 5 and 7 March 1955, 3S/231, 248 para. 53; see generally paras. 53-58.

⁹3S/48.

The following interpretations of this Resolution are provided in the Report of the Working Party on “Organizational and Functional Questions”¹⁰ and in summary records from the Review Session.

- The phraseology used in the Resolution is the same as that employed in the Protocol of Provisional Application and is subject to the same interpretation regarding the mandatory character of the legislation.¹¹
- “... the reservation would provide to a contracting party a defence against the charge that it was acting inconsistently with the General Agreement only to the extent to which the legislation in question was in fact covered by the terms of the reservation. It was open to any contracting party to submit this matter to the judgment of the CONTRACTING PARTIES under the appropriate procedures of the Agreement or in the course of the review provided for in the [Resolution].”¹²
- “The formula suggested ... does not set any fixed time-limit for the duration of a reservation, but the general intent of the [Resolution] and the detailed procedures proposed are directed towards securing as early as possible complete conformity between the legislation of contracting parties and their obligations under the General Agreement ...”¹³
- “It was the understanding of the Working Party that the annual review provided for in paragraph 3 ... would afford an opportunity for consultations regarding any special difficulties of any contracting party arising out of the operation of the legislation of another contracting party covered by the Reservation. The words ‘appropriate recommendations’ in paragraph 4 were intended to mean that the CONTRACTING PARTIES could make whatever recommendations were indicated in the circumstances existing at the time, taking into account any inequities which would result from the maintenance of the situation. It was also clear that the acceptance of the Resolution would not deprive any contracting party of resort to Article XXIII in accordance with paragraph 1(b) or (c) thereof.”¹⁴

The CONTRACTING PARTIES agreed that the following interpretation proposed by New Zealand was correct:

- “(i) that the purpose of the reservation procedures was to give contracting parties with legislation inconsistent with the Agreement a breathing space within which to bring that legislation into conformity with the Agreement without the need for recourse to transitional period procedures;
- “(ii) that the provision in paragraph 3 would permit the CONTRACTING PARTIES annually to review the progress made in bringing such legislation into conformity with the Agreement, with a view to assessing the progress achieved towards the full application of the Agreement by all contracting parties, and to making appropriate recommendations.
- “(iii) that, in the review mentioned in paragraph 4 of the situation prevailing at the end of three years with respect to the Resolution, the CONTRACTING PARTIES would then decide what further recommendations – over and above those which might have been made following annual reviews – would be appropriate to ensure the equal acceptance by all contracting parties of the obligations of the General Agreement.”¹⁵

See also the discussion of reservations in accession protocols under Article XXXIII.

¹⁰L/327, adopted on 28 February and 5-7 March 1955, 3S/231.

¹¹*Ibid.*, 3S/249-250, para. 58.

¹²*Ibid.*, 3S/249, para. 57.

¹³*Ibid.*, 3S/249, para. 56.

¹⁴*Ibid.*, 3S/248-249, para. 55.

¹⁵SR.9/46, p. 4.

3. Paragraph 3

(1) *Authentic text*

The standard text of accession protocols provides that

“The provisions of the General Agreement to be applied to contracting parties by [...] shall, except as otherwise provided in this Protocol, be the provisions contained in the text annexed to the Final Act of the second session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as rectified, amended and otherwise modified by such instruments as may have become effective on the day on which [...] becomes a contracting party.”¹⁶

(1) *Authentic texts: languages*

Text of the General Agreement: Under Article XXVI, the texts of Parts I through III of the General Agreement and the annexes thereto are authentic both in English and in French. When Part IV of the General Agreement was drawn up, the Protocol Amending the General Agreement on Tariffs and Trade to Introduce a New Part IV on Trade and Development provided for authentic texts in English, French and Spanish.¹⁷ The Secretariat prepared and published on its own responsibility a Spanish translation of the text of the General Agreement in Volume IV of the Basic Instruments and Selected Documents series, but as no authentic Spanish text was ever agreed for Parts I through III of the General Agreement, Parts I-III of this text had no formal status. A Spanish language text of the Havana Charter had been finalized in October 1949 and deposited with the Secretary-General of the United Nations as one of the authentic texts of the Charter.¹⁸

During the legal drafting process for the Uruguay Round, participants working on the French and Spanish texts of the Final Act noted a lack of concordance between the French and Spanish versions of the Uruguay Round texts and the French and Spanish texts respectively of the General Agreement. They also noted a number of instances of a lack of concordance between the English, French and Spanish texts of the General Agreement. Upon discussion participants concluded that the preferable course would be to conform the French and Spanish texts of the General Agreement to the linguistic usage reflected in the English language text and the Uruguay Round Agreements. In addition, Spanish-speaking delegations sought to establish an authentic text of Parts I-III of the General Agreement in Spanish. Participants decided to implement these objectives directly in the text of the General Agreement that would be incorporated into Annex 1A of the WTO Agreement, with certain other legal instruments, as the “General Agreement on Tariffs and Trade 1994” (or “GATT 1994”). With the agreement of participants, lists of agreed rectifications to the authentic French text, and of corrections to Parts I-III of the Spanish text published as Volume IV of the BISD, were drawn up by the Translation and Documentation Division of the Secretariat and were circulated as annexes to document MTN.TNC/41, a Decision of the Trade Negotiations Committee (TNC) on “Corrections to be Introduced in the General Agreement on Tariffs and Trade”. In this Decision, the TNC:

“*Noting* the need to ensure improved concordance between the French-language text of the General Agreement on Tariffs and Trade 1994 and other texts in the Final Act, and the desirability of introducing corresponding corrections in the French-language text of the General Agreement on Tariffs and Trade 1947;

“*Noting further* that the text of the General Agreement on Tariffs and Trade 1994 will be authentic in the Spanish language for all Parts of that agreement; and that it is desirable to make a corresponding Spanish language text of the General Agreement on Tariffs and Trade 1947 authentic in all parts;

¹⁶See, e.g., Annecy Protocol of Terms of Accession, I/79, 81, para. 6; Protocol for the Accession of Costa Rica, L/6626, 37S/7.

¹⁷13S/2, 10. The Spanish text was not ready at the time of the Final Act of the Second Session, which provided for later authentication of the Spanish text. See: C/M/24; L/2328 (Spanish text); L/2328/Add.2 (text incorporating comments); L/2401; SR.22/7 p. 89; L/2424, decision adopted at the Twenty-second Session on 22 March 1965.

¹⁸The Spanish translation was prepared by the government of Cuba, was redrafted by a committee of interested governments in September 1948, and was further redrafted on the basis of comments and finalized in a drafting committee which met in September-October 1949. See further ICITO/1/21 and ICITO/1/25. Chinese and Russian translations of the Charter, prepared by the United Nations translation services, were not finalized; copies are on deposit in the GATT Library.

“*Decides* to invite the CONTRACTING PARTIES:

- “(a) to initiate as soon as possible the procedures required for the correction of the French-language text of the General Agreement on Tariffs and Trade 1947 in accordance with the list in Annex A to this Decision;
- “(b) to correct the Spanish-language text of the General Agreement on Tariffs and Trade in Volume IV of the Basic Instruments and Selected Documents in accordance with the list in Annex B to this Decision; and
- “(c) to initiate as soon as possible the procedures required for the authentication of a Spanish-language text of the General Agreement on Tariffs and Trade 1947 as so corrected.”¹⁹

The TNC adopted this Decision on 30 March 1994 when it approved the Final Act of the Uruguay Round. The text that defines GATT 1994, which appears in Annex 1A of the WTO Agreement and was approved on the same day, included a Paragraph 2(c) as follows:

- “(i) The text of GATT 1994 shall be authentic in English, French and Spanish.
- “(ii) The text of GATT 1994 in the French language shall be subject to the rectifications of terms indicated in Annex A to document MTN.TNC/41.
- “(iii) The authentic text of GATT 1994 in the Spanish language shall be the text in Volume IV of the Basic Instruments and Selected Documents series, subject to the rectifications of terms indicated in Annex B to document MTN.TNC/41.”²⁰

The corrected and authentic French and Spanish texts of the GATT 1994, including the rectifications in MTN.TNC/41, appear in *The Results of the Uruguay Round of Trade Negotiations: The Legal Texts*, published by the Secretariat.

On 10 May 1994, after the 15 April 1994 signing of the Final Act at Marrakesh, the GATT Council adopted a decision which included operative clauses identical to those of the decision in document MTN.TNC/41, as well as the same lists of rectifications and corrections as in that document.²¹ The Secretary-General of the United Nations, who is the depositary of Parts I-III of the GATT 1947, is responsible for conducting rectification of texts and authentication of new language texts. However, as of early 1995 the process of rectification of the French text and authentication of a corrected Spanish text of the GATT 1947 had not been initiated. In consequence, there remained differences between the French language text of the GATT 1947 and the French language text included in the GATT 1994, and between the Spanish language text hitherto published in Volume IV of the BISD and the Spanish language text included in the GATT 1994.

Authentic text of Schedules: During discussions on the draft General Agreement at Geneva in 1947 it was agreed that “each Schedule would be authentic in either English or French or in both languages, at the option of the country whose Schedule was concerned. The way it was decided to provide for this was to put in parentheses at the top of the Schedule the words: ‘Authentic in the English text only’ or ‘Authentic in the French text only,’ if it was to be authentic only in one of these two languages. For that reason it was not considered necessary” to refer to the authentic language of Schedules in Article II or in the paragraph corresponding to the present Article XXVI:3.²² The standard text of accession protocols now provides that the English, French and Spanish texts of the protocol will each be authentic, “except as otherwise specified with respect to the Schedule annexed thereto”.²³ Tariff protocols such as the Geneva (1992) Protocol provide that “The Schedules annexed hereto are

¹⁹TNC/41, adopted on 30 March 1994; text also provides for immediate derestriction of the Decision and its annexes (including rectifications to the French and Spanish texts of the General Agreement) on adoption.

²⁰“General Agreement on Tariffs and Trade 1994”, in Annex 1A of Agreement Establishing the World Trade Organization, para. 2(c)(i)-(iii).

²¹L/7457, Decision of 10 May 1994 on “Corrections to the French and Spanish Language Texts of the General Agreement”.

²²EPCT/TAC/PV/25, p. 13-14.

²³See, e.g. Protocols for the Accession of Bolivia, L/6562, 37S/5, 6, para. 10, or Costa Rica, L/6626, 37S/7, 9, para. 12.

authentic in the English, French or Spanish language as specified in each Schedule”.²⁴ No Schedule done in a language other than English, French or Spanish has ever been made authentic.

Practice since 1979: With two exceptions the Tokyo Round Agreements of 1979 were done in English, French and Spanish, each text being equally authentic. The Agreement on Trade in Civil Aircraft was initially done in English and French; a Spanish text was added in 1986. Also, the 1979 Agreement on Government Procurement provided that the lists of entities attached thereto would be authentic in English, French or Spanish as specified.²⁵ Since 1984, authentic texts of agreements and protocols under the auspices of the GATT have been done in three languages, English, French and Spanish. The text of the WTO Agreement and of the agreements in Annexes I through 4 thereof are authentic in English, French and Spanish. In conformity with earlier practice the Marrakesh Protocol to the GATT 1994 provides in paragraph 8 that “The Schedules annexed hereto are authentic in the English, French or Spanish language as specified in each Schedule”. Also, commitments on market access annexed to the General Agreement on Trade in Services, and the Appendices listing entity coverage of the 1994 Agreement on Government Procurement are authentic as specified in English, French or Spanish.

For examples of *interpretation of the meaning of a provision in the light of the different authentic texts* thereof, see, e.g., the Panel Report on “Italian Discrimination against Imported Agricultural Machinery”,²⁶ the Report of the Group of Experts on Anti-dumping and Countervailing Duties²⁷, a Note by the Executive Secretary on “Article XXIV:5(a) – Interpretation of the word ‘applicable’”,²⁸ the Working Party Report on “EEC – Association with Malta”²⁹, and the Panel Report on “United States – Procurement of a Sonar Mapping System”.³⁰ There have in addition been discussions of the differences between authentic texts of the General Agreement or associated legal instruments.³¹

(3) *Working languages of the GATT*

The negotiation of the Havana Charter and the General Agreement was conducted in English and French, and since that time these two languages have been working languages of ICITO and the GATT. Rule 33 of the Rules of Procedure of the CONTRACTING PARTIES provides that “Subject to the provisions of Rule 34, English and French shall be the working languages”. Rule 34 provides that “A decision, by unanimous agreement, may be taken at any meeting to adopt a rule of procedure regarding interpretations of a more simple character than rule 33”.³² Since the beginning of the GATT, all GATT documents have been issued in both English and French and interpretation from and into English and French has been provided for all formal meetings.

At the Seventeenth Session in November 1960, the representative of Uruguay on behalf of the Spanish-speaking contracting parties urged that the Spanish language be introduced on a progressive basis. On the basis of a study by the Budget Working Party it was agreed to introduce for the year 1961 simultaneous interpretation from Spanish into English and French during plenary meetings of the CONTRACTING PARTIES and the Council, and translation of some texts from Spanish into English and French.³³ At the Nineteenth Session in November 1961, the CONTRACTING PARTIES approved the introduction of simultaneous interpretation at all meetings of committees and working groups from and into English and French and from Spanish into English and French.³⁴ During the period 1962-1979 the use of Spanish was gradually expanded as the budget permitted. As of 1979,

²⁴L/6987, para. 5.

²⁵26S/55.

²⁶L/833, adopted on 23 October 1958, 7S/60, 63, para. 11: “the slight difference of wording which existed between the French and the English texts of paragraph 4 of Article III. The French text which had been submitted to the Italian Parliament for approval provided that the imported products ‘ne seront pas soumis à un traitement moins favorable’ whereas the English text reads ‘the imported product shall be accorded treatment no less favourable’”.

²⁷L/978, adopted 13 May 1959, 8S/145, 149, para. 14: “the like product” vs. “un produit similaire”.

²⁸L/1919, dated 14 November 1962.

²⁹L/3665, adopted on 29 May 1972, 19S/90, 95, para. 17.

³⁰GPR.DS1/R, dated 23 April 1992 (unadopted), para. 4.18 (interpretation using English, French and Spanish texts of Agreement on Government Procurement).

³¹See, e.g., W.9/239 (Note by the Legal and Drafting Committee on “Drafting Improvements Applicable to the French Text”); Spec/84/55 (Note on differences between authentic texts of Article VII:3), VAL/W/53 (comments of Australia on linguistic consistency between different authentic texts of Article 8.1(b) of the Agreement on Implementation of Article VII).

³²12S/15.

³³SR.17/4 p. 43-45, L/1355, L/1367; proposal in Budget Working Party report in L/1370, approved at SR.17/10, p. 132-135.

³⁴W.18/4, SR.18/4 p. 39; proposal in Budget Working Party report at L/1562 p. 4-5, approved at C/M/18, SR.19/12 p. 212.

interpretation into Spanish was provided at meetings of the CONTRACTING PARTIES, the Council and the Committee on Trade and Development and for other meetings where many Spanish language experts were present. Publications of the GATT, as well as documents containing decisions, legal texts and reports of committees, working parties or panels, were also issued in Spanish. During the Tokyo Round, most of the Tokyo Round technical documents were also issued in Spanish, and interpretation from and into Spanish was also provided for formal MTN meetings.

After the close of the Tokyo Round negotiations in 1979, the budget estimates for 1980 were established “so as to continue to provide the same services for the implementation of the results of the negotiations, as well as for the other operational activities of the GATT”.³⁵ This practice has been continued to the present. Since 1983, all GATT documents have been distributed in English, French and Spanish. All Uruguay Round documents have been issued in English, French and Spanish and interpretation from and into all three languages has been provided for all formal meetings of Uruguay Round negotiating groups.

(4) Deposit

All GATT legal instruments from 1948 until 1 February 1955, including Parts I-III of the General Agreement and the Protocol of Provisional Application, were deposited with the Secretary-General of the United Nations, who continues to handle depositary functions for them. For all later instruments, including the Part IV Protocol and the Tokyo Round Agreements, depositary functions have been entrusted to the Executive Secretary (later, the Director-General) to the CONTRACTING PARTIES. The Secretariat has registered these agreements, has taken care of formalities regarding accession and participation, and has prepared the loose-leaf *Status of Legal Instruments* published by the GATT. All GATT legal instruments have been published in the United Nations Treaty Series.

On 8 and 9 December, the Preparatory Committee for the WTO, the GATT CONTRACTING PARTIES and the Executive Committee of the Interim Commission of the International Trade Organization (ICITO) adopted an Agreement on the Transfer of Assets, Liabilities, Records, Staff and Functions from the Interim Commission of the International Trade Organization and the GATT to the World Trade Organization. Paragraph 5 of this agreement provides that “The Director-General of the WTO shall perform the depositary functions of the Director-General of the GATT 1947 after the date on which the legal instruments through which the contracting parties apply the GATT 1947 are terminated. On that date the records of the GATT 1947 shall be transferred to the WTO.”³⁶

4. Paragraph 4: acceptance of the General Agreement

Paragraph 4 provides for deposit of instruments of acceptance of the General Agreement. When the modalities of accession to the GATT were first considered in 1949, standard terms were drafted for the Annex Protocol of Terms of Accession, so that this instrument would provide not only for provisional application of the General Agreement by the acceding government, but would also confer on that government a right to accede to the General Agreement under Article XXVI. The 1949 Report of the Working Party on “Accession at Annecy” notes that

“By the deposit of an instrument of accession, the acceding governments may accede, on the terms of the protocol, to the Agreement in the form in which it enters into force pursuant to Article XXVI. This may or may not be identical with that provisionally applied by the government under paragraph 1 of the Protocol.

“The procedure for such definitive accession is similar to the procedure for acceptance contained in Article XXVI ... It envisages that the deposit of an instrument of accession may take place either prior to or following the definitive entry into force of the Agreement, but that such accession would not take effect until the definitive entry into force of the Agreement.”³⁷

³⁵C/M/136, p. 15; L/4852.

³⁶PC/9, L/7580, ICITO/39.

³⁷Report adopted on 9 June 1949, GATT/CP.3/37, II/148, 154, paras. 29-30.

See, for instance, paragraph 8 of the Annecy Protocol, which provides:

“(a) Any acceding government ... may, on or after the date on which the General Agreement enters into force pursuant to Article XXVI thereof, accede to that Agreement upon the terms of this Protocol by deposit of an instrument of accession with the Secretary-General of the United Nations. Such accession shall take effect on the day on which the General Agreement enters into force pursuant to Article XXVI or on the thirtieth day following the day of the deposit of the instrument of accession, whichever shall be the later.

“(b) Accession to the General Agreement pursuant to [sub-paragraph (a)] shall, for the purpose of paragraph 2 of Article XXXII of that Agreement, be regarded as acceptance of the Agreement pursuant to paragraph [4] of Article XXVI thereof.”³⁸

5. Paragraph 5

(1) “Territories for which it has international responsibility”

(a) Territorial scope of acceptance

Paragraph 1 of the Protocol of Provisional Application provides that, in respect of Belgium, France, the Netherlands, and the United Kingdom, acceptance is limited to their metropolitan territories. Acceptance by the other governments listed in paragraph 1 (Australia, Canada, Luxembourg, and the United States) is not subject to that express limitation. Paragraph 2 provides that the governments named in paragraph 1 shall make effective provisional application of the General Agreement in respect of any of their other territories other than their metropolitan territories after giving notice thereof to the Secretary-General of the United Nations.³⁹ Notices under paragraph 2 were received from Australia (on behalf of Papua New Guinea), Belgium (on behalf of the Belgian Congo), France (on behalf of all overseas territories of the French Union listed in Annex B except Morocco), the Netherlands (on behalf of its overseas territories), and the United Kingdom (on behalf of Newfoundland, the Mandated Territory of Palestine, all territories for the international relations of which it is responsible except Jamaica, and later on behalf of Jamaica).⁴⁰

See also statements concerning territorial application and/or territorial scope of acceptance in accession protocols e.g. of Japan⁴¹, Portugal⁴² and Spain.⁴³

In a number of instances, governments have invoked or disinvoked Article XXXV in respect of territories for which they had international responsibility at the time and in respect of which they had agreed to apply provisionally the General Agreement under paragraph 2 of the Protocol of Provisional Application.⁴⁴

³⁸1/79, para. 7. See also the identical provisions in the Protocols for the Accession of Costa Rica, El Salvador, Tunisia and Venezuela, 37S/7, para. 9; 37S/27, para. 7; 37S/41, para. 7; and 37S/72, para. 7.

³⁹Concerning territorial application of the General Agreement to territories for which the United States has international responsibility other than the customs territory of the United States, see discussion at GATT/CP.3/SR.5 p. 5, and note by the United States dated 13 September 1949, GATT/CP/33.

⁴⁰Status of Legal Instruments, p. 1-2.2. See also discussion at CP.3/SR.5 p. 4. Concerning the notification by the United Kingdom in 1962 that the General Agreement was to be applied provisionally in respect of Jamaica (L/1809), see also L/3485, Report of the Panel on “Jamaica - Margins of Preference”, adopted 2 February 1971, 18S/183. See also L/3800, notice by the United Kingdom concerning its continuing representation of Hong Kong after UK accession to the EC 1 January 1973; and MTN.GNS/W/159/Corr.1 of 4 March 1993, concerning the legal régime governing relations between the European Economic Community, the Netherlands and Aruba.

⁴¹4S/7, para. 1(d) (exception from the application of GATT under certain circumstances for islands referred to in the Treaty of Peace with Japan).

⁴²11S/20, 24, para. 11 (acceptance “in respect of all Portugal’s separate customs territories”).

⁴³12S/27, 28 para. 3 (acceptance in respect of the customs territories listed in Annex B to the Protocol, i.e. (1) territory in the Peninsula and Balearic Islands, Canary Islands, and Ceuta and Melilla; (2) Ifni and Sahara; and (3) Fernando Po and Rio Muni. These territorial units into which the National Territory is divided are considered customs territories for the sole purpose of the General Agreement).

⁴⁴See, e.g., L/3396 (disinvocation of Article XXXV by the United Kingdom in respect of certain territories for which it had international responsibility).

The final provisions of the Tokyo Round multilateral trade agreements provide that “In regard to acceptance, the provisions of Article XXVI:5(a) and (b) of the General Agreement would be applicable.”⁴⁵ On 17 December 1979 the United Kingdom accepted six of these agreements on behalf of the territories for which it has international responsibility except for Antigua, Bermuda, Brunei, Cayman Islands, Montserrat, St. Kitts-Nevis, Sovereign Base Areas Cyprus and the British Virgin Islands.⁴⁶ On 23 April 1986 Hong Kong was deemed to be a contracting party to the GATT in accordance with Article XXVI:5(c) (see below); having declared its intention to continue to accept each of these agreements, Hong Kong became a party to each of them in its own right with effect from 23 April 1986.⁴⁷ The Netherlands accepted the Agreement on Technical Barriers to Trade and the Agreement on Civil Aircraft “in respect of the Kingdom as a whole including the Netherlands Antilles”.⁴⁸ In August 1994 the Committee on Government Procurement approved accession by the Netherlands to the Agreement on Government Procurement with respect to Aruba.⁴⁹

In October 1990, Germany informed contracting parties of the Treaty of German Unity signed 3 October 1990, through which the German Democratic Republic acceded to the Federal Republic of Germany, forming one State which as a single contracting party remained bound by the provisions of the General Agreement.⁵⁰

Paragraph 3 of the accession protocol of Switzerland provides: “For the purposes of the territorial application of this Protocol, the customs territory of Switzerland shall be deemed to include the territory of the Principality of Liechtenstein as long as a customs union treaty with Switzerland is in force.”⁵¹ On 29 March 1994, the Swiss authorities informed the Secretariat that while Switzerland had accepted its accession protocol on behalf of the territory of Liechtenstein, the Principality of Liechtenstein possesses full autonomy with respect to its external commercial relations and the other matters provided for in the General Agreement; as Liechtenstein also made a request under Article XXVI:5(c) on the same date, Liechtenstein was deemed to be a contracting party as of 29 March 1994, and succeeded to the Schedule concessions of Switzerland.

See also the material on paragraph 2 of the Protocol of Provisional Application in this Index.

b) *Changes in international responsibility*

In 1947, the Government of the United Kingdom negotiated on behalf of Newfoundland, as a separate customs territory for which the United Kingdom had international responsibility; the concessions accorded thereby constituted Section B of Schedule XIX. When Newfoundland became a part of the customs territory of Canada, in 1949, the CONTRACTING PARTIES approved a Declaration of 11 August 1949, providing that “Section B shall be deemed to be no longer a part of Schedule XIX”.⁵² Newfoundland has since that date been subject to the obligations of Canada under the General Agreement.

(c) *Territorial claims*

At the Nineteenth Session in 1961, in connection with consideration of the draft protocol for the accession of Portugal, the representative of India sought clarification of the relationship between Portugal and certain customs territories referred to therein as overseas provinces of Portugal. “The Executive Secretary stated that he was satisfied that in adopting the text which was proposed for paragraph 3, the CONTRACTING PARTIES would not be taking any position with respect to the international status of these territories. Contracting parties were

⁴⁵See, e.g., Article IX:1(e) of the Agreement on Government Procurement, 26S/33, 52.

⁴⁶Agreement on Import Licensing; Agreement on Technical Barriers to Trade; Agreement on Government Procurement; Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT (“Subsidies Code”); Agreement on Implementation of Article VI of the GATT (“Anti-Dumping Code”); Agreement on Implementation of Article VII of the GATT (“Customs Valuation Code”).

⁴⁷*Status of Legal Instruments*, p. 16-2.3, 16-3.3, 16-4.5, 16-5.2, 16-9.3, 16-10.3.

⁴⁸*Status of Legal Instruments* p. 16-3.3, 16-6.2.

⁴⁹GPR/77, Decision of the Committee, circulated 24 August 1994. See GPR/W/136, Secretariat Note on Accession of the Kingdom of the Netherlands with respect to Aruba, dated 20 July 1994, including proposed decision on accession and list of entities of Aruba to be included in Annex I of the Agreement. The Agreement already applied to the European territory of the Netherlands by virtue of the acceptance of the Agreement by the European Economic Community.

⁵⁰L/6747.

⁵¹14S/6, 7-8.

⁵²Declaration at II/14; see also GATT/CP/26 (notification by UK), GATT/CP/75 (draft declaration), GATT/CP.3/SR.40 p. 8 (approval).

concerned only with what was relevant to the General Agreement, which were the trading arrangements proposed with respect to these territories and not their status in international law. Therefore, the approval of this protocol would not, in his view, in any way affect or conflict with whatever decisions might be taken or had been taken by the General Assembly of the United Nations, on these legal matters. The Chairman stated that in his view no conflict arose between the terms of the protocol and the United Nations resolution.”⁵³

In 1965, in response to the issuance of a list of countries and territories where the General Agreement was effective, the US took the formal position that “it does not recognize any of the claims of sovereignty which have been asserted over territory in Antarctica nor does it recognize any basis for any country to apply such an agreement as the General Agreement on Tariffs and Trade to that area. Moreover, the Government of the United States of America reserves all the rights of the United States of America with respect to Antarctica. It calls attention, in that connexion, to Article IV of the Antarctic Treaty, signed at Washington on 1 December 1959.”⁵⁴

See also the material under Article XXV on political questions.

d) *Application of Article XXVI:5(b)*

The 1971 Panel Report on “Jamaica – Margins of Preference” notes that in 1948, the government of the United Kingdom gave notice (under paragraph 2 of the Protocol of Provisional Application) of its intention to apply the General Agreement provisionally to all of the territories for the international relations of which it was responsible, except for Jamaica. In 1962, United Kingdom, in a communication received on 2 July, gave notice that the General Agreement was to be applied provisionally also to Jamaica. In accordance with paragraph 2 of the Protocol of Provisional Application and Article XXVI:5(b), this notification was effective as from 1 August 1962.⁵⁵

(e) *Occupied areas*

Until the Review Session amendments agreed in 1954-55, an interpretative note to Article XXVI provided that “Territories for which the contracting parties have international responsibility do not include areas under military occupation”. A Final Note provided that “The applicability of the General Agreement on Tariffs and Trade to the trade of contracting parties with the areas under military occupation has not been dealt with and is reserved for further study at an early date. Meanwhile, nothing in this Agreement shall be taken to prejudice the issues involved. This, of course, does not affect the applicability of the provisions of Articles XXII and XXIII to matters arising from such trade”.⁵⁶ These provisions were deleted effective 7 October 1957; see section III below.

(2) *Succession to GATT under Article XXVI:5(c)*

Of the 128 GATT contracting parties as of 1 January 1995, 63 have succeeded to contracting party status on the basis of Article XXVI:5(c). A list of these contracting parties appears in the appendix tables at the end of this book.

(a) *“full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement”*

The preparatory work of the General Agreement indicates that it was intended that the “responsible contracting party” should certify that the customs territory in question “had the right *de jure* and/or *de facto* to act on its own behalf and to fulfil” its obligations.⁵⁷ During the negotiation of the General Agreement in 1947, an ad-hoc Sub-committee examined the situation of Burma, Ceylon and Southern Rhodesia (now Myanmar, Sri Lanka and Zimbabwe). In response to a request by the Sub-committee, the United Kingdom submitted

⁵³SR.19/12, p. 195-196. See also discussion of political questions and the representation of China at SR.22/3, p. 1-2.

⁵⁴L/2428, dated 8 April 1965 (responding to L/2337, reprinted at 14S/1).

⁵⁵Panel Report in L/3485, adopted on 2 February 1971, 18S/183, 184, para. 3; see also L/1809.

⁵⁶L/74; concerning the inclusion of these provisions in the General Agreement see EPCT/W/311, EPCT/W/340 and Rev.1, and discussion of Notes at EPCT/TAC/PV/22 p. 52-65, EPCT/TAC/PV/24 p. 2-26, EPCT/TAC/PV/28 p. 21-40.

⁵⁷EPCT/TAC/PV/22, p. 22.

information on certain specific matters relating to the autonomy in commercial policy of these territories and made a Declaration to the Tariff Agreement Committee establishing the ability of these three territories to enter into and fulfil all obligations under the General Agreement. The Sub-Committee agreed to recommend that Burma, Ceylon and Southern Rhodesia be admitted to participate as full contracting parties, and also recommended consequential changes to the Preamble, the provisions on acceptance which became Article XXVI:5, and the accession provisions in Article XXXIII.⁵⁸

Declarations concerning the autonomy in commercial matters of customs territories under the international responsibility of another State were made in the case of Hong Kong, Lesotho, Liechtenstein and Macau.⁵⁹

(b) *“upon sponsorship through a declaration by the responsible contracting party”*

The Sub-committee which drafted this provision during the negotiation of the General Agreement in Geneva in 1947 “thought this was necessary ... because the other contracting parties must have sufficient information to be able to judge the legal ability of such separate customs territory”.⁶⁰

Before 1963, it was customary to refer requests under Article XXVI:5(c) to the CONTRACTING PARTIES, even though accession under Article XXVI:5(c) is automatic providing that the stated conditions are fulfilled. At its meeting of April/May 1963, the Council agreed to a Secretariat proposal for a simplified procedure for the admission of newly-independent States. The minutes of that meeting note that

“Article XXVI:5(c) provided that if certain conditions were fulfilled, the admission of such States would follow automatically, and it was therefore considered that if requests were received at a time when no session was to be held it would be unfortunate if mere formalities were to cause delay in the admission of the new contracting parties. It was now proposed that when a request for admission under Article XXVI:5(c) was received the matter could be dealt with by a certification by the Executive Secretary to the effect that the conditions of Article XXVI:5(c) had been fulfilled in respect of a certain State, and advising that the State had therefore become a contracting party and had acquired the rights and obligations of the General Agreement. These certifications would be brought to the notice of the Council or the CONTRACTING PARTIES when next in session so that note could be taken of them and a welcome extended to the new contracting parties.”⁶¹

This procedure of certification has been followed since 1963. The rights and obligations of contracting parties succeeding to contracting party status under Article XXVI:5(c) date from the date of independence of the newly-independent State or the date of receipt of certification of a territory’s autonomy in the conduct of its external commercial relations.

In instances where pre-existing concessions in schedules related to the territory of the newly-independent State or newly-autonomous territory, such concessions have been continued, and a new Schedule for the new contracting party comprising those concessions has been established by using the procedure of certification of changes to schedules to the General Agreement. Paragraph 5 of the Decision of 26 March 1980 on “Procedures for Modification and Rectification of Schedules of Tariff Concessions” states that “The procedure of Certification under this Decision may be applied for the establishment of consolidated Schedules or of new Schedules under paragraph 5(c) of Article XXVI, wherein all changes are modifications or rectifications [of a purely formal character]”.⁶²

⁵⁸EPCT/198, report of the Sub-committee, and attached Declaration and statement of sponsorship of Burma, Ceylon and Southern Rhodesia by UK Government.

⁵⁹Hong Kong: L/5986, 34S/27 (certification incorporating communication by the United Kingdom). Lesotho: L/2701 (communication from the United Kingdom), 4 October 1966. Liechtenstein: L/7440 (statements dated 29 March 1994 from both Switzerland and Liechtenstein concerning commercial autonomy of Liechtenstein). Macau: L/6806 (certification by the Director-General incorporating a communication by Portugal); see also L/6807 (communication from the government of the People’s Republic of China).

⁶⁰EPCT/TAC/PV/22, p. 22, discussing EPCT/198.

⁶¹C/M/15, p. 7 (approval of procedure proposed by the Executive Secretary in C/30).

⁶²L/4962, Decision of 26 March 1980, 27S/25, 26, para. 5.

(c) *“be deemed to be a contracting party”*

In the first full draft of the General Agreement (EPCT/135) the separate customs territory was “entitled to appoint a representative” to the CONTRACTING PARTIES. In the revised text of 30 October 1947, the word “deemed” was used intentionally in order to make clear that such territory could either act in its own right as a full contracting party and be represented by a separate delegate (as in the case of Burma, Ceylon and Southern Rhodesia during the negotiation of the General Agreement in 1947) or continue to be represented by the metropolitan contracting party acting on behalf of such customs territory.⁶³

(d) *Terms and conditions of succession to GATT*

The Report of the Working Party on “Article XXXV - Application to Japan” pointed out “that there could be no doubt that a government becoming a contracting party under Article XXVI:5(c) does so on the terms and conditions previously accepted by the metropolitan government on behalf of the territory in question. Consequently, if Article XXXV had been invoked in respect of that territory (or if that territory had not been specifically excluded from such invocation), it would continue to be valid unless expressly disinvoked by the succeeding government. If this were clearly understood, it would then be unnecessary for the new government to take an immediate decision on whether the invocation should or should not be maintained”.⁶⁴

The 1971 Panel Report on “Jamaica – Margins of Preference” includes the following finding:

“The Panel held that since Jamaica had acceded to the General Agreement on Tariffs and Trade under the provisions of Article XXVI:5(c) it had acquired the rights and obligations which had previously been accepted by the United Kingdom in respect of the territory of Jamaica. This meant that Jamaica assumed the rights and obligations involved in the application to it of the General Agreement by the United Kingdom before Jamaica became independent. On 6 August 1962, the day Jamaica became independent, Article I:4 formed part of the General Agreement as it had been applied by the United Kingdom on behalf of the territory of Jamaica. The provision of Article I:4 establishing 10 April 1947 as the base date for permissible margins of preference was therefore applicable to Jamaica.”⁶⁵

(3) *De facto application of the GATT by newly-independent States pending a decision under paragraph 5(c)*

The concept of *de facto* application of the General Agreement arose as a means to provide some time for governments of newly-independent territories to consider their future commercial policy and the question of their relations with the General Agreement, while continuing the pre-existing arrangements governing the trade relations between the newly-independent country and the contracting parties to the GATT. The Recommendation of 1 November 1957 on “Procedures for Sponsorship under Article XXVI:5(c)”⁶⁶ provided that as soon as a customs territory in respect of which a contracting party had accepted the Agreement, or had made effective the provisional application of the Agreement, acquired full autonomy in the conduct of its external commercial relations and of the other matters provided for in the Agreement, the responsible contracting party should notify the Secretariat. The CONTRACTING PARTIES would then set a “reasonable period” during which the contracting parties would continue to apply *de facto* the General Agreement in their relations with that territory on a basis of reciprocity, pending accession under Article XXVI:5(c).⁶⁷ A Recommendation of 18 November 1960 set the period of *de facto* application at two years from the acquisition of autonomy.⁶⁸ Later Recommendations provided for prolongation of the period of *de facto* application for such territories.⁶⁹

⁶³EPCT/TAC/PV/22, pp. 21-22.

⁶⁴L/1545, adopted on 7 December 1961, 10S/69, 73, para. 19.

⁶⁵L/3485, adopted on 2 February 1971, 18S/183, 187, para. 13.

⁶⁶6S/11.

⁶⁷See Recommendation of 22 November 1957 on “Application of the General Agreement to Laos, Cambodia and Tunisia”, 6S/10 (recommending that this “reasonable period” should end in the case of Laos and Cambodia two weeks after the commencement of the Thirteenth Session and in the case of Tunisia two weeks after the commencement of the Fourteenth Session); Recommendation of 19 November 1959 on “Application of the General Agreement to Guinea”, 8S/8 (fixing end of “reasonable period” in the case of Guinea at two weeks after commencement of last session of the CONTRACTING PARTIES in 1961).

⁶⁸Recommendation of 18 November 1960 on “Application of the General Agreement to Territories which Acquire Autonomy in

Considering that prolongations of the *de facto* régime had frequently been requested and that they had always been granted, the CONTRACTING PARTIES adopted the Recommendation adopted 11 November 1967 on "Application of the General Agreement to Territories which acquire Autonomy in Commercial Matters", in which the CONTRACTING PARTIES, *inter alia*,

"Considering that paragraph 5(c) of Article XXVI of the General Agreement provides that if a customs territory, in respect of which a contracting party has accepted the Agreement, 'acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in the Agreement', such territory may be 'deemed' to be a contracting party;

"Considering that the CONTRACTING PARTIES have recognized that the governments of territories which acquire such autonomy will normally require some time to consider their future commercial policy and the question of their relations with the General Agreement and that it is desirable that meanwhile the provisions of the Agreement should continue to be applied between such territories and the contracting parties, and accordingly, recommended, on 8 November 1960, that contracting parties should continue to apply *de facto* for a period of two years, the General Agreement in their relations with any such territory, provided that the territory continued to apply *de facto* the Agreement to its trade with contracting parties; and

"Considering that many such territories have requested repeated prolongations of this arrangement for the *de facto* application of the Agreement to their trade and that the CONTRACTING PARTIES have granted all such requests;

"Recommend that contracting parties should continue to apply *de facto* the General Agreement in their relations with each territory which acquires full autonomy in the conduct of its external commercial relations and in respect of which a contracting party had accepted the Agreement, provided such territory continues to apply *de facto* the Agreement to its trade with the contracting parties."⁷⁰

The Recommendation of 1967 does not have a time-limit. The Director-General is requested to submit a report on its application after three years. The most recent such report was submitted in June 1991⁷¹. A list of countries with respect to which the Recommendation was applicable as of April 1993 appears in the Appendices to this Index.

Letters have been addressed to the governments concerned, upon their independence, advising them that the Recommendation is applicable to their trade relations with the contracting parties and seeking their confirmation that they will reciprocate in applying the General Agreement on a *de facto* basis. The governments are regularly kept informed about GATT activities and receive all GATT documents and publications. They are also invited to be represented by observers at the annual sessions of the CONTRACTING PARTIES.

Commercial Matters," 9S/16, 17: "... contracting parties should continue to apply *de facto* the General Agreement in their relations with any territory which has acquired full autonomy in the conduct of its external commercial relations and of other matters provided for in the General Agreement, for a period of two years from the date on which such autonomy was acquired ..." See also W.17/10, Secretariat Note of 12 November 1960 on "Article XXVI:5(c)"; L/1405, Secretariat Note of 10 January 1961 on "Application of the General Agreement to Territories which Acquire Autonomy in Commercial Matters"; and L/1458, Secretariat Note of 3 May 1961 on "Commercial Policy Problems of Newly Independent States".

⁶⁹Recommendation of 9 December 1961, 10S/17 (extending time-limit for one year for any State to which the previous Recommendation was applicable and which requested an extension), approval at SR.19/12, p. 199, Secretariat draft at W.19/19; Decision on "Newly-independent African States" of 14 November 1962, 11S/53 (extension until close of last Session in 1963, for Cameroon, Central African Republic, Chad, Congo, Côte d'Ivoire, Dahomey, Gabon, Madagascar, Mali, Mauritania, Niger, Senegal, Togo, Upper Volta and Zaïre); Decision of 2 March 1964, 12S/34 (extension until end of Twenty-second Session for Zaïre and Mali), Decision of 22 March 1965, 13S/12 (extension until end of Twenty-third Session for Algeria, Mali, Rwanda and Zaïre) Decision of 6 April 1966, 14S/12 (extension until end of Twenty-fourth Session for Algeria, Mali and Zaïre; determination that 1960 Recommendation applied in respect of Singapore and Zambia until 24 October 1966).

⁷⁰15S/64. See also L/2757, Secretariat Note of 8 March 1967 on "Territories which Acquire Commercial Autonomy".

⁷¹L/6866. Earlier reports were submitted to the Council in November 1970 (L/3457), November 1973 (L/3948), October 1976 (L/4427), October 1979 (L/4846 and Add.1), July 1982 (L/5345) July 1985 (L/5823), and June 1988 (L/6349).

The CONTRACTING PARTIES have never defined the meaning of *de facto* application. However, the following practices have evolved in regard to this form of association with the General Agreement⁷²:

- The countries applying the General Agreement on a *de facto* basis are expected to observe the substantive provisions of the General Agreement. However, they do not apply the procedural provisions of the General Agreement. Thus, when these countries impose import restrictions for balance of payments purposes, they do not notify the GATT and do not consult in the GATT Balance-of-Payments Committee under Article XVIII:B. They also do not notify the trade measures they take for development purposes under Article XVIII:C, emergency actions under Article XIX, or the formation of customs unions and free-trade areas under Article XXIV. They are expected to apply the schedule of concessions which the metropolitan government had agreed to apply to their territory; however, they do not notify any modifications of their tariff schedules under Article XXVIII. The contracting parties granting GATT treatment to a country applying the General Agreement on a *de facto* basis determine themselves whether the conditions stipulated in these provisions are met.
- Each contracting party decides whether or not to apply the provisions of the General Agreement to a country which applied the General Agreement on a *de facto* basis. The contracting parties do not inform the GATT of their decision.
- The CONTRACTING PARTIES do not assist in the resolution of disputes on the interpretation or application of the General Agreement that might arise between contracting parties and countries applying the General Agreement on a *de facto* basis. Article XXIII:2 is not applied to such disputes.⁷³
- The countries applying the General Agreement on a *de facto* basis are treated as non-contracting parties for organizational purposes. They are invited to be represented as observers at the annual sessions of the CONTRACTING PARTIES. They do not attend other GATT meetings unless they have requested and obtained observer status, and they do not contribute to the GATT budget.

The legal aspects of *de facto* application of the General Agreement are presented in a Secretariat Note of 28 June 1984 on “De facto Application of the General Agreement”.⁷⁴ A Secretariat Note of 1988 lists the countries that have succeeded to the status of contracting parties under Article XXVI:5(c) after having applied the General Agreement on a *de facto* basis.⁷⁵

6. Paragraph 6: “this Agreement shall enter into force”

Paragraph 6 provides for entry into force of the General Agreement thirty days after the deposit of instruments of acceptance on behalf of governments among the thirty-four governments listed in Annex H, representing 85 per cent of total external trade, computed in accordance with the percentages in Annex H. The 30 October 1947 text of the General Agreement listed twenty governments in Annex H, with percentages based on an average of 1938 and the latest twelve months for which figures were available; Annex H was revised at the Review Session to reflect changes in GATT membership and to update the trade percentages.⁷⁶

The CONTRACTING PARTIES have considered the question of definitive application of the General Agreement on several occasions, for instance during the Review Session in 1955⁷⁷, during the Twenty-second Session in 1965⁷⁸, in 1977⁷⁹ and in 1990.⁸⁰

⁷²See C/130.

⁷³See also VAL/M/8, p. 2, for a Secretariat legal opinion on this issue, and the chapter herein on Article XXIII.

⁷⁴C/130.

⁷⁵MTN.GNG/NG7/W/40/Rev.1.

⁷⁶L/327, Report of the Review Working Party on “Organizational and Functional Questions”, adopted 28 February, 5 and 7 March 1955, 3S/231, 251, para. 68.

⁷⁷See 3S/247-250.

⁷⁸See the Secretariat Note in L/2375.

⁷⁹See 24S/61-62 and EEC memorandum proposing definitive application of the General Agreement under Article XXVI, CG.18/W/20.

⁸⁰MTN/GNG/NG7/W/70, W/71.

Only one of the current contracting parties, Haiti, has accepted the General Agreement (on 7 March 1952). Liberia accepted the General Agreement on 17 May 1950, but withdrew from the General Agreement on 13 June 1953. Hence, the General Agreement has never entered into force pursuant to paragraph 6 and continues to be applied by contracting parties “provisionally” under the 1947 Protocol of Provisional Application and subsequent Protocols of Accession.

The WTO Agreement provides in its Article II:2 that the agreements and associated legal instruments included in Annexes 1A, 2 and 3 are integral parts of that Agreement and binding on all Members. A Member that has accepted or acceded to the WTO Agreement is thus bound definitively by “GATT 1994”, as defined in Annex 1A of the WTO Agreement. On 8 December 1994, at their Sixth Special Session, the CONTRACTING PARTIES adopted a Decision on “Transitional Co-existence of the GATT 1947 and the WTO Agreement”, which provides *inter alia*:

“The legal instruments through which the contracting parties apply the GATT 1947 are herewith terminated one year after the date of entry into force of the WTO Agreement. In the light of unforeseen circumstances, the CONTRACTING PARTIES may decide to postpone the date of termination by no more than one year.”⁸¹

Unless the requisite number of acceptances have been received by that date, the provisional application of the GATT 1947 will terminate without the General Agreement ever having entered into force.

7. Paragraph 7: Registration

Article 102 of the Charter of the United Nations provides as follows.

“1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into effect shall as soon as possible be registered by the [United Nations] Secretariat and published by it.

“2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.”

The General Agreement was registered with the United Nations on 30 May 1950.⁸² Protocols associated with the General Agreement and agreements and arrangements made under the auspices of the GATT have been registered with the United Nations by the Secretariat and published in the United Nations Treaty Series. Information on their registration and UNTS citations can be found in the GATT publication on *Status of Legal Instruments*.

B. RELATIONSHIP BETWEEN ARTICLE XXVI AND OTHER ARTICLES

1. Article XXXIII

See the discussion under Article XXXIII.

2. Article XXXV

See the reference to the Report of the Working Party on “Article XXXV – Application to Japan” above on page 921.

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

Havana Charter and 30 October 1947 text of the General Agreement: No strict equivalency exists between most of the final provisions of the General Agreement and those of the Havana Charter. The Charter provided for

⁸¹PC/12, L/7583.

⁸²No. 814, 55 UNTS 187, UN Sales No. 1947.II.10 - Vol. I.

participation not by governments but by States. However, the Charter too had provisions on acceptance, entry into force, and registration (Article 103), and deposit, date of the Charter and authentic languages (Article 106).

The 30 October text of the General Agreement included an Interpretative Note *Ad* Article XXVI, as follows: "Territories for which the contracting parties have international responsibility do not include areas under military occupation". It also included a Final Note on areas under military occupation; see page 919 above. These provisions were deleted in the Review Session of 1954-55.

Amendments agreed in 1949: Paragraph 4 of the Article was amended in 1949 to conform to the treatment of territorial application in the accession protocols agreed at Annecy, which aligned the treatment of territorial application with that in the Protocol of Provisional Application. It was also pointed out that "the present form of Article XXVI might frustrate the entry into force of the Agreement" by enabling a territory which was a separate customs territory and did not possess full autonomy in external commercial relations to withhold its consent and thus delay indefinitely the acceptance of the country which was internationally responsible for it. The new text was modelled on Article 104 of the Havana Charter.⁸³

Amendments agreed in the Review Session: In the Review Session in 1954-1955 additional amendments to Article XXVI were agreed. References to the Final Act of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment were deleted; this involved the introduction of new paragraphs 1 and 2 and amendments in paragraph 6 (formerly 5). References to deposit of acceptances were amended to substitute the Executive Secretary to the CONTRACTING PARTIES for the Secretary-General of the United Nations. At the same time the interpretative note on areas under military occupation was deleted and Annex H was revised.⁸⁴ These changes were effected through the Protocol Amending the Preamble and Parts II and III, which entered into force on 7 October 1957.

IV. RELEVANT DOCUMENTS

Geneva

Discussion: EPCT/TAC/SR.12, 13, 16
EPCT/TAC/PV/22, 24, 25, 26, 28
Reports: EPCT/135, 189, 196, 198, 199,
205, 209, 214/Add.1/Rev.1, 215,
224, 233
Other: EPCT/207
EPCT/W/273, 274, 276, 277, 285,
312, 316

Review Session

Discussion: SR.9/38, 46, 47
Reports: W.9/198+Add.1, W.9/236, L/327,
3S/231
Other: L/189+Add.1, L/273, 275, 276,
282
W.9/62, 195, 236
Spec/59/55, 82/55, 119/55

CONTRACTING PARTIES

Discussion: GATT/1/SR.3-11
GATT/CP.2/SR.4-6, 15-18, 20
GATT/CP.3/SR.5, 31, 33
GATT/CP.5/SR.24, 25
GATT/CP.6/11
Reports: GATT/1/21, 35
GATT/CP.2/22/Rev.1, 27
GATT/CP.3/37, 49
GATT/CP.4/11
GATT/CP.5/9

⁸³Protocol Modifying Article XXVI, Vol.II/155, para. 32.

⁸⁴See Secretariat proposals in L/189, text proposed by Legal and Drafting Committee in W.9/236.

ARTICLE XXVII

WITHHOLDING OR WITHDRAWAL OF CONCESSIONS

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I. TEXT OF ARTICLE XXVII

Article XXVII

Withholding or Withdrawal of Concessions

Any contracting party shall at any time be free to withhold or to withdraw in whole or in part any concession, provided for in the appropriate Schedule annexed to this Agreement, in respect of which such contracting party determines that it was initially negotiated with a government which has not become, or has ceased to be, a contracting party. A contracting party taking such action shall notify the CONTRACTING PARTIES and, upon request, consult with contracting parties which have a substantial interest in the product concerned.

II. INTERPRETATION AND APPLICATION OF ARTICLE XXVII

1. “or has ceased to be a contracting party”

(1) Succession

A Secretariat Note of 29 April 1949 on “The Position of Palestine in Relation to the Agreement” stated that upon termination of the League of Nations mandate of the United Kingdom with respect to Palestine, the successor state could not be regarded as being bound by obligations under the GATT. “The second question is, what is to be done in the light of this conclusion. In this connection it is relevant to record that the United Kingdom negotiated in Geneva on behalf of the mandated territory and the concessions negotiated on behalf of Palestine are contained in a separate section of Schedule XIX. Moreover, the concessions were applied separately on behalf of Palestine by notice on March 20, 1948 to the Secretary-General of the United Nations, in accordance with Paragraph 2 of the Protocol of Provisional Application.” The Note proposed the text of a Declaration based on Article XXVII.¹

The Executive Secretary, discussing this Note, stated that “the Secretariat paper had proceeded upon the assumption that the first question to be determined was whether or not Article XXVII applied. If the decision

¹CP.3/17.

was affirmative the consequences had two aspects. First, the concessions made on behalf of Palestine by the United Kingdom and included in Section E of Schedule XIX would disappear and it might be desirable to make the appropriate rectification subsequently. That could be done by a protocol of rectification approved by a unanimous vote. Secondly, there was the right of withdrawal of concessions granted by other Contracting Parties on Palestine products. This was clearly dealt with in Article XXVII which expressly provided for consultation with other interested Contracting Parties. ... The United Kingdom had negotiated in Geneva on behalf of the mandatory government of Palestine. On 15 May 1948, the mandatory government had ceased to exist. Therefore, at that date the United Kingdom could no longer be regarded as a contracting party in respect of Palestine. ... It was not correct to say that the United Kingdom was withdrawing concessions. The mandatory government having ceased to exist the United Kingdom had ceased to be a contracting party on behalf of Palestine".²

The Declaration adopted by the CONTRACTING PARTIES on 9 May 1949 provides:

"Whereas the Government of the United Kingdom in the course of the negotiations leading up to the drawing up of the General Agreement on Tariffs and Trade in 1947, negotiated on behalf of the mandated territory of Palestine for concessions to be accorded to products originating in such territory and for concessions to be accorded to the products of other contracting parties entering such territory, and

"Whereas the Government of the United Kingdom ceased to be responsible for the mandated territory of Palestine on 15 May 1948,

The CONTRACTING PARTIES

Declare that, since the United Kingdom ceased, as from 15 May 1948, to be a contracting party in respect of the territory formerly included in the Palestine mandate,

1. Section E shall be deemed to be no longer part of Schedule XIX; and
2. Any contracting party shall, in accordance with Article XXVII of the General Agreement, be free to withhold or withdraw, in whole or in part, any concession provided for in the appropriate schedule annexed to the GATT which such contracting party determines was initially negotiated with the United Kingdom on behalf of Palestine, provided that the contracting party taking such action shall give notice to all other contracting parties and, upon request, consult with the contracting parties which have a substantial interest in the product concerned."³

It was stated during the discussion of this matter at the Third Session that "It is certain that, during the duration of its mandate, the United Kingdom was competent to contract international obligations on behalf of Palestine. But it is equally certain that termination of its mandate deprived Great Britain of this power and that Great Britain has retained no obligation as a contracting party in respect of the territory of Palestine".⁴

²CP.3/SR.11 p. 3.

³II/14; see also draft declaration at CP.3/17, discussion and adoption at CP.3/SR.11 p. 1-5.

⁴GATT/CP.3/SR.14 p. 2.

(2) *Change in international responsibility for a territory*

In 1947 the Government of the United Kingdom negotiated and agreed to tariff concessions on most-favoured-nation and preferential duty rates on behalf of Newfoundland, which applied to the customs territory of Newfoundland. When Newfoundland changed status from an overseas territory of the United Kingdom to a province of Canada, the CONTRACTING PARTIES approved a Declaration of 11 August 1949, which provided that these tariff concessions were no longer part of the tariff schedules and ceased to have effect as from 31 March 1949:

“Whereas the Government of the United Kingdom in the course of the negotiations leading up to the drawing up of the General Agreement on Tariffs and Trade in 1947, negotiated on behalf of Newfoundland, as a separate customs territory for which the United Kingdom had international responsibility; and

“Whereas the concessions to be accorded as a result of such negotiations to the products of other contracting parties entering Newfoundland constituted Section B of Schedule XIX of the General Agreement; and

“Whereas the Government of the United Kingdom ceased to be responsible for Newfoundland on 31 March 1949 and Newfoundland became a part of the customs territory of Canada, which is also a contracting party,

“The CONTRACTING PARTIES declare that Section B shall be deemed to be no longer a part of Schedule XIX.”⁵

2. “that it was initially negotiated”

See *infra* material on initial negotiating rights (INRs) under Article XXVIII.

3. “a substantial interest in the product concerned”

See *infra* material on substantial supplier rights under Article XXVIII.

4. Application of Article XXVII in specific cases

Notifications of withdrawal of concessions appear in a table in this chapter. Of the countries listed in the middle column, China, Syria, Lebanon and Liberia subsequently notified their withdrawal of provisional application of the General Agreement. Colombia participated in the Annecy Round but decided against provision being made for its accession in the Annecy Protocol. Korea and Philippines participated in the negotiations at Torquay; schedules of concessions for these countries were included in the Torquay Protocol, but they did not accept the Protocol. Korea acceded in 1967.

5. Article XXVII and tariff protocols

Tariff protocols to which the concessions negotiated in rounds of multilateral trade negotiations have been attached have included provisions permitting participants to withhold or withdraw, in whole or in part, concessions with respect to any product for which the principal supplier is any other participant in the negotiating round or any government having negotiated for accession during the negotiating round, whose schedule has not yet become a Schedule to the General Agreement. Similar provisions also appear in the Marrakesh Protocol to the GATT 1994.⁶

⁵Declaration at II/14; see also GATT/CP/26 (notification by UK), GATT/CP.3/75 (Secretariat note and draft declaration), GATT/CP.3/SR.40 p. 8 (approval). GATT/CP.3/75 notes that this approach was taken after discussion with Canada and with the contracting parties with which the concessions in Schedule XIX were initially negotiated. See also Annecy Press Release No. 60 of 11 August 1949.

⁶See, e.g., paragraph 6 of the Protocol Embodying the Results of the 1960-61 Tariff Conference, 11S/10, and paragraph 3 in each of the following: Geneva (1967) Protocol (results of Kennedy Round), 15S/6; Geneva (1979) Protocol, 26S/4, and Protocol Supplementary to the Geneva (1979) Protocol, 26S/6 (results of Tokyo Round). See also paragraph 4 of the Marrakesh Protocol.

Notifications of withdrawal of concessions pursuant to Article XXVII

Concessions granted by	Initially negotiated with	Reference
Australia	China, Syria/Lebanon, Philippines	L/1266
Benelux: Section A - Metropolitan Territories	China, Syria/Lebanon, Liberia, Philippines	L/674
Benelux: Section C - Netherlands New Guinea	China	L/658 and Add.1
Canada	China, Liberia, Philippines, Korea	L/553
Ceylon	China	L/1102, L/1505
Chile	Colombia	L/3191
Czechoslovakia	Palestine	GATT/CP/23
Finland	China	L/659
France	China, Syria/Lebanon, Philippines	L/460 and L/1269
Germany, Fed. Rep.	Philippines	L/1264
India	China, Colombia, Philippines	G/77 and L/1430
Pakistan	China	L/1293
Sweden	Colombia, Philippines, China	L/950
United Kingdom	China	L/786
United States	China	GATT/CP/115 and Add.3
Uruguay	China, Colombia	L/1613

6. Modification and rectification of schedules of tariff concessions

In their Decision of 26 March 1980 on “Procedures for Modification and Rectification of Schedules of Tariff Concessions”, the CONTRACTING PARTIES decided, *inter alia*, that

“Changes in the authentic texts of Schedules annexed to the General Agreement which reflect modifications resulting from action under ... Article XXVII ... shall be certified by means of Certifications. A draft of such change shall be communicated to the Director-General within three months after the action has been completed.”⁷

III. PREPARATORY WORK

Article XXVII was drafted as part of the General Agreement in the New York Drafting Committee and at the Geneva meeting of the Preparatory Committee in 1947. It has no direct counterpart in the Havana Charter. During the Review Session of 1954-55, it was agreed to modify the final sentence of Article XXVII in order to require notice to the CONTRACTING PARTIES and consultation upon request with any contracting party claiming a substantial interest in the product concerned.⁸

⁷L/4962, 27S/25, para. 1.

⁸See Secretariat proposal at L/189, p. 17 and documents listed below.

IV. RELEVANT DOCUMENTS*Geneva*

Discussion: EPCT/TAC/SR.14, 15
EPCT/TAC/PV/14, 25
Reports: EPCT/135, 189, 196, 209,
214/Add.1/Rev.1
Other: EPCT/W/274, 285, 312

CONTRACTING PARTIES

- re Schedule XIX:B
(Newfoundland): GATT/CP.3/75;
GATT/CP.3/SR.40; II/14
- re Schedule XIX:E (Palestine):
GATT/CP.3/17;
GATT/CP.3/SR.11; II/14

Review Session

Reports: W.9/212, L/327, 3S/231
Other: L/189, 261/Add.1, 283
W.9/19, 45, 124, 217+Corr.1,
236; Spec/137/55

ARTICLE XXVIII

MODIFICATION OF SCHEDULES

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I. TEXT OF ARTICLE XXVIII AND INTERPRETATIVE NOTE AD ARTICLE XXVIII

Article XXVIII*

Modification of Schedules

1. On the first day of each three-year period, the first period beginning on 1 January 1958 (or on the first day of any other period* that may be specified by the CONTRACTING PARTIES by two-thirds of the votes cast) a contracting party (hereafter in this Article referred to as the "applicant contracting party") may, by negotiation and agreement with any contracting party with which such concession was initially negotiated and with any other contracting party determined by the CONTRACTING PARTIES to have a principal supplying interest* (which two preceding categories of contracting parties, together with the applicant contracting party, are in this Article hereinafter referred to as the "contracting parties primarily concerned"), and subject to consultation with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest* in such concession, modify or withdraw a concession* included in the appropriate Schedule annexed to this Agreement.

2. In such negotiations and agreement, which may include provision for compensatory adjustment with respect to other products, the contracting parties concerned shall endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement prior to such negotiations.

3. (a) If agreement between the contracting parties primarily concerned cannot be reached before 1 January 1958 or before the expiration of a period envisaged in paragraph 1 of this Article, the contracting party which proposes to modify or withdraw the concession shall, nevertheless, be free to do so and if such action is taken any contracting party with which such concession was initially negotiated, any contracting party determined under paragraph 1 to have a principal supplying interest and any contracting party determined under paragraph 1 to have a substantial interest shall then be free not later than six months after such action is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.

(b) If agreement between the contracting parties primarily concerned is reached but any other contracting party determined under paragraph 1 of this Article to have a substantial interest is not satisfied, such other contracting party shall be free, not later than six months after action under such agreement is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.

4. The CONTRACTING PARTIES may, at any time, in special circumstances, authorize* a contracting party to enter into negotiations for modification or withdrawal of a concession included in the appropriate Schedule annexed to this Agreement subject to the following procedures and conditions:

- (a) Such negotiations* and any related consultations shall be conducted in accordance with the provisions of paragraphs 1 and 2 of this Article.
- (b) If agreement between the contracting parties primarily concerned is reached in the negotiations, the provisions of paragraph 3 (b) of this Article shall apply.

- (c) If agreement between the contracting parties primarily concerned is not reached within a period of sixty days* after negotiations have been authorized, or within such longer period as the CONTRACTING PARTIES may have prescribed, the applicant contracting party may refer the matter to the CONTRACTING PARTIES.
- (d) Upon such reference, the CONTRACTING PARTIES shall promptly examine the matter and submit their views to the contracting parties primarily concerned with the aim of achieving a settlement. If a settlement is reached, the provisions of paragraph 3 (b) shall apply as if agreement between the contracting parties primarily concerned had been reached. If no settlement is reached between the contracting parties primarily concerned, the applicant contracting party shall be free to modify or withdraw the concession, unless the CONTRACTING PARTIES determine that the applicant contracting party has unreasonably failed to offer adequate compensation.* If such action is taken, any contracting party with which the concession was initially negotiated, any contracting party determined under paragraph 4 (a) to have a principal supplying interest and any contracting party determined under paragraph 4 (a) to have a substantial interest, shall be free, not later than six months after such action is taken, to modify or withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.

5. Before 1 January 1958 and before the end of any period envisaged in paragraph 1 a contracting party may elect by notifying the CONTRACTING PARTIES to reserve the right, for the duration of the next period, to modify the appropriate Schedule in accordance with the procedures of paragraph 1 to 3. If a contracting party so elects, other contracting parties shall have the right, during the same period, to modify or withdraw, in accordance with the same procedures, concessions initially negotiated with that contracting party.

Interpretative Note *Ad* Article XXVIII from Annex I

The CONTRACTING PARTIES and each contracting party concerned should arrange to conduct the negotiations and consultations with the greatest possible secrecy in order to avoid premature disclosure of details of prospective tariff changes. The CONTRACTING PARTIES shall be informed immediately of all changes in national tariffs resulting from recourse to this Article.

Paragraph 1

1. If the CONTRACTING PARTIES specify a period other than a three-year period, a contracting party may act pursuant to paragraph 1 or paragraph 3 of Article XXVIII on the first day following the expiration of such other period and, unless the CONTRACTING PARTIES have again specified another period, subsequent periods will be three-year periods following the expiration of such specified period.

2. The provision that on 1 January 1958, and on other days determined pursuant to paragraph 1, a contracting party "may ... modify or withdraw a concession" means that on such day, and on the first day after the end of each period, the legal obligation of such contracting party under Article II is altered; it does not mean that the changes in its customs tariff should necessarily be made effective on that day. If a tariff change resulting from negotiations undertaken pursuant to this Article is delayed, the entry into force of any compensatory concessions may be similarly delayed.

3. Not earlier than six months, nor later than three months, prior to 1 January 1958, or to the termination date of any subsequent period, a contracting party wishing to modify or withdraw any concession embodied in the appropriate Schedule, should notify the CONTRACTING PARTIES to this effect. The CONTRACTING PARTIES shall then determine the contracting party or contracting parties with which the negotiations or consultations referred to in paragraph 1 shall take place. Any contracting party so determined shall participate in such negotiations or consultations with the applicant contracting party with the aim of reaching agreement before the end of the period. Any extension of the assured life of the Schedules shall relate to the Schedules as modified after such negotiations, in accordance with paragraphs 1, 2, and 3 of Article XXVIII. If the CONTRACTING PARTIES are arranging for multilateral tariff negotiations to take place within the period of six months before 1 January 1958, or before any other day determined pursuant to paragraph 1, they shall include in the arrangements for such negotiations suitable procedures for carrying out the negotiations referred to in this paragraph.

4. The object of providing for the participation in the negotiation of any contracting party with a principal supplying interest, in addition to any contracting party with which the concession was originally negotiated, is to ensure that a contracting party with a larger share in the trade affected by the concession than a contracting party with which the concession was originally negotiated shall have an effective opportunity to protect the contractual right which it enjoys under this Agreement. On the other hand, it is not intended that the scope of the negotiations should be such as to make negotiations and agreement under Article XXVIII unduly difficult nor to create complications in the application of this Article in the future to concessions which result from negotiations thereunder. Accordingly, the CONTRACTING PARTIES should only determine that a contracting party has a principal supplying interest if that contracting party has had, over a reasonable period of time prior to the negotiations, a larger share in the market of the applicant contracting party than a contracting party with which the concession was initially negotiated or would, in the judgment of the CONTRACTING PARTIES, have had such a share in the absence of discriminatory quantitative restrictions maintained by the applicant contracting party. It would therefore not be appropriate for the CONTRACTING PARTIES to

determine that more than one contracting party, or in those exceptional cases where there is near equality more than two contracting parties, had a principal supplying interest.

5. Notwithstanding the definition of a principal supplying interest in note 4 to paragraph 1, the CONTRACTING PARTIES may exceptionally determine that a contracting party has a principal supplying interest if the concession in question affects trade which constitutes a major part of the total exports of such contracting party.

6. It is not intended that provision for participation in the negotiations of any contracting party with a principal supplying interest, and for consultation with any contracting party having a substantial interest in the concession which the applicant contracting party is seeking to modify or withdraw, should have the effect that it should have to pay compensation or suffer retaliation greater than the withdrawal or modification sought, judged in the light of the conditions of trade at the time of the proposed withdrawal or modification, making allowance for any discriminatory quantitative restrictions maintained by the applicant contracting party.

7. The expression "substantial interest" is not capable of a precise definition and accordingly may present difficulties for the CONTRACTING PARTIES. It is, however, intended to be construed to cover only those contracting parties which have, or in the absence of discriminatory quantitative restrictions affecting their exports could reasonably be expected to have, a significant share in the market of the contracting party seeking to modify or withdraw the concession.

Paragraph 4

1. Any request for authorization to enter into negotiations shall be accompanied by all relevant statistical and other data. A decision on such request shall be made within thirty days of its submission.

2. It is recognized that to permit certain contracting parties, depending in large measure on a relatively small number of primary commodities and relying on the tariff as an important aid for furthering diversification of their economies or as an important source of revenue, normally to negotiate for the modification or withdrawal of concessions only under paragraph 1 of Article XXVIII, might cause them at such time to make modifications or withdrawals which in the long run would prove unnecessary. To avoid such a situation the CONTRACTING PARTIES shall authorize any such contracting party, under paragraph 4, to enter into negotiations unless they consider this would result in, or contribute substantially towards, such an increase in tariff levels as to threaten the stability of the Schedules to this Agreement or lead to undue disturbance of international trade.

3. It is expected that negotiations authorized under paragraph 4 for modification or withdrawal of a single item, or a very small group of items, could normally be brought to a conclusion in sixty days. It is recognized, however, that such a period will be inadequate for cases involving negotiations for the modification or withdrawal of a large number of items and in such cases, therefore, it would be appropriate for the CONTRACTING PARTIES to prescribe a longer period.

4. The determination referred to in paragraph 4 (d) shall be made by the CONTRACTING PARTIES within thirty days of the submission of the matter to them unless the applicant contracting party agrees to a longer period.

5. In determining under paragraph 4 (d) whether an applicant contracting party has unreasonably failed to offer adequate compensation, it is understood that the CONTRACTING PARTIES will take due account of the special position of a contracting party which has bound a high proportion of its tariffs at very low rates of duty and to this extent has less scope than other contracting parties to make compensatory adjustment.

UNDERSTANDING ON THE INTERPRETATION OF ARTICLE XXVIII OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members hereby agree as follows:

1. For the purposes of modification or withdrawal of a concession, the Member which has the highest ratio of exports affected by the concession (i.e. exports of the product to the market of the Member modifying or withdrawing the concession) to its total exports shall be deemed to have a principal supplying interest if it does not already have an initial negotiating right or a principal supplying interest as provided for in paragraph 1 of Article XXVIII. It is however agreed that this paragraph will be reviewed by the Council for Trade in Goods five years from the date of entry into force of the WTO Agreement with a view to deciding whether this criterion has worked satisfactorily in securing a redistribution of negotiating rights in favour of small and medium-sized exporting Members. If this is not the case, consideration will be given to possible improvements, including, in the light of the availability of adequate data, the adoption of a criterion based on the ratio of exports affected by the concession to exports to all markets of the product in question.

2. Where a Member considers that it has a principal supplying interest in terms of paragraph 1, it should communicate its claim in writing, with supporting evidence, to the Member proposing to modify or withdraw a concession, and at the same time inform the Secretariat. Paragraph 4 of the "Procedures for Negotiations under Article XXVIII" adopted on 10 November 1980 (BISD 27S/26-28) shall apply in these cases.

3. In the determination of which Members have a principal supplying interest (whether as provided for in paragraph 1 above or in paragraph 1 of Article XXVIII) or substantial interest, only trade in the affected product which has taken place on an MFN basis shall be taken into consideration. However, trade in the affected product which has taken place under non-contractual preferences shall also be taken

into account if the trade in question has ceased to benefit from such preferential treatment, thus becoming MFN trade, at the time of the negotiation for the modification or withdrawal of the concession, or will do so by the conclusion of that negotiation.

4. When a tariff concession is modified or withdrawn on a new product (i.e. a product for which three years' trade statistics are not available) the Member possessing initial negotiating rights on the tariff line where the product is or was formerly classified shall be deemed to have an initial negotiating right in the concession in question. The determination of principal supplying and substantial interests and the calculation of compensation shall take into account, *inter alia*, production capacity and investment in the affected product in the exporting Member and estimates of export growth, as well as forecasts of demand for the product in the importing Member. For the purposes of this paragraph, "new product" is understood to include a tariff item created by means of a breakout from an existing tariff line.

5. Where a Member considers that it has a principal supplying or a substantial interest in terms of paragraph 4, it should communicate its claim in writing, with supporting evidence, to the Member proposing to modify or withdraw a concession, and at the same time inform the Secretariat. Paragraph 4 of the above-mentioned "Procedures for Negotiations under Article XXVIII" shall apply in these cases.

6. When an unlimited tariff concession is replaced by a tariff rate quota, the amount of compensation provided should exceed the amount of the trade actually affected by the modification of the concession. The basis for the calculation of compensation should be the amount by which future trade prospects exceed the level of the quota. It is understood that the calculation of future trade prospects should be based on the greater of:

- (a) the average annual trade in the most recent representative three-year period, increased by the average annual growth rate of imports in that same period, or by 10 per cent, whichever is the greater; or
- (b) trade in the most recent year increased by 10 per cent.

In no case shall a Member's liability for compensation exceed that which would be entailed by complete withdrawal of the concession.

7. Any Member having a principal supplying interest, whether as provided for in paragraph 1 above or in paragraph 1 of Article XXVIII, in a concession which is modified or withdrawn shall be accorded an initial negotiating right in the compensatory concessions, unless another form of compensation is agreed by the Members concerned.

II. INTERPRETATION AND APPLICATION OF ARTICLE XXVIII

A. SCOPE AND APPLICATION OF ARTICLE XXVIII

1. General

The present text of Article XXVIII was drafted during the Review Session of 1954-55 by the Review Session Working Party on Schedules and Customs Administration, whose Report notes that the revised text reflected the view "that the Article should provide for the extension of the firm validity of the schedules by three-year periods, but with greater flexibility in the right to renegotiate and in the procedures for negotiation, both during the periods of firm validity and at the end of each period".¹ The General Agreement as agreed in 1947 provided that Schedules of concessions would have firm validity and would not be renegotiable until 1 January 1951. This date was by stages extended to 1 January 1958; at the same time the CONTRACTING PARTIES accorded "sympathetic consideration" to case-by-case requests for renegotiation of concessions.

The principal changes made to Article XXVIII in the Review Session were the provision of rights for "principal suppliers" and the insertion of paragraphs 4 and 5. "Regulations" for the use of Article XXVIII were negotiated at the same time, and were inserted as interpretative notes to Article XXVIII. These amendments came into effect on 7 October 1957.² Procedures have been adopted for renegotiations under Article XXVIII; the Procedures now in effect, which were adopted in 1980, appear *in extenso* at pages 960-961.

In the Uruguay Round an Understanding on Article XXVIII was agreed and was incorporated into GATT 1994. The text of this Understanding appears above.

¹L/329, adopted on 26 February 1955, 3S/205, 217, para. 27(iii).

²Declarations extending the validity of Schedules for those contracting parties with respect to which the revised Article XXVIII was not yet in effect appear at 6S/19-22 (Declaration of 30 November 1957) and 9S/29-32 (Declaration of 19 November 1960).

2. Paragraph 1

(1) *“On the first day of each three-year period ...”*

The Report of the Review Working Party on “Schedules and Customs Administration” provides that

“... the revised text of paragraph 1 of the Article should be considered with particular reference to [paragraphs] 1 to 5 [of the Interpretative Notes to Article XXVIII]. The new paragraph 1 of the revised Article provides for the automatic renewal of the firm validity of the Schedules for successive period of three years unless the CONTRACTING PARTIES specify some other period by a majority of two-thirds of the votes cast. Contracting parties not wishing to accept the period thus specified will have the right of recourse to paragraph 5”.³

While the date specified in Article XXVIII:1 is the deadline for completion of renegotiations conducted thereunder, this deadline has on occasion been extended by the Council for all or for specific contracting parties.⁴

(2) *“by negotiation and agreement”*

During discussion of the draft of this Article and Article XXVII (which were at the time numbered as XXVI and XXV) at the Geneva session of the Preparatory Committee, it was stated that “There is a difference between Article XXVI [XXVIII] and Article XXV [XXVII]. Article XXV [XXVII] permits a country to take action first: in other words to determine that a particular concession it negotiated with a country which does not become a contracting party will be withheld. In the case of Article XXVI [XXVIII], the intention is ... that consultation shall precede the withdrawal of the concession - that is to say, the modification of the concession. The action will not be taken first and consultation later”.⁵

(3) *“any contracting party with which such concession was initially negotiated”*

(a) *Initial negotiating rights (INRs)*

For each concession, the contracting party with whom the concession was “initially negotiated”, or holder of “initial negotiating rights” (“INR holder”), is determined generally through consulting the Schedules and the negotiating records associated with the concession. Rules for rounds of tariff negotiations before the Kennedy Round included the “principal supplier rule”, which typically stated that “Participating countries may request concessions on products of which they individually, or collectively, are the principal suppliers to the countries from which the concessions are asked. This rule shall not apply to prevent a country not a principal supplier from making a request, but the country concerned may invoke the principal supplier rule if the principal supplier of the product is not participating in the negotiations or is not a contracting party to the General Agreement”.⁶ Concessions made in these rounds were typically negotiated by the principal supplier at the time, which then became the INR holder with respect to the concession.

In addition, in many cases a contracting party other than a principal supplier has initially negotiated a concession and thereby become an INR holder, or has secured agreement to accord to it the status of INR holder (a “negotiated INR”) in respect of a concession which was initially negotiated by another contracting party. If the tariff on an item has been reduced through successive concessions over the years, the item may have a number of INRs, at different concession rates, for different contracting parties. The determination of INRs and INR holders may therefore be complex. Further concerning sources for determination of initial negotiating rights in schedules, see the discussion of schedules under Article II.

³L/329, adopted 26 February 1955, 3S/205, 217, para. 28.

⁴See, e.g., C/W/165, C/M/63 p. 5 (agreement to extend deadline from 1 January 1970 until 31 December 1970); C/W/315, C/M/131 (agreement to extend deadline from 1 January 1979 to 30 June 1979 for Czechoslovakia and to 31 March 1979 for the United States).

⁵EPCT/TAC/PV/14, p.13.

⁶See Dillon Round rules at 8S/114, 115-116, para. II.(b)(i); identical statement in Rules for the Geneva tariff conference of 1956 at 4S/79, 80, para. II.3.

Articles II:4, XVIII:7, XVIII:18 and XXVII also refer to concessions initially negotiated, or to contracting parties with which concessions were initially negotiated.

(b) Floating initial negotiating rights

During the Kennedy Round, tariff cuts were for the first time negotiated on the basis of a general formula applied to tariff rates.⁷ During the closing days of the Kennedy Round, the Trade Negotiations Committee approved a proposal, responding to the issue posed for INRs by the use of a general tariff-cutting formula, providing that “for the generality of concessions negotiated in the Kennedy Round, no initial negotiator would be specified”.⁸ This proposal was then adopted by the CONTRACTING PARTIES at the Twenty-fourth Session on 16 November 1967:

“In respect of the concessions specified in the Schedules annexed to the Geneva (1967) Protocol, a contracting party shall, when the question arises, be deemed for the purposes of the General Agreement to be the contracting party with which a concession was initially negotiated if it had during a representative period prior to that time a principal supplying interest in the product concerned”.⁹

During discussion of the text of this decision in the Trade Negotiations Committee of the Kennedy Round, “it was understood that the words ‘that time’ in the text refer back to ‘when the question arises’. In other words, if a question of the type referred to arose, say, in some five or eight years, the representative period referred to would be a period related to that time”.¹⁰ At the Twenty-fourth Session, the Chairman of the CONTRACTING PARTIES also noted that “the proposal would only apply in the case of concessions for which no initial negotiator was specified ... it therefore followed that the adoption of the recommendation would not affect initial negotiating rights on concessions granted before the Kennedy Round, nor would it alter the rights which Article XXVIII gave to substantial suppliers”.¹¹

In the Tokyo Round (1973-1979), the use of a tariff-cutting formula was also agreed, and concessions were thus in most cases not the result of bilateral negotiations. The following “Action by the CONTRACTING PARTIES on the MTN Tariff Concessions” was therefore adopted on 28 November 1979:

“1. The CONTRACTING PARTIES note that as a result of the tariff negotiations in the Multilateral Trade Negotiations, the Geneva (1979) Protocol to the General Agreement on Tariffs and Trade and the Protocol Supplementary to the Geneva (1979) Protocol have been drawn up.

“2. The CONTRACTING PARTIES adopt the following decision: in respect of the concessions specified in the Schedules annexed to the Geneva (1979) Protocol to the General Agreement on Tariffs and Trade and the Protocol Supplementary to the Geneva (1979) Protocol, a contracting party shall, when the question arises, be deemed for the purposes of the General Agreement to be a contracting party with which a concession was initially negotiated if it had during a representative period prior to the time when the question arises a principal supplying interest in the product concerned. This decision does not affect initial negotiating rights which are the result of bilateral negotiations and which have been duly notified”.¹²

In introducing the Harmonized System of tariff nomenclature, many contracting parties have conducted Article XXVIII negotiations with respect to their tariff schedules. The Council adopted a Decision on 15 June 1988 on “Floating Initial Negotiating Rights” providing that in respect of the concessions specified in the Schedules annexed to the protocols drawn up in connection with the introduction of the Harmonized System,

“a contracting party shall, when the question arises, be deemed for the purposes of the General Agreement to be a contracting party with which a concession was initially negotiated if it had during a representative period prior to the time when the question arises a principal supplying interest in the product concerned.

⁷Concerning the use of formulas in tariff negotiations see generally under Article XXVIII*bis*.

⁸Proposal at TN.64/103; discussion and adoption at TN.64/SR.16 p. 9-10, paras. 35-40; reported in L/2867.

⁹15S/67.

¹⁰L/2867; TN.64/SR.16 p. 9, para. 36.

¹¹L/2867; SR.24/10, p. 115.

¹²26S/202.

This decision does not affect initial negotiating rights which are the result of bilateral negotiations and which have been duly notified”.¹³

The Council minutes for 15 June 1988 record the following explanation by the Legal Adviser to the Director-General of the background of this Decision: “... in the Kennedy and Tokyo Rounds, tariff reductions had been granted according to an across-the-board formula. Thus, no contracting parties had acquired initial negotiating rights to most of the concessions granted, as opposed to previous rounds where results had been achieved through bilateral negotiations which clearly identified initial negotiators. Decisions taken at the end of the Kennedy and Tokyo Rounds provided that the rights of an initial negotiator would accrue to the contracting party that had the main supplying rôle at the time of a particular renegotiation of a bound item. The principal supplier would thus have the same rights as the initial negotiator would have under Article XXVIII. As the concessions resulting from the Kennedy and Tokyo Rounds had come up for renegotiation in connection with the introduction of the Harmonized System, it had proved necessary to have a similar rule for the concessions resulting from those renegotiations. Accordingly, the draft decision ... was not an amendment to Article XXVIII, but simply a definition of ‘initial negotiator’ in the context of that particular type of negotiation. The substantial suppliers would not at all be affected by it. The draft decision was required because for many concessions there were no initial negotiators in the traditional sense, hence the reference to ‘floating’ negotiating rights, which would remain ‘floating’ until they became activated in a concrete case”.¹⁴

(c) *INRs and initial negotiating rights in compensatory concessions*

Paragraph 7 of the Uruguay Round Understanding on the Interpretation of Article XXVIII of the GATT 1994 provides as follows:

“7. Any Member having a principal supplying interest, whether as provided for in paragraph 1 above or in paragraph 1 of Article XXVIII, in a concession which is modified or withdrawn shall be accorded an initial negotiating right in the compensatory concessions, unless another form of compensation is agreed by the Members concerned.”

(4) ***“with any contracting party determined by the CONTRACTING PARTIES to have a principal supplying interest ... and ... with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest”***

The original text of Article XXVIII referred only to “any contracting party determined by the CONTRACTING PARTIES to have a substantial interest”. During the Geneva session of the Preparatory Committee in 1947, in the discussion by the Tariff Agreement Committee of this provision, it was stated that the purpose of including this phrase was “to limit the right of other countries to hold up or delay or prevent the withdrawal or modification of the Schedule ... any country can claim that it has an interest in any item in a Schedule, and if they wish to be difficult, it would be possible for them to hold up a modification of the Schedule by claiming an interest in a commodity, their interest in which was exceedingly remote. ... the obvious thing to do was to give the right of decision to the CONTRACTING PARTIES, so that if a country claimed an interest and the country which had granted the concession did not think that that interest was sufficiently significant to give the country the right to be consulted, then it could be settled by majority vote ... and you could get on with the business”.¹⁵

The reference to contracting parties determined to have a “principal supplying interest” was inserted into Article XXVIII as one of the Review Session amendments.

See the Interpretative Notes 4-7 to paragraph 1 of Article XXVIII for a definition of these terms.

¹³L/6367, 35S/336; see also 1988 Report of the Committee on Tariff Concessions, 35S/29-30.

¹⁴C/M/222, p. 2-3.

¹⁵EPCT/TAC/PV/14, p. 14-15, discussing proposal in EPCT/W/326.

(a) *Submission of claims of interest*

See the “Procedures for Negotiations under Article XXVIII” adopted on 10 November 1980, cited *in extenso* at page 960-961.

(b) *“substantial interest”*

No precise definition for “substantial interest” has ever been agreed. During the meeting of the Committee on Tariff Concessions in July 1985, it was stated that the “10 per cent share” rule had been generally applied for the definition of “substantial supplier”.¹⁶

(c) *Principal supplier rights where a concession affects a major part of a contracting party’s exports*

Note 5 *Ad* Article XXVIII:1 provides that the CONTRACTING PARTIES “may exceptionally determine that a contracting party has a principal supplying interest if the concession in question affects trade which constitutes a major part of the total exports of such contracting party.”

In 1985-86, discussions took place in the Committee on Tariff Concessions on a Swiss proposal that a test be carried out in the context of the negotiations linked to introduction of the Harmonized System, by offering a negotiating right to “the exporter for which trade in a specific product has the most importance”.¹⁷

At the September 1992 Council meeting, Argentina noted its request for recognition of its principal supplying interest with respect to concessions in the EEC Schedule on soyabeans and soyacakes on the basis that its exports to the EEC of these products constituted a major part of its total exports and therefore met the criteria in Note 5. Argentina requested the establishment of a panel to examine this claim so that the CONTRACTING PARTIES could determine this interest under Article XXVIII:1. At the November 1992 Council meeting, the EEC stated that “Argentina’s recourse to the dispute settlement mechanism in this case was inappropriate and improper” as in its view this was not a dispute between Argentina and the Community, but a dispute between Argentina and the CONTRACTING PARTIES; the EEC offered to recognize Argentina’s claim of rights subject to the later conclusions of a working group. Argentina noted that

“... paragraph 4 of the Procedures for Negotiations under Article XXVIII adopted in November 1980 .. provided that any contracting party which considered that it had a principal or substantial supplying interest in a concession that was the subject of negotiation and consultation under Article XXVIII should communicate its claim in writing to the contracting party intending to modify or withdraw the concessions concerned. If the latter contracting party -- the Community in the present case -- recognized such a claim, that recognition would constitute a determination by the CONTRACTING PARTIES of an interest in the sense of Article XXVIII:1. If the claim was not recognized, the contracting party having made it could refer the matter to the Council. ... Clearly, if the Community and the Council did not recognize such a claim, the matter would be considered closed. However, for the Community to condition such a recognition on the establishment of a working group which would examine the consequences thereof did not make any sense, and did not square with the 1980 procedures”.¹⁸

After the EEC then reiterated its acceptance of Argentina’s principal supplying interest in soyabeans and soyacakes, the Chairman stated that “it was his understanding that the matter referred to the Council had been satisfactorily resolved between the parties concerned, and that the Council should, accordingly, take note of this”, the US representative commented that

“... three options had been raised in the present discussion to resolve the matter: the first was the establishment of a working group, to which the Community had alluded but which did not appear to be satisfactory to Argentina; the second was the establishment of a panel, as requested by Argentina, and which would be an automatic Council decision if Argentina insisted on it; and the third was for some

¹⁶TAR/M/16, p. 10.

¹⁷TAR/W/57, dated 18 December 1985; TAR/132. 1986 Report of the Committee, 33S/133, 134, para. 6.

¹⁸C/M/260, p. 28.

consensus whereby the Council determined that Argentina had principal supplier rights in the products concerned. ...”¹⁹

The Director-General, in support of the Chairman, said that

“... for the sake of having the Council take appropriate action to conclude this item, he would quote paragraph 4 of the 1980 Procedures for Negotiations under Article XXVIII, which read as follows: ‘If the contracting party referred to in paragraph 1 [which intends to negotiate for the modification or withdrawal of concessions under Article XXVIII:1] recognizes the claim [of principal or substantial supplying interest], the recognition will constitute a determination by the CONTRACTING PARTIES of interest in the sense of Article XXVIII:1’. In other words, it was enough for the two parties concerned to have agreed on this matter for it to constitute a ‘determination by the CONTRACTING PARTIES’. Therefore, the Chairman was correct in proposing that the Council should take note that the matter referred to it had been satisfactorily resolved between the two parties, and nothing more.”²⁰

The Council took note of the statements, and also that the matter referred to it had been satisfactorily resolved between Argentina and the European Community.

Paragraphs 1 and 2 of the Uruguay Round Understanding on the Interpretation of Article XXVIII of the GATT 1994 provide as follows:

“1. For the purposes of modification or withdrawal of a concession, the Member which has the highest ratio of exports affected by the concession (i.e. exports of the product to the market of the Member modifying or withdrawing the concession) to its total exports shall be deemed to have a principal supplying interest if it does not already have an initial negotiating right or a principal supplying interest as provided for in paragraph 1 of Article XXVIII. It is however agreed that this paragraph will be reviewed by the Council for Trade in Goods five years from the date of entry into force of the WTO Agreement with a view to deciding whether this criterion has worked satisfactorily in securing a redistribution of negotiating rights in favour of small and medium-sized exporting Members. If this is not the case, consideration will be given to possible improvements, including, in the light of the availability of adequate data, the adoption of a criterion based on the ratio of exports affected by the concession to exports to all markets of the product in question.

“2. Where a Member considers that it has a principal supplying interest in terms of paragraph 1, it should communicate its claim in writing, with supporting evidence, to the Member proposing to modify or withdraw a concession, and at the same time inform the Secretariat. Paragraph 4 of the ‘Procedures for Negotiations under Article XXVIII’ adopted on 10 November 1980 (BISD 27S/26-28) shall apply in these cases.”

d) *Principal and substantial supplier rights and trade conducted at other than most-favoured nation duty rates*

Paragraph 3 of the Uruguay Round Understanding on the Interpretation of Article XXVIII of the GATT 1994 provides as follows:

“In the determination of which Members have a principal supplying interest (whether as provided for in paragraph 1 [of the Understanding] or in paragraph 1 of Article XXVIII) or substantial interest, only trade in the affected product which has taken place on an MFN basis shall be taken into consideration. However, trade in the affected product which has taken place under non-contractual preferences shall also be taken into account if the trade in question has ceased to benefit from such preferential treatment, thus becoming MFN trade, at the time of the negotiation for the modification or withdrawal of the concession, or will do so by the conclusion of that negotiation.”

¹⁹*Ibid.*, p. 31.

²⁰*Idem.*

(6) *Negotiating rights and trade in new products*

Paragraphs 4 and 5 of the Uruguay Round Understanding on the Interpretation of Article XXVIII of the GATT 1994 provide as follows:

“4. When a tariff concession is modified or withdrawn on a new product (i.e. a product for which three years' trade statistics are not available) the Member possessing initial negotiating rights on the tariff line where the product is or was formerly classified shall be deemed to have an initial negotiating right in the concession in question. The determination of principal supplying and substantial interests and the calculation of compensation shall take into account, *inter alia*, production capacity and investment in the affected product in the exporting Member and estimates of export growth, as well as forecasts of demand for the product in the importing Member. For the purposes of this paragraph, ‘new product’ is understood to include a tariff item created by means of a breakout from an existing tariff line.

“5. Where a Member considers that it has a principal supplying or a substantial interest in terms of paragraph 4, it should communicate its claim in writing, with supporting evidence, to the Member proposing to modify or withdraw a concession, and at the same time inform the Secretariat. Paragraph 4 of the ... ‘Procedures for Negotiations under Article XXVIII’ shall apply in these cases.”

(7) *“modify or withdraw a concession”*

See the discussion below at page 959 and following of procedures for negotiations under Article XXVIII and their relationship to the ensuing modification or rectification of schedules.

(a) *Renegotiation of Schedule concessions other than tariffs*

In 1956 Germany withdrew a concession relating to screen quotas for the exhibition of films of foreign origin, after renegotiations under Article XXVIII.²¹ Various concessions relating to the operation of import monopolies have been modified or withdrawn pursuant to negotiations under Article XXVIII, in the context of Article XXIV:6. In recent years some governments have included in their Schedules, in addition to tariff concessions, such non-tariff commitments as minimum import quotas²², or commitments for elimination of import permit requirements, import licensing schemes, or import prohibitions.²³ Some of these Schedules have also provided explicitly for negotiations in the event of withdrawal of these commitments; in a number of instances such Schedules have specified initial negotiating rights with respect to these commitments.

3. Paragraph 2**(1) *“maintain a general level of reciprocal and mutually advantageous concessions not less favourable”: concepts of equivalence of concessions***

During the discussion on the provisions which became the present Article XXVIII during the Geneva session of the Preparatory Committee in 1947, the addition of this sentence was suggested together with the possibility of counter-withdrawals (see paragraph 3) in order to “keep before us the objectives of the Charter to achieve a substantial reduction of tariffs, and, at the same time, permit the necessary flexibility for withdrawing individual items as an alternative to complete withdrawal from the Agreement”.²⁴

²¹SECRET/27, Spec/86/56.

²²Schedule XXXII - Austria, Part III, non-tariff concessions (1979); Schedule XX - United States, note 2 to chapter 2, unit B.

²³See Schedule LXXVII - Mexico (indication in Column 7 of items to be exempt from prior import permit requirement); Schedule LXXXVI - Venezuela (indication in Column 7 of items for which certain notes to Venezuelan tariff to cease to apply); Schedule LXXXVIII - Guatemala (indication in Column 7 of items to be exempt from prohibitions, licensing and restrictive permits, and other quantitative import restrictions); Schedule LXXXV - Costa Rica (indication in Column 7 of items to be exempt from licensing or quantitative restrictions or from duties and charges inconsistent with Articles III and VIII); Schedule LXXXVII - El Salvador (indication in Column 7 of items to be free from quantitative restrictions except to protect health or morals or national security, and free from charges and taxes inconsistent with Article III); Schedule LXXXIV - Bolivia (exemption from import licensing or quantitative restriction for items for which US has initial negotiating rights); Schedule LXXXIII - Tunisia (indication of exemption from import licensing or other quantitative restrictions for certain items).

²⁴EPCT/TAC/PV/14, p. 32.

See also the material in the chapter on Article XXVIII*bis* on measurement of value of concessions in the context of trade negotiating rounds. See also a Secretariat technical note of 1988 on methodology for evaluating equivalence of concessions in another context.²⁵

(a) *Base period for determination of value of tariff concessions*

In 1963, a Panel was established to render an advisory opinion to the EC and the United States in relation to the renegotiation by the EC under Article XXIV:6 of certain bound tariff concessions on poultry. The Panel examined the value to be ascribed to United States exports of poultry to the Federal Republic of Germany, on the basis of the definition of poultry provided in item 02.02 of the EEC Common Customs Tariff and the rules and practices of the GATT, and in the context of the unbindings concerning this product.

“The Panel recognized that the matter before it fell to be dealt with in the context of the Article XXIV:6 negotiations. This was relevant both to the choice of the reference period ... and to the manner in which this determination [of the value of such poultry exports as of 1 September 1960] was to be made.

“In its choice of a reference period, the Panel was guided by the practice normally followed by contracting parties in tariff negotiations, namely to lay particular emphasis on the period for which the latest data were available. As, in its view, the latest data which could reasonably have been expected to be available on 1 September 1960 would run up to 30 July 1960, the Panel decided to take as the reference period the year 1 July 1959 to 30 June 1960. ...”²⁶

The 1978 Panel Report on “Canada - Withdrawal of Tariff Concessions” examined a proposed withdrawal of concessions by Canada under Article XXVIII:3. In December 1974 the EC (acting under a prior invocation of Article XXVIII:5) notified its desire to negotiate under Article XXVIII in order to convert specific duties on unwrought lead and unwrought zinc to ad valorem rates of duty. In December 1975 the EC submitted its final report on the negotiations in which Australia had agreed on rates of duty of 3.5 per cent ad valorem on both lead and zinc; no agreement had been reached with Canada. The EC then introduced these new duty rates on 1 January 1976. In May 1976 Canada notified proposed withdrawals of bindings on various items in the Canadian tariff schedule, the trade coverage of which was equivalent to the annual average figure for Canada’s total exports to the Community of zinc in the period 1973-75. Canada did not contest the final rate on lead.²⁷

“The Panel based its consideration of the case on Article XXVIII of the GATT which, as both parties agreed, was the applicable provision, *inter alia*, for negotiations which are undertaken with the aim of converting specific rates of duty into ad valorem rates. In this connexion, the Panel considered of special importance paragraph 2 of Article XXVIII which provides that the contracting parties concerned ‘shall endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement prior to such negotiations’.

“The Panel noted that as a general principle, Article XXVIII negotiations had in the past been based on the most recent three-year period for which trade statistics were available, for the purpose of determining principal or substantial supplier rights. It was also the understanding of the Panel that in past negotiations a three-year period had been used as an element in the determination of the value of tariff concessions. The Panel noted on the other hand that no clear precedent could be found as regards the selection of a base period for the purpose of converting specific into ad valorem rates of duty. In the absence of agreement between the parties on an appropriate base period, the Panel held that the general principle of using the most recent three-year period should be applied to this case as well in order to allow account to be taken of cyclical movements and random events.”²⁸

“The Panel does not consider that full statistics for the applicable base period must be available at the very beginning of the negotiations, provided these data become available later in the negotiations and the latter are not unduly delayed. By June 1975, Community statistics (on which Canada had agreed to conduct

²⁵Spec(88)48.

²⁶L/2088 (partially reprinted at 12S/65). See also GATT/AIR/352, C/M/18.

²⁷L/4636, adopted on 17 May 1978, 25S/42, 43, paras. 6-7.

²⁸*Ibid.*, 25S/47, paras. 14-15.

the negotiations) for the first ten or eleven months of 1974 became available (except for Ireland) for both lead and zinc. The offer of the Community in the negotiations on both lead and zinc, submitted to Canada in late June 1975, should therefore, in the Panel's view, have taken account of trade figures for 1974. The Panel came to the conclusion that a correct and reasonable interpretation of the GATT, in the particular circumstances applying in this case, would be to base the ad valorem equivalents on global trade statistics for the years 1972-74. The Panel, in basing its decision on figures relating to global Community imports of zinc rather than relating to imports from Canada only, took account of the provision of Article XXVIII:2 which refers to the maintenance of a 'general level' of concessions, not less favourable to 'trade', formulations which in the view of the Panel clearly indicate the requirement, in the absence of specific agreement between the parties, to base the ad valorem equivalent of a specific duty on total import figures. To take another view would, in the case of two or more principal or substantial suppliers with different price levels, result in different ad valorem rates which is inconceivable under the General Agreement. The 1972-74 figures submitted to the Panel by the Community indicate an ad valorem equivalent of 2.64 per cent for total Community imports of zinc. Consequently, the Panel considers that, as it was not the intention of the Community to modify the scope of the concession, the ad valorem duty rate of the Community for zinc should have been rebound, after conversion, at that level or at the closest round half-percentage point figure, rather than at 3.5 per cent".²⁹

The Panel found that Canada was entitled to proceed to a withdrawal of concessions; see at page 948 below.

(b) Tariff conversion on the basis of weighted averages

The 1978 Panel Report on "Canada - Withdrawal of Tariff Concessions", referred to directly above, goes on to note that:

"In the Panel's view, this result would also be appropriate when considering lead and zinc together. ... the Panel noted that the trade-weighted ad valorem equivalent for both products together for the years 1972-74 amount to 2.97 per cent, a figure indicating that a rebinding for lead of 3.5 per cent (as implemented by the Community) and for zinc at the lower level, as indicated in the previous paragraph, would have been in conformity with the requirement of Article XXVIII:2 of the GATT".³⁰

See also the Report of the "Panel on Vitamins"³¹ discussed under Article II.

(c) Renegotiation following an increase in the value of a concession

The 1984 Report of the "Panel on Newsprint" examined the claim of Canada concerning the application of a tariff concession on newsprint established by the European Communities. The concession in the EC's Schedule LXXII provided for an annual tariff quota of 1.5 million tonnes duty-free, leaving the bound duty rate at 7 per cent for imports exceeding that quota. Under agreements between the EC and the EFTA countries, newsprint imports from EFTA countries became duty-free as from 1 January 1984, and the EC then opened a duty-free tariff quota for m.f.n. suppliers of 500,000 tonnes for newsprint for the year 1984.

"... the Panel concluded that the EC, in unilaterally establishing for 1984 a duty-free quota of 500,000 tonnes, had not acted in conformity with their obligations under Article II of the GATT. The Panel shared the view expressed before it relating to the fundamental importance of the security and predictability of GATT tariff bindings, a principle which constitutes a central obligation in the system of the General Agreement. ...

"While holding that the right of Canada to compete within a duty-free tariff quota of 1.5 million tonnes has been impaired by the EC action, the Panel recognized, however, that as a result of newsprint imports from EFTA countries entering the EC market duty-free since 1 January 1984 under the terms of the free-trade agreements, the *value* of the EC concession had greatly increased for non-EFTA suppliers and especially for Canada as the most important m.f.n. supplier. The Panel concluded that this increased value

²⁹*Ibid.*, 25S/47-48, paras. 14-17.

³⁰*Ibid.*, 25S/48, para. 18.

³¹L/5331, adopted on 1 October 1982, 29S/110.

of the concession justifies the EC engaging in renegotiations under Article XXVIII, in accordance with the customary procedures and practices for such negotiations, with the objective of achieving some reduction in the size of the tariff quota. In the view of the Panel, such a reduction would, in a case like the one before the Panel where the increased value of the concession derives from an action by the EC to grant duty-free access to newsprint imports from the EFTA countries, be without payment of compensation. In this connection, the Panel found that although the statistical data before it did not differentiate between imports entering duty-free under the GATT quota and those under the autonomous régime, the fact that the GATT quota was filled while total Canadian exports never exceeded half that quota is evidence that the EFTA countries did participate in the GATT quota up until the end of 1983.

“The Panel carefully noted and examined the statement by the EC that, should the Panel consider the action taken by the EC as not being in conformity with the GATT, they might proceed to option (b) under which the tariff quota would be maintained at 1.5 million tonnes but that imports from all sources, including the EFTA countries, would be recorded against that quota; once the latter had been filled, the Community’s formal contractual obligations would have been met. While the Panel could find no specific GATT provision forbidding such action and no precedents to guide it, it considered that this would not be an appropriate solution to the problem and would create an unfortunate precedent. It is in the nature of a duty-free tariff quota to allow specified quantities of imports into a country duty-free which would otherwise be dutiable, which is not the case for EFTA imports by virtue of the free-trade agreements. Imports which are already duty-free, due to a preferential agreement, cannot by their very nature participate in an m.f.n. duty-free quota. The situation in this respect could only change if the free-trade agreements with the EFTA countries were to be discontinued; in this case these countries would be entitled to fall back on their GATT rights vis-à-vis the EC, which rights continue to exist.

“On the basis of the findings and conclusions reached above, the Panel suggests that the CONTRACTING PARTIES recommend that the European Communities engage promptly in renegotiations under the procedures of Article XXVIII of the GATT with regard to the tariff quota on newsprint in Schedule LXXII. Further, the Panel suggests that the CONTRACTING PARTIES recommend to the European Communities that, pending the termination of such negotiations, the duty-free tariff quota of 1.5 million tonnes for m.f.n. suppliers be maintained”.³²

(d) *Renegotiation and institution of a tariff quota*

Paragraph 6 of the Uruguay Round Understanding on the Interpretation of Article XXVIII of the GATT 1994 provides as follows:

“6. When an unlimited tariff concession is replaced by a tariff rate quota, the amount of compensation provided should exceed the amount of the trade actually affected by the modification of the concession. The basis for the calculation of compensation should be the amount by which future trade prospects exceed the level of the quota. It is understood that the calculation of future trade prospects should be based on the greater of:

“(a) the average annual trade in the most recent representative three-year period, increased by the average annual growth rate of imports in that same period, or by 10 per cent, whichever is the greater; or

“(b) trade in the most recent year increased by 10 per cent.

“In no case shall a Member’s liability for compensation exceed that which would be entailed by complete withdrawal of the concession.”

³²L/5680, adopted on 20 November 1984, 31S/114, 131-133, paras. 52, 54-56.

4. Paragraph 3

(1) “shall be free ... to withdraw ... substantially equivalent concessions”

(a) Basis and consequences of withdrawals under paragraph 3

During discussions on the provisions which became the present Article XXVIII, in the Tariff Agreement Committee at Geneva in 1947, the proposal to include a paragraph providing for the right to make compensatory withdrawals was explained as follows: “... if we wish to take an item out of our Schedule then clearly it is fair and proper that the countries with whom we negotiate should be free to make the corresponding changes in their Schedules in order to restore the balance. ... but we want any such exercise to be limited to what is corresponding and not to be used in a punitive way”.³³

Later, when the Tariff Agreement Committee discussed the draft of Article XXVIII, which was phrased “suspend ... the application to the trade of the contracting party taking such action, of substantially equivalent concessions”, the question was put whether - given the similarity to the nullification and impairment provisions proposed - it was intended that action be discriminatory. It was stated in reply that “There is only a question here of withdrawal of concessions; there is no question of discriminatory measures against a particular country”³⁴ and “this is, so to speak, a negotiation in reverse. It is not like the Nullification Article...”³⁵ The Chairman in summing up stated: “It was agreed that there was no intention to interfere in any way with the operation of the most-favoured-nation clause. This Article is headed ‘Modification of Schedules’. It refers throughout to concessions negotiated under paragraph 1 of Article II, the Schedules, and there is no reference in the Article to Article I, which is the Most-Favoured-Nation clause. Therefore, I think the intent is clear: that in no way should this Article interfere with the operation of the Most-Favoured-Nation clause.”³⁶ It was also agreed then that by “non-discriminatory action to adjust the balance of the Schedules ... we mean withdrawal and not suspension of concessions”.³⁷ The Committee altered the provision accordingly. The issue of contracting parties affected by counter-withdrawals was also raised at that time. It was stated that “it is probably not desirable to carry it beyond the stage of the original action and the countermeasures. ... if unfairness does result from the practical action of those measures, it will have to be sorted out by the [CONTRACTING PARTIES]”.³⁸

The 1990 Award by the Arbitrator on “Canada/European Communities - Article XXVIII Rights”, also referred to at page 951 below, notes concerning compensatory withdrawal of concessions under Article XXVIII:3 by Canada that “Should Canada exercise her right to withdraw concessions, she undertakes obligations to compensate third countries having negotiating rights in respect of Canada for the products on which concessions would be withdrawn.”³⁹

(b) Extent of withdrawals under paragraph 3

In introducing the draft of Article XXVIII during the discussions of the Tariff Agreement Committee at Geneva, the chairman of the ad-hoc Sub-committee which drafted it stated, regarding the draft: “It was agreed in the Sub-Committee that both the contracting parties with which a concession was initially negotiated and a contracting party which was substantially affected should have the right to withdraw substantially equivalent concessions. What was a substantially equivalent concession would be determined in the light of what the party concerned had paid for the concession which had been withdrawn. It was also agreed that, since the contracting party which proposes to withdraw a concession or to modify a concession has, under the proposed draft, been given the right to act if negotiations break down without having to seek the approval of the [CONTRACTING PARTIES], the same right should be given to any other contracting party which is affected by the action.”⁴⁰

³³EPCT/TAC/PV/14, p. 20.

³⁴EPCT/TAC/PV/18, p. 42.

³⁵*Ibid.*, p. 44.

³⁶*Ibid.*, p. 46.

³⁷*Ibid.*, p. 43.

³⁸*Ibid.*, p. 44.

³⁹DS12/R, 37S/80, 86.

⁴⁰EPCT/TAC/PV/18, p. 40, discussing draft in EPCT/194.

See also Note 6 *Ad* Article XXVIII:1, which provides that the applicant contracting party should not “have to pay compensation or suffer retaliation greater than the withdrawal or modification sought, judged in the light of the conditions of trade at the time of the proposed withdrawal or modification, making allowance for any discriminatory quantitative restrictions maintained by the applicant contracting party”.

In 1963, a Panel was established to render an advisory opinion to the EC and the United States in relation to the renegotiation by the EC under Article XXIV:6 of certain bound tariff concessions on poultry; concerning the reference period used, see above at page 944. The Panel examined the value to be ascribed to United States exports of poultry to the Federal Republic of Germany, on the basis of the definition of poultry provided in item 02.02 of the EEC Common Customs Tariff and the rules and practices of the GATT, and in the context of the unbindings concerning this product.

“The Panel recognized that the matter before it fell to be dealt with in the context of the Article XXIV:6 negotiations. This was relevant both to the choice of the reference period ... and to the manner in which this determination [of the value of such poultry exports as of 1 September 1960] was to be made. ...

“The Panel was satisfied that it was in accordance with the normal practice of the GATT for a correction to be made to the figures for the reference period to take account of the discriminatory quantitative restrictions existing in the Federal Republic of Germany during that period.

“It was the Panel’s view that, in the absence of such quantitative restrictions, United States exports would have had a larger share of the existing German market. Moreover, the unrestricted entry of lower-priced United States poultry would have brought about an increase in German consumption and United States exports would also have had a share in this increase. The Panel then attempted to assess what the United States could reasonably have expected that the value of their exports would have been in the reference period had there been no discriminatory quantitative restrictions.

“The Panel considered that it could not reasonably be argued that the whole of the increase in German consumption of poultry would have been taken up by United States exports. It was certainly to be expected that the other supplying countries would adjust their price policies in an endeavour to maintain their share of the market. Account also had to be taken of the additional sources of supply resulting from new production in certain European countries. The Panel felt, however, that the share in the reference period of the various exporting countries in the Swiss market, which was free and competitive, afforded a fair guide as to the proportion of the increased German poultry consumption likely to be taken up by United States exports.

“Having taken account of these factors, and basing itself entirely on the information which could have been known on 1 September 1960, the Panel came to the conclusion that the advisory opinion it should render to the parties concerned was that a figure of \$26 million would reasonably represent the value to be ascribed, as of 1 September 1960, in the context of the unbindings concerning this product, to United States exports of poultry to the Federal Republic of Germany ...”⁴¹

The 1978 Panel Report on “Canada - Withdrawal of Tariff Concessions” concluded, on the basis of the findings noted above at pages 944-945:

“... Canada was entitled, in the Panel’s opinion, to proceed to a withdrawal of concessions. The Panel, however, was of the view that the withdrawal of concessions should have been less than the equivalent of the total export volume of zinc to the Community as account should have been taken of the rebinding of the Community duty. Also, the right of retaliation should be related to the actual damage suffered by Canada and consequently the withdrawals should have been based on the difference between the ad valorem equivalent of the specific rate calculated on imports from Canada only and the new ad valorem rate. Finally, account should have been taken of the fact that the ad valorem duty on lead had been fixed at a level lower than the incidence in respect of Community imports from Canada. In view of the complexity of assessing the value of a tariff binding, irrespective of the rate of duty involved, the Panel abstained from making any quantitative assessment in this respect. In the interest of maintaining the highest possible general level of

⁴¹L/2088, partially reprinted at 12S/65; cited portion not reprinted in BISD. See also GATT/AIR/352, C/M/18.

concessions the Panel finds that the Canadian retaliatory action should be withdrawn; i.e. that the previous Canadian tariff bindings should be re-established as soon as the Community proceeds either to decrease their tariff on zinc or to make tariff concessions on other products of export interest to Canada of an equivalent value.”⁴²

At the May 1988 Council meeting, in discussion of the follow-up to the 1987 Panel Report on “United States - Taxes on Petroleum and Certain Imported Substances” and a related request by the EEC for authorization to suspend concessions with respect to the United States, the Legal Advisor to the Director-General stated as follows:

“There had never been any decision by the CONTRACTING PARTIES regarding the actual calculation of the level of damage. The most common case involved the withdrawal of tariff concessions, for which there were fairly well established criteria that were taken into account in the calculation of compensation. The first criterion was the development of the imports during, normally, the three years before the renegotiations started. What was taken into account was not just a statistical average, but also the trend in the development of trade during that period. Furthermore, account was taken of the size of the tariff increase being negotiated. Moreover, an estimate was made of the price elasticity of the product concerned. The CONTRACTING PARTIES had agreed on two occasions that it was not possible to draw up firm rules for the calculation of damage in such cases, and that it had to be left to the negotiators in each individual case to calculate what they considered to be the damage and the appropriate compensation. ...”⁴³

In Council meetings in 1988 and 1989, the European Community, stating that the United States transposition of its tariff schedule to the Harmonized System had resulted in increased duties on certain textiles inconsistent with Section 2 of the Decision of 12 July 1983 on “GATT Concessions under the Harmonized Commodity Description and Coding System”, proposed that its differences of view with the United States on these items be submitted to arbitration by the Director-General. The United States stated that since both the Community and the United States had achieved a balance, any examination of the conversion should review the overall balance of concessions on both sides; the United States did not believe that arbitration was a tool well-suited for such broad-gauged evaluation. The Council took note of the statements.⁴⁴

(c) *Pre-requisites for compensatory withdrawals under Article XXVIII:3*

The CONTRACTING PARTIES have decided in many instances to grant or extend waivers suspending the application of Article II of the General Agreement to enable a contracting party to implement a modified Schedule in advance of completion of negotiations under Article XXVIII, subject to specified conditions. In recent years, the following conditions have been included in most cases:

- “1. The Government of [contracting party] will as soon as possible enter into negotiations or consultations pursuant to paragraphs 1 to 3 of Article XXVIII.
- “2. The negotiations or consultations mentioned above shall be completed not later than [date].
- “3. Pending the entry into force of the results of the negotiations or consultations mentioned above, the other contracting parties will be free to suspend concessions initially negotiated with [contracting party] to the extent that they consider that adequate compensation is not offered by the Government of [contracting party].”⁴⁵

At the June 1988 Council meeting, in the discussion of the waivers requested by Bangladesh and Mexico in connection with their implementation of the Harmonized System:

⁴²L/4636, adopted on 17 May 1978, 25S/42, 48-49, para. 19.

⁴³C/M/220, p. 35-36.

⁴⁴C/M/227, p. 27-28; C/M/228, p. 20-21; C/M/231, p. 11-13.

⁴⁵See, e.g., Waiver decisions on “Indonesia - Establishment of a new Schedule XXI”, L/6331, Decision of 22 April 1988, 35S/347; “Bangladesh - Establishment of a new Schedule LXX”, L/6374, Decision of 18 July 1988, 35S/348; “Mexico - Establishment of a New Schedule LXXVII”, L/6377, Decision of 18 July 1988, 35S/351.

"The representative of Jamaica noted that paragraphs 1 and 3 of Article XXVIII required prior action by the CONTRACTING PARTIES acting jointly if a contracting party sought to withdraw concessions in terms of ensuring compensation, while paragraph 2 did not require a prior determination by the CONTRACTING PARTIES. With this in view, he pointed out that paragraph 1 in each of two of the draft decisions referred to negotiations and consultations with interested contracting parties pursuant to paragraphs 1, 2 and 3 of Article XXVIII, while paragraph 3 of the draft decisions merely stated that other contracting parties would be free to suspend concessions initially negotiated to the extent that they considered that adequate compensation was not offered by the government seeking the waiver. He asked for clarification on this point.

"... the Legal Adviser to the Director-General said that paragraph 3 of the two draft decisions only foresaw a temporary situation before the negotiations were actually terminated and the results entered into force. The final corresponding situation was covered by paragraph 3(a) of Article XXVIII, which did not provide for any approval by the CONTRACTING PARTIES. The only requirement was that contracting parties which had negotiating rights under Article XXVIII had to notify the CONTRACTING PARTIES that they intended to withdraw substantially equivalent concessions. They did not have to ask for permission to do so".⁴⁶

(d) *Time-limits for invocation of Article XXVIII:3 (including application in the context of Article XXIV:6)*

During the Review Session of 1954-55, in a discussion of the Declaration on Continued Application of the Schedules, the Executive Secretary observed that the notice period provided in the Declaration for modifications or withdrawals referred to "the date on which the change affected the Schedule of the contracting party rather than the date on which the duty was formally altered by internal action of the contracting party".⁴⁷

At the Council meeting of 26 April 1974, "The representative of the United States stated that the United States and the European Communities had not yet concluded their negotiations under Article XXIV:6 under the applicable procedures of Article XXVIII. He pointed out that the United Kingdom, Denmark and Ireland had been applying import treatment in accordance with their Accession agreements with the European Communities, rather than in accordance with their Schedules referred to in Article II. This raised the question of whether the concessions should be considered withdrawn or modified as of 1 January 1974. He felt that if this were the case, Article XXVIII:3 could be interpreted as requiring notification to the CONTRACTING PARTIES of any compensatory withdrawals on or before 31 May 1974". The representative of the EC stated that it "did not consider that the time-limit laid down in Article XXVIII:3 posed a problem at the present time, because the renegotiations were still in progress and the six-month period mentioned in that Article would run only as from the end of the renegotiations". In response to a joint request made by the US and the EC, "the Council decided that without prejudice to the interpretation of Article XXVIII:3 the six-month period referred to in Article XXVIII:3 would not be considered to expire prior to 31 August 1974".⁴⁸

At the Council meeting of 19 July 1974, the EC representative stated that the Communities considered the renegotiations under Article XXIV:6 to be terminated, and intended as of 31 July to withdraw the schedules of concessions of the Six and of Denmark, Ireland, and the United Kingdom and replace them with two new schedules for the Community of Nine, one relating to the EEC and one to the ECSC. The representatives of the United States and of Australia each stated that the negotiations pursuant to Article XXIV:6 had not achieved satisfactory results with respect to compensation for certain specific concessions. The United States and Australia each reserved the right under Article XXVIII:3 to withdraw substantially equivalent concessions: with respect to those concessions; with respect to any modification made by the EC to its schedules pursuant to its reservation mentioned below; with respect to any modification by the EC to its schedules referred to in the Report filed by that country and the EC on the Article XXIV:6 negotiations; and with respect to any failure by the EC to implement the concessions in these new schedules on or before 31 July 1974. The EC representative stated that the EC considered that the concessions in its new schedules provided full compensation for the withdrawals in question, and noted that the EC had inserted in those schedules a reservation reserving the right to make counter-withdrawals in the event of withdrawals by its trading partners after the Article XXIV:6 negotiations. The Council agreed that the six-month period referred to in Article XXVIII:3 would not apply to actions pursuant to these reservations and

⁴⁶C/M/222, p. 5.

⁴⁷SR.9/47 p. 2.

⁴⁸C/M/95, p. 1-2; see also request to Council at L/4019.

that such actions could be taken at any time upon expiration of thirty days from the day that written notice is given to the CONTRACTING PARTIES.⁴⁹

At the Council meeting of 24 March 1975, Canada and the EC gave notice of: a Joint Declaration which stated that they had been able to reach agreement in their Article XXIV:6 negotiations except for certain cereal items; a statement by the EC regarding inclusion in its Schedules of the reservation above regarding counter-withdrawals; and a statement by Canada that its adherence to the Declaration “in no way implies acceptance by Canada of General Note 1 in the draft new Schedules LXXII and LXXII*bis*, nor limits Canada’s right to request the CONTRACTING PARTIES to examine whether the reservation of rights envisaged in this General Note is consistent with the European Communities’ obligations under the provisions of the General Agreement”. The Council agreed to the joint request by Canada and the European Communities to extend the time-limit under Article XVIII:3 insofar as certain cereal items were concerned.⁵⁰

The 1990 Award by the Arbitrator on “Canada/European Communities - Article XXVIII Rights” finds, concerning the Agreement on Quality Wheat concluded by Canada with the Community on 29 March 1962:

“Given the fact that wheat exports to the European Economic Community are of great importance to Canada, given the fact that it was not known in 1962 what the import restrictions on wheat would be under the CAP, and given the fact that the parties were under considerable pressure to conclude the XXIV:6 negotiations, given these facts and the safe assumption that the parties were fully versed and competent in GATT matters and were acting in good faith, on the basis of these considerations I reach the conclusion that the purpose of these agreements was to place Canada in a legal position *equivalent* to the one she would be in if the time-limits of Article XXVIII did not apply. Otherwise, I see no reason for Canada to have signed them”.⁵¹

The Award further notes:

“The question still remains whether, by formally acknowledging the conclusion in 1962 of the XXIV:6 Negotiations (which followed the procedures of Article XXVIII) Canada lost her right to invoke the provisions of Article XXVIII:3, including the right to withdraw equivalent concessions. This paragraph of Article XXIII can be invoked only if an agreement cannot be reached. Moreover, there are severe time-limits tied to the exercise of this right to withdraw. These have long since expired so far as the 1960-62 XXIV:6 negotiations are concerned.

“However, as noted earlier, I conclude that the very purpose of this bilateral agreement was to put Canada into a legal position *equivalent* to the one it would be in if the time-limits of Article XXVIII did not apply.

“It follows that Canada still maintains a right to withdraw equivalent concessions if the negotiations under the bilateral agreement are not successfully concluded.

“In sum, I conclude that Canada maintains through the bilateral Agreement of 29 March 1962 with respect to Quality Wheat all the negotiating rights provided for in Article XXVIII, or their equivalent.

“It needs stressing that the time-limits established in Article XXVIII:3 have, *inter alia*, the purpose of safeguarding the interests of third countries. Should Canada exercise her right to withdraw concessions, she undertakes obligations to compensate third countries having negotiating rights in respect of Canada for the products on which concessions would be withdrawn.”⁵²

A communication from the United States of 30 November 1990⁵³ noted that because, in connection with the accession of Spain and Portugal to the European Communities, the EC had effected the withdrawal of Spain’s concession on corn and sorghum and replaced them with variable levies, and no agreement had been

⁴⁹C/M/99, p. 1-7.

⁵⁰C/M/105, p. 1-3; see also C/W/259.

⁵¹DS12/R, 37S/80, 83.

⁵²*Ibid.*, 37S/85-86.

⁵³L/6774.

reached on compensation under Articles XXIV:6 and XXVIII, the United States had notified in May 1986 the suspension of certain concessions in Schedule XX⁵⁴, but that these concessions had been restored subject to the provisions of an agreement between the United States and the EC under Article XXIV:6 concluded 29 January 1987, which set forth certain compensatory measures, provided for a review, and “reserved full GATT rights including those which would otherwise be time-limited”.⁵⁵ The Communication notified suspension of certain concessions in Schedule XX to take effect midnight 31 December 1990, and stated:

“Where a contracting party to the GATT has withdrawn a concession in the expansion of a customs union, Article XXIV entitles other contracting parties to negotiated compensation, or, in the absence of a successful negotiation, to use Article XXVIII to ‘withdraw substantially equivalent concessions’. The Article XXVIII right is time-limited to six months. The agreed ‘review of the situation’ began in July and has not resulted in a negotiated continuation of compensation to the United States. If negotiations to continue compensation to the United States are not successful, then compensation under the 1987 agreement will expire at midnight on December 31, 1990. Moreover, the time-limited Article XXVIII right could be construed, in this case, to expire on December 31, 1990 unless exercised”.⁵⁶

The European Communities’ reply of 7 December 1990 stated that

“The Community view is that this bilateral agreement [of January 1987] concluded the negotiations between the two sides under Article XXIV:6 and that the compensation was therefore part of a final settlement. ... The United States appears to consider that this review provision represents a continuation of the tariff negotiations under Article XXIV:6. As indicated above, the Community does not share this view, since those tariff negotiations were concluded in early 1987 and the two parties are no longer in a tariff negotiation in terms of Article XXVIII. In any event the proposed action by the United States on 1 January 1991 is neither necessary nor justified; either GATT rights under Article XXVIII exist - in which case they are not time-limited, under the terms of the agreement - or such rights do not exist, in which case US action is illegal in GATT”.⁵⁷

The US later gave notice that as the EC had agreed to extend the provisions of the January 1987 agreement until 31 December 1991 it would not suspend such concessions at that time, but reserved its rights with respect to the withdrawals announced by the EC on 13 February 1986.⁵⁸ The two parties later jointly notified the agreement of the EC to extend the provisions set forth in the annexes to the January 1987 agreement until December 1992 and December 1993.⁵⁹

Time-limits under Article XXVIII:3 were also extended in the case of the transposition of the United States schedule into the Harmonized System tariff nomenclature.⁶⁰ See also the discussion of time-limits under Article XIX:3.

(2) *Invocations of Article XXVIII:3*

The tables on the use of Article XXVIII which follow this chapter include all instances of compensatory withdrawals under Article XXVIII:3 (except for Article XXVIII:3 withdrawals under Article XXIV:6). The only instances noted in these tables are action by Australia in February 1968 following the withdrawal by the EC of concessions on certain types of cheese⁶¹, action by Canada in May 1976 following the conversion by the EC of specific duties on lead and zinc into ad valorem duties⁶² and action by Canada in March 1986 following the increase of the applied rate of duty on single-strength orange juice by the United States.⁶³ A 1983 Secretariat Note on Article XXVIII states:

⁵⁴L/5997, 26 May 1986.

⁵⁵L/6774.

⁵⁶L/6774, p. 2.

⁵⁷L/6785, p. 1-2.

⁵⁸L/6774/Add.1, 8 January 1991.

⁵⁹L/6944 (communication dated 12 November 1991) and L/6944/Add.1 (communication dated 11 December 1992).

⁶⁰SECRET/HS/7/Add.1-2 and supplements.

⁶¹SECRET/165/Add.2.

⁶²See the Panel Report referred to at page 944 above.

⁶³SECRET/314/Add.2.

“... In the majority of Article XXVIII cases, a satisfactory agreement was reached between the parties concerned. ... The very rare use of the retaliation provision of Article XXVIII:3 would therefore appear to be based on the fact that in almost all cases negotiations were successful and partly also because of the difficulty inherent in finding appropriate concessions with regard to which retaliatory action can be taken; the latter point applies especially to countries with a limited number of tariff concessions”.⁶⁴

5. Paragraph 4

(1) *“The CONTRACTING PARTIES may ... authorize a contracting party to enter into negotiations”*

The renegotiation procedure “in special circumstances” in paragraph 4 was added to Article XXVIII as one of the amendments agreed in the Review Session of 1954-55. It incorporated elements of the procedures for “sympathetic consideration” of requests for renegotiation in “exceptional circumstances” during the period of validity of schedules, described below at page 963.

The Report of the Review Working Party on “Schedules and Customs Administration” notes that “paragraph 4 is intended to bring into the Agreement a provision for renegotiations under authority obtained from the CONTRACTING PARTIES in special circumstances, on the lines of the ‘sympathetic consideration’ procedures adopted at the eighth session, but providing in certain circumstances for modification or withdrawal even if the negotiations are not successful”.⁶⁵ The Intersessional Procedures adopted at the Review Session provided that the Intersessional Committee “shall examine applications for authority, in special circumstances, to enter into negotiations for the modification or withdrawal of concessions included in Schedules to the Agreement and shall act for the CONTRACTING PARTIES in performing the functions prescribed in any procedures and conditions established by them”.⁶⁶ This and other functions of the Intersessional Committee were conferred upon the Council of Representatives at its establishment in 1960.⁶⁷

The 1986 Report of the Committee on Tariff Concessions notes that “At the Council meeting of 17 June 1986, following a request by a country under Article XXVIII:4 for authority to renegotiate its schedule in view of the introduction of the Harmonized System, one delegation suggested that a general decision should be taken to allow countries which have not reserved their rights under Article XXVIII:5 to renegotiate their schedules. The Committee was requested to examine this question ... and came to the conclusion that there was no need for a general decision because countries were always free to present requests to the Council”.⁶⁸

The tables of invocations of Article XXVIII which follow this chapter include a complete list of invocations of Article XXVIII:4. As of March 1994, Article XXVIII:4 or the “sympathetic consideration” procedures which preceded it had been invoked 66 times, primarily in the period before 1965.

In March 1992, the Report of the Members of the Reconvened Oilseeds Panel on “Follow-up on the Panel Report ‘EEC - Payments and Subsidies paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins’” made the following recommendation: “The Panel ... recommends that the Community should act expeditiously to eliminate the impairment of the tariff concessions -- either by modifying its new support system for oilseeds or by renegotiating its tariff concessions for oilseeds under Article XXVIII. In the event that the dispute is not resolved expeditiously in either of these ways, the CONTRACTING PARTIES should, if so requested by the United States, consider further action under Article XXIII:2 of the General Agreement.”⁶⁹ On 4 June 1992 the EEC requested the authorization of the CONTRACTING PARTIES to enter into negotiations under Article XXVIII:4 for modification of the EEC concessions with respect to soya beans, rape or colza seeds, sunflower seeds, and oilcake included in Schedule LXXX - EEC, stating that “This procedure will enable the negotiations to be concluded rapidly and ensure that they take place under the full control of

⁶⁴TAR/W/42, p. 4.

⁶⁵L/329, adopted on 26 February 1955, 3S/205, 217, para. 30.

⁶⁶3S/11, para. 8; see also revised Intersessional Procedures at 7S/8, para. 3, referring explicitly to Article XXVIII:4.

⁶⁷9S/7.

⁶⁸TAR/132, 33S/133, 134, para. 8.

⁶⁹DS28/R, dated 31 March 1992, para. 88.

the CONTRACTING PARTIES.”⁷⁰ During the Council discussion of this request, the EEC representative stated that:

“... The Panel had ... given the Community a free choice between the two options, while insisting on the need to act expeditiously ... In the Community’s view, Article XXVIII offered two options: the multilateral option in paragraph 4, and what was in effect a bilateral option in paragraph 5. The Community had opted for the provision of Article XXVIII which it believed would give the most satisfaction at the multilateral level and which would, at the same time, allow the CONTRACTING PARTIES to have a degree of control over the proceedings. The bilateral option in paragraph 5, furthermore, did not provide any strict guarantee as to the time period for the procedures to be followed thereunder, and would be determined by the free choice of the two parties concerned... As he had stated earlier, paragraph 4 permitted the CONTRACTING PARTIES to exercise some control and almost permanent monitoring over the negotiations thereunder, as stipulated in its sub-paragraphs (c) and (d). Furthermore, these provisions provided very strict time frames: thirty days for the CONTRACTING PARTIES to decide whether to authorize a contracting party to enter into renegotiations; sixty days thereafter for the contracting parties primarily concerned to reach agreement; and thirty days for a final determination by the CONTRACTING PARTIES under sub-paragraph (d)”.⁷¹

This authorization was granted on 19 June 1992.⁷²

(2) “*in special circumstances*”

In discussion at the Review Session of 1954-55 concerning continued application of the Schedules, “the Executive Secretary pointed out that if the transposition of a tariff from specific to ad valorem duties in fact involved modifications or withdrawals of concessions, then contracting parties were obliged to act under Article XXVIII. Such a transposition, however, would fall under the qualification of ‘special circumstances’ and could therefore take place under the revised paragraph 4 of Article XXVIII”.⁷³ See also the discussion of conversion from specific to ad valorem duties under Article II.

The 1958 Report of the Working Party on “Conversion of Specific Duties in the Norwegian Schedule” examined the proposal of the Norwegian Government, consequent to the adoption of the Brussels Nomenclature, to convert a number of specific duties in Schedule XIV into ad valorem duties. The Report notes that “The Working Party wishes to record that it considers the circumstances in which the application was made to be such as would warrant a finding of ‘special circumstances’ within the terms of paragraph 4 of Article XXVIII”.⁷⁴

In 1970, during the discussion in the Council of a request for an authorization under Article XXVIII:4 to renegotiate a tariff concession, it was stated “that for reasons of principle it was essential to stress that the abolition of a quantitative restriction should not be used as the pretext for a duty increase”.⁷⁵

In 1973, during the discussion in the Council of what constituted the “special circumstances” in terms of a request under Article XXVIII:4, it was stated “that the question of defining special circumstances had been raised in the Council before and that it would not be a good policy to define special circumstances too rigorously, since it could encourage contracting parties to invoke paragraph 5 of Article XXVIII more easily”.⁷⁶

See also the reference in the second interpretative note to paragraph 4 to authorization of negotiations under paragraph 4 by “certain contracting parties depending in large measure on a relatively small number of primary commodities and relying on the tariff as an important aid for furthering diversification of their

⁷⁰DS28/2, dated 5 June 1992.

⁷¹C/M/257, p. 11-12.

⁷²*Ibid.*, p. 26.

⁷³SR.9/47, p. 2.

⁷⁴L/913, adopted on 14 November 1958, 7S/112, 113, para. 6.

⁷⁵C/M/63, p.6.

⁷⁶C/M/85, p. 9; C/M/86, p. 4.

economies or as an important source of revenue". See also the provisions of Article XVIII:7 permitting "out of season" renegotiations by those contracting parties which fall under Article XVIII:4(a).

(3) "refer the matter to the CONTRACTING PARTIES"

At the September/October 1992 Council meeting, the EEC noted that in 16 August 1992, it had referred the matter of its negotiations concerning certain oilseeds items under Article XXVIII:4 to the CONTRACTING PARTIES: "The Community had brought this matter before the Council under ... Article XXVIII:4, and after it had exhausted the provisions in paragraph (a) thereof, and since (b) unfortunately did not apply, it had had to move on to paragraph (c) ... Under Article XXVIII:4(d) it was incumbent upon the 'applicant contracting party' – the Community in this case – to refer the matter to the CONTRACTING PARTIES if an agreement had not been reached in sixty days".⁷⁷

This has been the only instance of invocation of paragraphs (c) or (d) of Article XXVIII:4.

(4) "the CONTRACTING PARTIES shall promptly examine the matter and submit their views to the contracting parties primarily concerned with the aim of achieving a settlement"

At the September/October 1992 Council meeting, the EEC, noting this referral, stated three series of questions concerning the interpretation of Article XXVIII, and requested the establishment of a working group to assist the CONTRACTING PARTIES on the interpretation of Article XXVIII.⁷⁸ Consensus was not reached on this request.

At the same meeting, the United States proposed binding arbitration concerning the total value to be ascribed to the impairment of tariff concessions in the oilseeds area by the Community's subsidy programme. At the November Council meeting, the EEC stated that no further decision on action under Article XXIII should be taken until the Article XXVIII:4 procedure authorized in June had been exhausted. Consensus was not reached on this request, nor on the later United States request for authorization to suspend concessions under Article XXIII:2.⁷⁹ At the Forty-eighth Session in December 1992, the EC representative noted that negotiations between the Community and the United States had led to a compromise agreed *ad referendum* which would enable the Community to end its Article XXVIII:4 negotiations with the United States.⁸⁰ At the June 1993 Council meeting the EC representative noted that this compromise had been approved by the EC Council of Ministers and the EC would resume negotiations as quickly as possible.⁸¹

6. Paragraph 5

(1) "reserve the right ... to modify the appropriate schedule"

The Report of the Review Working Party on "Schedules and Customs Administration" notes:

"Concerning paragraph 5, the Ninth Session Working Party on Schedules and Customs Administration wishes to place on record, in order to eliminate any possibility of misunderstanding that, without prejudice to the provisions of [interpretative Note 3 to paragraph 1], a reservation of the right under that paragraph to modify a schedule applies to the whole schedule and cannot apply to selected items only".⁸²

During the GATT Council meeting in December 1981, the representative of Australia said "that Australia was currently conducting a series of negotiations with a number of its trading partners under the provisions of Article XXVIII:1, and expressed the hope that these negotiations would be concluded prior to 1 January 1982. He said that in the event that these negotiations had not been finalized by that date, Australia would continue any ongoing discussions after 1 January 1982 under the provisions of Article XXVIII:5". In reply, the EC representative

⁷⁷C/M/259, p. 32, 52; SECRET 336/Add.1.

⁷⁸C/M/259, p. 32-33; statement appears also in L/7096.

⁷⁹C/M/260, p. 26, referring to L/7096, DS28/3.

⁸⁰SR.48/2, p. 15-16.

⁸¹C/M/264, p. 52. As of late March 1994 the Secretariat had not yet received notice of agreement resolving these negotiations.

⁸²L/329, adopted on 26 February 1955, 3S/205, 218, para. 31.

said that “the late notification of products by Australia and the incomplete communication of statistical figures had seriously diminished the time available for negotiation. In his view, the entry into force of the increased rates on 1 January 1982, in the event that the negotiations could not be completed within the very short deadline, would not be in conformity with normal GATT procedures in this respect, nor was the Australian intention to transform concessions that had been granted prior to 1965 without providing up-to-date statistics. He stated that the European Economic Community expressly reserved all its GATT rights on both these points and hoped that Australia would abide by GATT procedures before proceeding to any withdrawals or transformations of concessions”.⁸³

Problems related to the interpretation and application of paragraph 5 in case of a pre-emptive tariff increase against a new product prior to its full-scale commercial production and trade (e.g. determination of “initial negotiator”, “principal supplier” and “substantial interest” in the absence of sizeable trade, and calculation of compensation in case of the prospect of rapid future trade growth of the new product) were discussed on several occasions in the GATT Council⁸⁴, in the Committee on Tariff Concessions⁸⁵ and in submissions by individual contracting parties.⁸⁶

(2) *Invocations of Article XXVIII:5*

Tables on the invocation of Article XXVIII:5 follow this chapter. Whereas for the first three-year period 1958-60, only four contracting parties reserved their right to modify their schedule, the number had risen to twelve for the period 1973-75 and stands at 37 for the present period of 1994-1996. A Secretariat Note of 1983 for the Committee on Tariff Concessions concerning the use of Article XXVIII states:

“It would appear ... that countries increasingly tend to invoke paragraph 5 of Article XXVIII even though a need for renegotiations of bound rates for particular products might not be in sight at the time of the invocation. In this context, concern has been expressed about the insecurity of tariff bindings if countries, having invoked the provision in question, may at any time (during a three-year period) proceed to a modification or withdrawal of existing concessions”.⁸⁷

During the meeting of the Committee on Tariff Concessions in April 1982, it was “noted that certain delegations had made abundant use of Article XXVIII:5 procedures, so that negotiations had been excessively prolonged. Perhaps these prolongations had led a contracting party to an interpretation of Article XXVIII, paragraph 5, according to which a contracting party would be authorized to implement, without a waiver, notified withdrawals together with the compensatory offers before the negotiations were concluded and even without notification of the absence of their conclusion”.⁸⁸ In a later meeting of the same body it was also stressed “that a number of Article XXVIII negotiations had become rather protracted ... in some circumstances, it might be necessary to proceed with the implementation of tariff changes for domestic reasons, before negotiations had been formally concluded but it should not prevent the parties involved from continuing their efforts to reach an agreed settlement”.⁸⁹

See also the discussion under Article II and above at page 949 on the practice of requesting waivers of Article II when a contracting party wishes to implement changes in its tariff in advance of the conclusion of negotiations under Article XXVIII.

7. Note *Ad* Article XXVIII: “the greatest possible secrecy”

The Interpretative Note to Article XXVIII as a whole provides for “the greatest possible secrecy” in negotiations and consultations under the Article. The Report of the Review Working Party on “Schedules and Customs Administration” notes that “In recommending the inclusion of [the interpretative Note] concerning the preservation of secrecy in order to avoid the disclosure of prospective tariff changes, the Working Party took note

⁸³C/M/154, p. 13-14.

⁸⁴C/M/170, 171, 183.

⁸⁵TAR/M/11, 13.

⁸⁶L/5522, L/5537, C/W/424.

⁸⁷TAR/W/42.

⁸⁸TAR/M/6, p. 20, para. 7.1.

⁸⁹TAR/M/9, p. 9, para. 8.1.

that several countries have public procedures for preparations for tariff negotiations and that the Regulation is not intended to disturb or prevent the continued use of such procedures”.⁹⁰

B. RELATIONSHIP BETWEEN ARTICLE XXVIII AND OTHER GATT PROVISIONS

1. Article II

See material on “maintenance of ‘treatment’ versus modification of a concession” under Article II.

2. Article XVIII:A

The present text of Article XVIII:7 (Section A of Article XVIII) was drafted during the Review Session in 1954-55 in the same Review Working Party on Schedules and Administration which drafted the present text of Article XXVIII. The proviso in Article XVIII:7 permitting the applicant contracting party to modify or withdraw concessions where it cannot, for good reasons, provide adequate compensation corresponds to Article XXVIII:4(d) including the right of other contracting parties to withdraw substantially equivalent concessions initially negotiated with that contracting party.⁹¹

3. Article XIX

In a number of instances, contracting parties which have suspended a concession under Article XIX have ceased to invoke Article XIX as a result of a modification or withdrawal of the concession under Article XXVIII. See the table of Article XIX actions following the chapter on Article XIX.

4. Article XXIII (including arbitration, conciliation and good offices)

See the references above at page 947 to the discussions in 1947 concerning the relationship between the basis and extent of action under Article XXVIII and the basis and extent of action under Article XXIII:2.

In 1974, when Article XXIV:6 negotiations between Canada and the European Communities did not produce a mutually satisfactory result, Canada referred the matter to the CONTRACTING PARTIES pursuant to paragraph 1(c) and 2 of Article XXIII and requested that a panel of experts be appointed to investigate whether the new Schedules LXXII and LXXIIbis maintained a general level of reciprocal and mutually advantageous concessions between Canada and the European Communities, not less favourable to trade than that provided for in Schedules XL, XLbis, XIX, XXII and LXI.⁹² The representative of the European Communities recalled “that the negotiations that had led to this new Schedule covered practically the whole of the customs tariffs in question and a difficult assessment of both a quantitative and qualitative character was therefore called for. The Community could not accept the proposal. The conciliation procedures of the GATT had hitherto mostly been used in cases of violations of the General Agreement; in the present case, a number of factors made this procedure inappropriate. Such an exercise would involve highly sophisticated assessments in complex trade fields where the criteria for reaching judgements were exceedingly imprecise”.⁹³ At the following Council meeting, the Chairman “concluded that it was the wish of the Council, with the exception of the European Communities, to establish such a panel and that he should, in due course, discuss the question of the panel in consultation with the parties most concerned”.⁹⁴ The two parties reached a bilateral agreement, referred to above at page 951.

The 1984 Report of the “Panel on Newsprint” (see page 945 above) includes the following findings:

“Taking all factors mentioned above into account, the Panel concluded that the EC, in unilaterally establishing for 1984 a duty-free quota of 500,000 tonnes, had not acted in conformity with their obligations under Article II of the GATT. The Panel shared the view expressed before it relating to the

⁹⁰L/329, adopted on 26 February 1955, 3S/205, 218, para. 33.

⁹¹L/329, adopted on 26 February 1955, 3S/205, 215, para. 23. See also documents listed below from the Review Session.

⁹²C/M/101, p. 7.

⁹³C/M/101, p. 8.

⁹⁴C/M/102, p. 4.

fundamental importance of the security and predictability of GATT tariff bindings, a principle which constitutes a central obligation in the system of the General Agreement.

“... the Panel found that the EC action constituted a *prima facie* case of nullification or impairment of benefits which Canada was entitled to expect from the General Agreement. ...

“On the basis of the findings and conclusions reached above, the Panel suggests that the CONTRACTING PARTIES recommend that the European Communities engage promptly in renegotiations under the procedures of Article XXVIII of the GATT with regard to the tariff quota on newsprint in Schedule LXXII. Further, the Panel suggests that the CONTRACTING PARTIES recommend to the European Communities that, pending the termination of such negotiations, the duty-free tariff quota of 1.5 million tonnes for m.f.n. suppliers be maintained.

“In the light of the suggested recommendations contained in paragraph 56 above, the Panel saw no need to express itself on the request by Canada that it be authorized to suspend the application of appropriate concessions or other obligations under the GATT”.⁹⁵

At the special meeting of the Council in October 1988 to review developments in the trading system, the Director-General informed the Council that in April 1988, Canada and the EC had asked him, with reference to paragraph 8 of the 1979 “Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance”,⁹⁶ to render an advisory opinion on whether a tariff concession granted by Portugal to Canada in 1961 was applicable to wet salted cod. This issue had arisen in tariff negotiations between Canada and the EC under Article XXIV:6. He had agreed on 15 April to render such an opinion and on 15 July had made it available to the two parties concerned.⁹⁷

The 1992 Report of the Members of the Reconvened Oilseeds Panel on “Follow-up on the Panel Report ‘EEC - Payments and Subsidies paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins’” notes as follows:

“... the Panel found that benefits accruing to the United States under Article II of the General Agreement in respect of the zero tariff bindings for oilseeds in the Community Schedule of Concessions continued to be impaired as a result of the production subsidy scheme provided for in Regulation 3766/91 ...

“The Panel noted that over two years had passed since the Oilseeds Panel Report had been adopted by the CONTRACTING PARTIES. While the Community Regulations had been modified, the impairment of the tariff concessions had not been eliminated. Under these circumstances, the Panel can see no reason for the CONTRACTING PARTIES to continue to defer consideration of further action in relation to the impairment of the tariff concessions.

“The Panel therefore recommends that the Community should act expeditiously to eliminate the impairment of the tariff concessions -- either by modifying its new support system for oilseeds or by renegotiating its tariff concessions for oilseeds under Article XXVIII. In the event that the dispute is not resolved expeditiously in either of these ways, the CONTRACTING PARTIES should, if so requested by the United States, consider further action under Article XXIII:2 of the General Agreement”.⁹⁸

In June 1992 the EEC requested and was granted authorization to renegotiate its tariff concessions for oilseeds and oilcake under Article XXVIII:4 (see above at page 953). In August 1992, the EEC referred certain issues to the CONTRACTING PARTIES under Article XXVIII:4(c) and (d), including the following.

⁹⁵L/5680, adopted on 20 November 1984, 31S/114, 132-133, paras. 52-53, 56-57.

⁹⁶L/4907, adopted on 28 November 1979, 26S/210, 211, para. 7.

⁹⁷C/M/225, p. 2.

⁹⁸DS28/R, dated 31 March 1992, paras. 85-88.

“How should the impact be estimated of the impairment of benefits of a tariff concession resulting from the subsequent grant of a subsidy with respect to the initial legitimate expectations of a contracting party that negotiated the concession?”

- “Should this impact be evaluated on the basis of changes in production, trade, consumption or the competitive relationship between domestic and imported products, or by a combination of all or some of these elements?”
- “Can countries which did not initially negotiate the concession be considered as ‘having a legitimate expectation’ with regard to subsidies granted subsequently to the negotiation?”
- “What can the ‘legitimate expectation’ with regard to a previously granted subsidy be in the case of a country which only subsequently acquires rights with respect to the concession (for example, in the case of accession to the GATT subsequent to the subsidy)?”
- “In the event of globalization of the six concessions, how will it be possible, where appropriate, to break down the impact of the various subsidies granted to each of the products concerned for the six tariff concessions?”⁹⁹

See also the material on non-violation nullification or impairment under Article XXIII. Consensus was not reached on a response to the EC request for the views of the CONTRACTING PARTIES. At the Forty-eighth Session in December 1992, the EC representative noted that thus far the CONTRACTING PARTIES had been unable to respond to the questions addressed by the EEC, and noted that negotiations between the Community and the United States had led to a compromise agreed *ad referendum* which would enable the Community to end its Article XXVIII:4 negotiations with the United States.¹⁰⁰

See also the reference on page 948 to the 1963 advisory opinion on the value of unbindings on poultry, the reference on page 941 to the request of Argentina in 1992 for establishment of a panel under Article XXIII:2 concerning the rights of Argentina under Article XXVIII, and the references to arbitration under Article XXVIII on page 949 and arbitration under Article XXIII on page 955. At the June 1993 Council meeting the EC representative noted that this compromise had been approved by the EC Council of Ministers and the EC would resume negotiations as quickly as possible.¹⁰¹

5. Article XXIV:6

See above at page 950, and see also the material under Article XXIV:6.

6. Article XXVII

See above at page 938.

C. PROCEDURES FOR RENEGOTIATIONS AND FOR MODIFICATION AND RECTIFICATION OF SCHEDULES

Article XXVIII provides for three types of negotiations: (a) normal three-year (open season) renegotiations under paragraph 1; (b) renegotiations in special circumstances, after authorization by the CONTRACTING PARTIES, under paragraph 4; and (c) renegotiations following a reservation made under paragraph 5. In addition, Article XVIII:7 (the present text of which was drafted in parallel with the text of Article XXVIII:4) provides for renegotiation of concessions at any time by a contracting party coming within the scope of Article XVIII:4(a), and Article XXIV:6 provides for use of the procedures of Article XXVIII. Article XXVII also provides for consultation with substantial suppliers with respect to concessions withheld or withdrawn thereunder.

⁹⁹L/7096, dated 7 October 1992 (communication dated 28 September 1992).

¹⁰⁰SR.48/2, p. 15-16.

¹⁰¹C/M/264, p. 52. No further information had been received by the Secretariat as of late March 1994.

1. Procedures for negotiations under Article XXVIII

On 31 May 1957 the Executive Secretary, in compliance with instructions given to him by the CONTRACTING PARTIES¹⁰², issued a Note concerning arrangements for negotiations under Article XXVIII in 1957.¹⁰³ This note served as a procedural guideline for Article XXVIII negotiations until 1978.

In June and September 1978, the Director-General issued Notes with revised procedural guidelines for renegotiations under Article XXVIII.¹⁰⁴ These guidelines were replaced by Procedures for Negotiations under Article XXVIII¹⁰⁵, adopted by the Council on 10 November 1980 on the recommendation of the Committee on Tariff Concessions. All renegotiations under Article XXVIII are now being conducted under these Procedures, which provide as follows:

“1. A contracting party intending to negotiate for the modification or withdrawal of concessions in accordance with the procedures of Article XXVIII, paragraph 1 -- which are also applicable to negotiations under paragraph 5 of that Article -- should transmit a notification to that effect to the secretariat which will distribute the notification to all other contracting parties in a secret document.¹⁰⁶ In the case of negotiations under paragraph 4 of Article XXVIII the request for authority to enter into negotiations should be transmitted to the secretariat to be circulated in a secret document and included in the agenda of the next meeting of the Council.

“2. The notification or request should include a list of items, with corresponding tariff line numbers, which it is intended to modify or withdraw indicating for each item the contracting parties, if any, with which the item was initially negotiated. It should be indicated whether the intention is to modify a concession or withdraw it, in whole or in part, from the schedule. If a concession is to be modified, the proposed modification should be stated in the notification or circulated as soon as possible thereafter to those contracting parties with which the concession was originally negotiated and those which are recognized, in accordance with paragraph 4 below, to have a principal or a substantial supplying interest. The notification or request should be accompanied by statistics of imports of the products involved, by country of origin, for the last three years for which statistics are available. If specific or mixed duties are affected, both values and quantities should be indicated, if possible.

“3. At the same time as the notification is transmitted to the secretariat or when the authorization to enter into negotiations has been granted by the Council -- or as soon as possible thereafter -- the contracting party referred to in paragraph 1 above should communicate to those contracting parties, with which concessions were initially negotiated, and those which have a principal supplying interest, the compensatory adjustments which it is prepared to offer.

“4. Any contracting party which considers that it has a principal or a substantial supplying interest in a concession which is to be the subject of negotiation and consultation under Article XXVIII should communicate its claim in writing to the contracting party referred to in paragraph 1 above and at the same time inform the secretariat. If the contracting party referred to in paragraph 1 above recognizes the claim, the recognition will constitute a determination by the CONTRACTING PARTIES of interest in the sense of Article XXVIII:1.¹⁰⁷ If a claim of interest is not recognized, the contracting party making the claim may refer the matter to the Council. Claims of interest should be made within ninety days following the circulation of the import statistics referred to in paragraph 2 above.

“5. Upon completion of each bilateral negotiation the contracting party referred to in paragraph 1 above should send to the secretariat a joint letter on the lines of the model in Annex A attached hereto signed by

¹⁰²Decision of 27 April 1957, IC/SR.31; L/641, 6S/158.

¹⁰³L/635.

¹⁰⁴L/4651 and Rev.1 and Addenda 1-3.

¹⁰⁵C/113 and Corr. 1, 27S/26.

¹⁰⁶The footnote to this sentence in the Procedures reads: “The date for submission of a notification for negotiation under Article XXVIII, paragraph 1, shall comply with the provisions of interpretative note 3 to paragraph 1 of Article XXVIII.”

¹⁰⁷The footnote to this sentence in the Procedures reads: “If, in exceptional circumstances, the contracting party referred to in paragraph 1 above is not in a position to supply relevant import statistics, it shall give due consideration to export statistics provided by contracting parties claiming an interest in the concession or concessions concerned.”

both parties. To this letter shall be attached a report on the lines of the model in Annex B attached hereto. The report should be initialled by both parties. The secretariat will distribute the letter and the report to all contracting parties as a secret document.

“6. Upon completion of all the negotiations the contracting party referred to in paragraph 1 above should send to the secretariat, for distribution in a secret document, a final report on the lines of the model in Annex C attached hereto.

“7. Contracting parties will be free to give effect to the changes agreed upon in the negotiations as from the first day of the period referred to in Article XXVIII:1, or, in the case of negotiations under paragraph 4 or 5 of Article XXVIII, as from the date on which the conclusion of all the negotiations have been notified as set out in paragraph 6 above. A notification shall be submitted to the secretariat, for circulation to contracting parties, of the date on which these changes will come into force.

“8. Formal effect will be given to the changes in the schedules by means of Certifications in accordance with the Decision of the CONTRACTING PARTIES of 26 March 1980.

“9. The secretariat will be available at all times to assist the governments involved in the negotiations and consultations.

“10. These procedures are in relevant parts also valid for renegotiations under Article XVIII, paragraph 7, and Article XXIV, paragraph 6.”¹⁰⁸

In discussion of these Procedures during the 3 November 1980 meeting of the Committee on Tariff Concessions, “the Chairman took up the question of the character of the document and recalled the comments made by the representative of Finland that the terms used in the text and particularly the word ‘should’ meant that the document should be interpreted as guidelines and that contracting parties entering into Article XXVIII negotiations were invited to follow those guidelines but should not consider them as binding obligations”.¹⁰⁹

2. Procedures for negotiations in connection with implementation of the Harmonized System

On 12 July 1983, the Council adopted a Decision on “GATT Concessions under the Harmonized Commodity Description and Coding System” setting out “basic principles” and “proposed special procedures” for renegotiations under Article XXVIII in order to facilitate the application of the Harmonized System with effect from 1 January 1987.

“3.2 The guidelines relating to procedures for negotiations under Article XXVIII ... will be the basis for this exercise. ... However, because of the amount and complexity of the work involved, and the exceptional nature of the exercise, it will be necessary to simplify the guidelines, as indicated below ...

“4.1 Each contracting party adopting the Harmonized System shall supply to the GATT secretariat the following information:

“4.1.1 An up-to-date consolidated schedule of concessions in the existing nomenclature in loose-leaf form.

“4.1.2 A proposed consolidated schedule of concessions in the nomenclature of the Harmonized System ...

“4.1.3 A concordance table from the existing to the proposed consolidated schedules of concessions ...

“4.1.4 A concordance table from the proposed to the existing consolidated schedules of concessions ...

“4.1.5 A list of items proposed for certification ...

“4.1.6 A list of items for renegotiation ...

¹⁰⁸C/113 and Corr.1, 27S/26-29. The Annexes are not reprinted in the BISD and can be found in C/113.

¹⁰⁹TAR/M/3, p. 9-10, para. 4.7.

“4.2 When contracting parties consider it unavoidable to combine headings or parts of headings in implementing the Harmonized System they may have to modify certain of their existing concessions. Possible ways of arriving at new rates include:

“4.2.1 Applying the lowest rate of any previous heading to the whole of the new heading.

“4.2.2 Applying the rate previously applied to the heading or headings with the majority of trade.

“4.2.3 Applying the trade weighted average rate of duty for the new heading.

“4.2.4 Applying the arithmetic average of the previous rates of duty, where no basis exists for establishing reasonably accurate trade allocations.

“4.3 If a contracting party considers that the conversion of a concession, which has been notified as a rectification case by another contracting party, in effect impairs the value of the concessions and should have been notified for renegotiation under Article XXVIII, the first contracting party, having demonstrated at least its substantial interest in the concession, is free to request, in accordance with normal practice in rectification exercises, that the concession be restored (or, failing, that the item concerned be notified for renegotiation).

...

“4.5 Consistent with Part IV of the GATT special account would be taken of the needs of developing countries.”¹¹⁰

Prior to the adoption of the Decision, it was stated “that, under this document, any contracting party was entitled to request the maintenance of particular tariff items of interest to it in the new nomenclature, whenever tariff lines with different bound rates were combined or whenever bound rates were combined with unbound rates. This understanding was in keeping with the basic principle stated in paragraph 2.1 [of the Decision,] namely that ‘existing GATT bindings should be maintained unchanged’”.¹¹¹

At the November 1986 Council meeting, the Forty-second Session and the December 1986 meeting of the Committee on Tariff Concessions, a number of contracting parties noted the difficulties experienced by their delegations in analysing documentation and submitting claims of interest within the time-limits proposed. Other contracting parties stressed the necessity of avoiding a further postponement of the entry into force of the Harmonized System, which had been deferred from 1 January 1987 to 1 January 1988 due to lack of completion of the associated Article XXVIII negotiations. The 1987 Report of the Committee notes that “the Committee recognized that it was necessary to extend the time-limits for the submission of specific claims of interest related to the transposition of national schedules of tariff concessions into the Harmonized System”.¹¹²

See also the Council minutes of discussions on the transposition of Schedule XX - United States into the Harmonized System nomenclature.¹¹³ See also the Secretariat Note of 26 September 1985 on “Loose-Leaf Schedules based on the Harmonized System Nomenclature”¹¹⁴ and the discussion of Schedules under Article II.

3. Procedures for rectification and modification of Schedules of concessions

Procedures for Modification and Rectification of Schedules of Tariff Concessions were adopted by the CONTRACTING PARTIES on 17 November 1959¹¹⁵, 19 November 1968¹¹⁶, and 26 March 1980.¹¹⁷ Paragraph 1 of the Decision of 26 March 1980 provides that “Changes in the authentic texts of Schedules annexed to the General Agreement which reflect modifications resulting from action under Article II, Article XVIII, Article XXIV,

¹¹⁰L/5470/Rev.1, 30S/17, 17-21.

¹¹¹C/M/170, p. 15.

¹¹²Report of 10 November 1987, TAR/142, 34S/81, para. 3; see also SR.42/1 p. 5-8, SR.42/4, C/W/509, and discussion in TAR/M/22.

¹¹³C/M/227, p. 27; C/M/228, p. 20; C/M/231, p. 11.

¹¹⁴TAR/W/55.

¹¹⁵8S/25.

¹¹⁶16S/16.

¹¹⁷27S/25.

Article XXVII or Article XXVIII shall be certified by means of Certifications". The text of the Decision of 26 March 1980 appears *in extenso* in the chapter on Article II, which also discusses practice regarding Certifications. See also under Article XXX concerning the former practice of issuing protocols of rectification or modification of Schedules.

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

Concerning the preparatory work associated with the schedule provisions of the General Agreement, and the relationship between the Havana Charter and Schedules under the General Agreement, see generally Section III under Article II. Since the Charter did not directly provide for schedules of concessions, it also did not provide for the renegotiation of concessions nor for modification of schedules. The text of Article XXVIII emerged from discussions of the Tariff Agreement Committee and a draft by an ad-hoc sub-committee, during September and October 1947 at the Geneva session of the Preparatory Committee.¹¹⁸

The text of Article XXVIII of the General Agreement as agreed 30 October 1947 provided that concessions could be renegotiated only after 1 January 1951; moreover, Article XXXI did not permit withdrawal prior to 1 January 1951. The sole general "escape clause" from the general obligation to maintain tariff concessions was Article XIX. During the negotiation of the text at Geneva one delegate summarized the legal situation as: "the obligation that we are accepting here in respect of a tariff item is initially to bind the item at the rates set out in the Schedule for three years ...".¹¹⁹ Paragraph 1 of Article XXVIII provided for renegotiation after 1 January 1951 "by negotiation and agreement" with INR holders and "subject to consultation with such other contracting parties as the CONTRACTING PARTIES determine to have a substantial interest in such treatment".

By a Resolution of 1 April 1950, the CONTRACTING PARTIES recommended prolongation of the assured life of the schedules negotiated at Geneva in 1947 and Annecy in 1949.¹²⁰ One year later, paragraph 6(a) of the Torquay Protocol of 21 April 1951 amended the date in paragraph 1 to substitute "January 1, 1954" for "January 1, 1951".¹²¹ and in a Declaration the CONTRACTING PARTIES agreed that "they will not invoke prior to 1 January 1954, the provisions of Article XXVIII, paragraph 1, of the General Agreement to modify or cease to apply the treatment which they have agreed to accord under Article II of the General Agreement to any product described in the appropriate schedule annexed to the General Agreement".¹²² A similar Declaration on 24 October 1953 extended this date to 1 July 1955.¹²³

Renegotiations did nevertheless take place, under waiver or under the "sympathetic consideration" procedure discussed below, even prior to 1 January 1951. The situation was summarized by the report of the Working Party in the Eighth Session on "Continued Application of Schedules Annexed to the Agreement", which drafted the 1953 Declaration:

"A contracting party which wishes to renegotiate an item in its schedule in order to afford protection for developmental purposes can have recourse to Article XVIII. In appropriate circumstances, contracting parties can also have recourse to other provisions of the General Agreement. Apart from the cases specifically provided for, the provisions of the General Agreement for the modification or withdrawal of tariff rates which are bound in the schedules would not operate, if the assured life of the schedules is extended as proposed, until 1 July 1955. The Working Party noted, however, that during the first and second periods of assured validity of the schedules, some contracting parties had felt the need, in exceptional circumstances, to modify certain bound rates of duty and have sought authority from the CONTRACTING PARTIES to enter into negotiations to this end. All such requests have been examined with sympathy and understanding and the CONTRACTING PARTIES have authorized the renegotiations. ...

¹¹⁸See EPCT/TAC/PV/14 p. 4-35, EPCT/194, EPCT/TAC/PV/18 p. 38-46.

¹¹⁹EPCT/TAC/PV/14, p. 19.

¹²⁰GATT/CP/25, Annex 1, p. 6; proposal at GATT/CP.4/7, draft at GATT/CP.4/25, discussion at GATT/CP.4/SR.6, 7, 8, 19.

¹²¹I/89.

¹²²Declaration of 21 April 1951, II/30-31.

¹²³2S/22-23.

“There is no reason to believe that contracting parties will be less ready in the future than they have been in the past to consider requests of this kind and to join in granting authority for the necessary negotiations, and the approval of this report would in itself be confirmation that the CONTRACTING PARTIES would give sympathetic consideration to such requests”.¹²⁴

The Intersessional Committee was given the authority to examine and authorize such requests for “sympathetic consideration”.¹²⁵

In the 1954-55 Review Session, Article XXVIII was extensively revised. Paragraph 4 was added, replacing the “sympathetic consideration” procedure; other additions included the provisions on rights for “principal suppliers”, paragraph 5, and the Interpretative Notes (originally negotiated as “regulations” for the use of Article XXVIII). These modifications came into effect on 7 October 1957 through entry into force of the Protocol Amending Parts II and III of the General Agreement.¹²⁶

IV. RELEVANT DOCUMENTS

Geneva

Discussion: EPCT/TAC/SR.14, 18
 EPCT/TAC/PV/14, 18, 25
 Reports: EPCT/135, 189, 194, 196, 209,
 214/Add.1/Rev.1
 Other: EPCT/W/193, 273, 274, 285, 312,
 326

CONTRACTING PARTIES

Discussion: GATT/CP.4/SR.6-8, 16, 19
 Reports: GATT/CP.4/7, 25, 42

Review Session

Discussion: SR.9/16, 17, 25, 36, 37, 45, 47
 Reports: W.9/107, 124, 206, 212+Corr.1,
 236/Add.3, 248, L/329, 3S/205
 Other: GATT/181-185, 187, 188, 191,
 192, 194, 195, 201
 L/189, 217, 246,
 261/Add.1/Corr.1, 270, 274, 277,
 282
 W.9/19, 21, 39/Add.1, 43, 44, 49,
 108, 118, 124, 166, 176, 182, 207
 Sec/126/54, 140/54, 141/54,
 147/54
 MGT/66/54+Add.1+Corr.1
 Spec/18/55+Revs.1-2, 49/55,
 99/55, 123/55, 147/55

¹²⁴G/54, adopted 23 October 1953, BISD 2S/61, 62-62 paras. 4-5.

¹²⁵2S/9.

¹²⁶Declarations extending the validity of Schedules for those contracting parties with respect to the revised Article XXVIII was not yet in effect, appear at 6S/19-22 (Declaration of 30 November 1957) and 9S/29-32 (Declaration of 19 November 1960).

V. TABLES**A. USE OF ARTICLE XXVIII:1, 4, AND 5: SUMMARY TABLE: STATUS AS OF 1 JANUARY 1995**

NOTE: The figures below indicate requests to renegotiate one or more concessions under Article XXVIII:1, 4 or 5 (including "sympathetic consideration" procedures) and are based on Tables C, D and E below. Each such request may range from one tariff item to an entire Schedule. The column on Article XXVIII:5 refers to requests for renegotiation of concessions. Invocations of Article XXVIII:5 in order to reserve rights with request to an entire Schedule for a three-year period appear in Table B below.

Contracting party	Para. 1	Para. 4	Para. 5	Total
Australia	6	13	14	33
Austria	3	1	6	10
Benelux	5	2		7
Brazil		1	2	3
Canada	4	5	9	18
Chile		1		1
Cuba	1	2	1	4
Czechoslovakia / Czech & Slovak Republic	2			2
Denmark	1	3	1	5
Dominican Republic	2			2
EEC	3	2	12	17
Egypt			1	1
Finland	4	2	5	11
France	1			1
Germany	2			2
Greece	3	1		4
Haiti		1		1
Hungary			1	1
India	1	2	3	6
Israel		1		1
Italy	1			1
Japan	1	2	3	6
Mexico			1	1
Morocco		1		1
New Zealand	7	6	19	32
Nicaragua	1			1
Norway	3	2	1	6
Pakistan	2	2		4
Peru	2	1		3
Portugal		1		1
Romania	1			1
Senegal	1			1
South Africa	5		35	40
Spain			1	1
Sri Lanka	3	1		4
Sweden	2	2	7	11
Switzerland	1		2	3
Tunisia	1			1
United Kingdom	2	1	2	5
United States	5	8	7	20
Uruguay	1			1
Zaire	1			1
TOTAL	78	64	133	275

B. INVOCATION OF ARTICLE XXVIII:5 SINCE 1958: STATUS AS OF 1995

NOTE: This table records invocations of Article XXVIII:5, permitted once each three years (most recently as of 1 January 1994). By invoking Article XXVIII:5 a contracting party reserves its rights for a three-year period with regard to its entire Schedule. In many cases no renegotiations have taken place even though such a reservation was made.

Contracting party	1958-60	1961-63	1964-66	1967-69	1970-72	1973-75	1976-78	1979-81	1982-84	1985-87	1988-90	1991-93	1994-96
Argentina										X	X	X	
Australia				X	X	X	X	X	X	X	X	X	X
Austria						X		X	X	X	X	X	X
Bangladesh						X	X				X		
Benelux		X											
Bolivia												X	X
Brazil							X	X	X	X	X	X	X
Burundi				X									
Canada				X			X	X	X	X	X	X	X
Chile	X										X	X	X
Colombia													X
Costa Rica												X	X
Cuba	X	X											
Czech Republic													X
Czechoslovakia												X	
Denmark		X	X	X	X	X							
El Salvador													X
Egypt													X
EEC			X			X	X	X	X	X	X	X	X
Finland					X	X		X	X	X	X	X	X
France		X											
Germany		X											
Greece	X	X											
Guatemala													X
Haiti										X			
Hungary								X	X	X	X	X	X
Iceland										X			X
India				X	X	X		X	X	X			
Indonesia													X
Israel					X	X	X				X	X	X
Italy		X											
Japan							X	X	X	X	X	X	X
Korea											X	X	X
Malaysia											X	X	X
Mexico											X	X	X
Morocco												X	X
New Zealand	X	X			X	X		X	X	X	X	X	X
Norway								X	X	X	X	X	X
Pakistan					X								
Peru												X	X
Philippines												X	X
Poland							X	X	X	X	X	X	
Portugal										X			
Romania									X	X		X	X
Singapore											X	X	
Slovak Republic													X
S. Africa					X	X	X	X	X	X	X	X	X
Spain								X	X	X			
Sweden								X	X	X	X	X	X
Switzerland								X	X	X	X	X	X
Thailand											X	X	X
Tunisia													X
Turkey		X		X	X	X	X	X	X	X	X	X	X
United States						X	X	X	X	X	X	X	X
Uruguay											X	X	
Venezuela												X	
Yugoslavia											X	X	
Zaire													X
Zimbabwe											X	X	
TOTAL	4	9	2	6	9	12	11	18	19	23	28	35	37

C. RENEGOTIATIONS UNDER ARTICLE XXVIII:1**General notes:**

1. In addition to notifications listed below, Article XXVIII negotiations have been carried out with respect to several Schedules under the special and simplified procedures adopted by the Council on 12 July 1983 (30S/17) in connection with the transposition of Schedules into the Harmonized System (SECRET/HS document series).
2. Australia, Benelux, Brazil, Chile, Cuba, Denmark, France, Haiti, Italy, New Zealand, South Africa, United Kingdom and Uruguay carried out renegotiations under Article XXVIII:1 in 1950 but detailed information is not available.
3. Renegotiations under Article XXVIII in certain particular cases where the paragraph of Article XXVIII was not specified have been listed under Article XXVIII:1.

Contracting party	Notification	Documents	Negotiations with	Products modified or withdrawn	Trade involved (yearly average)	Remarks
AUSTRALIA	5.5.1955	SECRET/38 + Add.1-5	France, Czechoslovakia and United Kingdom	Galoshes, rubber sand boots and shoes. Galoons. Ribbons.	EA 403,880	
	2.10.1957	SECRET/90 + Add.1-9	France, United Kingdom, United States, Sweden, Germany, Benelux	Products listed in SECRET/90/Add.1	EA 75,606,421	
	27.7.1960	Spec/215 SECRET/119 + Add.1-17	Italy, France, Norway, Benelux, Germany, Sweden, Finland, Czechoslovakia, United States, United Kingdom and India: Ceylon (Part II)	Products listed in SECRET/119	EA 302,719,500	
	5.11.1963	SECRET/156 + Add.1-8	Sweden, South Africa, Norway, EEC, India, United States	Items listed in SECRET/156	EA 15,053,500	Forged steel flanges, refrigerator appliances, linseed oil and woollen piece goods: originally Article XIX actions
	30.9.1966	SECRET/168 + Add.1-5	Japan, EEC, Czechoslovakia	Footwear: iron and steel. Cinematograph films. Dictating machines. Tools. Paints and colours. Acetylsalicylic acid.	EA 45,434,000	
	6.10.1981	SECRET/279 + Add.1		Whole schedule	n.a.	Transposition of Schedule into CCCN. Bilateral renegotiations carried out under Article XXVIII:5
AUSTRIA	21.5.1955	SECRET/21 + Corr.1 + Add.1-9	Finland, India, Benelux, Canada, Chile, Czechoslovakia, Denmark, France, Germany, Norway, Sweden, United Kingdom, United States, Greece, Italy	About 100 items	S 1,114,158,600	
	22.7.1957	SECRET/80 + Add.1-14	Germany, France, United Kingdom, United States, Benelux, Sweden, Denmark, Norway	Sulphite. Linoleum. Oil cloth of silk. Combustion engines. Boiler feeder pumps. Hay tedders. Refrigerator machinery. Eye/ opera glasses. Aromatic essences.	S 142,502,100	
	27.7.1960	SECRET/120 + Add.1-3	Czechoslovakia, Germany	Tableware (of porcelain or china)	S 35,008,000	
BENELUX (Belgian Congo)	26.2.1955	SECRET/29 + Add.1-7	Union of South Africa, Czechoslovakia, Germany, United States, United Kingdom, Italy, Canada	Sugar confectionery. Enamel colours and paints. Fancy jewellery. Storm lanterns.	BF 114,524,000	

Contracting party	Notification	Documents	Negotiations with	Products modified or withdrawn	Trade involved (yearly average)	Remarks
(Metropolitan territory)	7.6.1955	SECRET/48 + Add.1-2	United States	Oranges and mandarins	Fl. 8,128,858.2	
(Belgian Congo, Rwanda Urundi)	10.7.1957	SECRET/78	South Africa, United Kingdom, Czechoslovakia, Germany, Rhodesia and Nyasaland, United States	Products listed in SECRET/78 (mainly textiles)	BF 1,004,141,000	
(Suriname)	22.7.1957	SECRET/81 + Add.1-5	United States, Canada, France	Products listed in SECRET/81	Sur. F. 5,535,500	
(Netherlands Antilles)	18.11.1960	SECRET/132 + Add.1-4	United Kingdom, United States	Liquorice. Marzipan. Bonbons. Sugar conf. Cocoa powder/paste. Chocolate.	Ant. F.436,250	
CANADA	13.4.1955	SECRET/35 + Add.1,2,3	United States	Fruits in cans. Ethylene glycol.	C\$5,746,401	
	31.7.1957	SECRET/82 + Add.1-10	France, Benelux, Sweden, Chile, Italy, United States,	Iron. Steel. Wool. Zinc. Mushrooms and truffles. Onions. Fruits and vegetables, etc. Listed in S/82 + Add.1)	C\$227,698,281	
	4.11.1960	SECRET/134 + Corr.1 + Add.1-5	United Kingdom, United States, France, Germany	Chickens, eggs. Coated papers. Iron or steel plates or sheets. Lawn or garden rollers. Hoes. Motion picture films.	C\$ 3,840,285,000	
	5.11.1963	SECRET/155 + Add.1-4	United States, EEC	Items listed in SECRET/155	C\$72,826,000	
CUBA	4.2.1955	SECRET/22 + Add.1-7	United States, Australia, Chile, Canada, Norway (Part II with United States only)	Some 50 products listed in SECRET/22/Add.1	\$53,123,568	
CZECHO-SLOVAKIA	12.7.1978	SECRET/246 + Add.1-4	Australia, India	Whole schedule	-	Conversion of specific into ad valorem duties
CZECH AND SLOVAK REP.	26.11.1992	L/6911 + Add.1-2 SECRET/338 + Add.1	Canada and United States	Review of customs tariff	Statistics provided	Reneg. of schedule under waiver; transformation from centrally planned to market economy
DENMARK	30.8.1960	SECRET/126 + Add.1	Finland	Newsprint	n.a.	
DOMINICAN REPUBLIC	23.6.1955	SECRET/49 + Add.1-5	France, United States	Pigments and paints. Cognac and armagnac. Liqueurs, cordials. Dyes.	n.a.	
	18.11.1960	SECRET/133 + Add.1	United States	Brown paper of straw or wood.	RD\$ 788,013	
EEC	1.6.1966	SECRET/165 + Add.1-8	Switzerland, Australia, Austria, Finland, Canada, New Zealand	Cheese	\$24,621,000	
	26.9.1966	SECRET/167 + Add.1-4	Canada, United States, Uruguay	Oil foods and dregs. Oilcake and other residues	\$55,000	
EEC	1.10.1969	SECRET/198 + Add.1, 2	Norway, United States	Unwrought aluminium	\$137,859,000	
FINLAND	17.6.1955	SECRET/47 + Add.1-7	France, Norway, Germany, Benelux, Czechoslovakia, Denmark, United Kingdom, United States	Polato meal. Mackerel, etc. Preserves of fruit. Wool yarns. Fabrics, ribbons, cords. Socks. stockings. Compressors, pumps. Refrigerator machines. Lacquers.	Fmk 2,988,593,027	

Contracting party	Notification	Documents	Negotiations with	Products modified or withdrawn	Trade involved (yearly average)	Remarks
	20.8.1957	SECRET/85 + Add.1-16	Austria, Italy, Germany, France, United States, Benelux, Czechoslovakia, Norway, United Kingdom, Denmark, Sweden, Ceylon, India	Listed in SECRET/85 + Add.1	Fmk 7,756,591,700	
	13.7.1960	SECRET/124 + Add.1-17	Canada, Norway, Austria, Greece, Germany, Benelux, Switzerland, France, Pakistan, Sweden, India, United Kingdom, Czechoslovakia, Denmark, Italy, United States	For list of products see various addenda	(Fmk million) 41,838.75	
	5.11.1963	SECRET/154 + Add. 1-6	United States, Denmark, Greece, EEC	Vegetables. Fruit. Woven fabrics. Linoleum.	(Fmk million) 940.39	
FRANCE (metropolitan territory)	28.5.1955	SECRET/44 + Add.1-5	Czechoslovakia, Germany, United States, Canada, United Kingdom	Fruits. Abrasin oil. Chloride of ammonium. Sulphate. Nitrates. Nitrog. chemical fertilizer. Rubber. Charcoal. Crystal paper. Liners. Aluminum.	FF 2,457,496,500	
GERMANY	3.3.1955	SECRET/27, Spec/214/55 Spec/86/56, Spec/102/56	United States	Cereal flour. Bran, sharps (from cereals). Lard. Screen quotas for exhibition of foreign films.	DM 85,800,700 (for lard only)	
	3.7.1957	SECRET/79 + Add.1-5	Benelux, Denmark, Greece, France	Asparagus. Swedes. Flower seeds. Pips of locust beans. Olive oil. Fruits. Sea pike. Clover. Sesame seeds. Figs.	DM 10,884,000	
GREECE	10.2.1955	SECRET/23 + Add.1-11 L831	U. of South Africa, Turkey, Benelux, Canada, France, Germany, Italy, UK, Norway, Finland, Austria, United States	About 30 products listed in SECRET/23 and Add.2	Dr 435,467,471,400	
	23.7.1957	SECRET/83 + Add.1-10	Czechoslovakia, Finland, United Kingdom, France, United States, Germany, Benelux, Austria	Fish. Whisky. Brandy. Leather. Skins. Wooden articles. Cutlery. Electrical articles. Optical instruments. Pencils.	Dr 132,231,406,000	
	18.5.1960	SECRET/131 + Add.1-10	Finland, France, Italy, Germany, Benelux, Japan, United States, Denmark, Austria, Turkey, United Kingdom	Products listed in addenda to SECRET/131	n.a.	Refrigerators: originally Art. XIX action
INDIA	12.5.1955	SECRET/39 + Add.1-4	Germany, United States and Czechoslovakia	Dyes	Rs 92,711,200	
ITALY	16.5.1955	SECRET/40 + Add.1-6	Denmark, Sweden and United States	Cheese, Wood panels and blocks. Printing machinery	6,269 million lire	
JAPAN	27.7.1960	SECRET/117 + Add.1-7	United States, Germany	Grinding machines. Metal or wood working machines. Photographic films. Gramophone records. Toluene. Polyethylene. Animal fats. Powdered milk. Sauces. Seeds of leguminous plants.	¥ 9,628,286,500	
NEW ZEALAND	12.2.1955	SECRET/25 + Add.1-7	Benelux, France, Czechoslovakia, United Kingdom and United States	Leather manufactures. Mufflers, pistons. Men's and boy's overcoats. Cards. Calendars. Cartridges. Metal wires. Buttons, crochets.	ENZ 356,749.5	
	11.9.1956	SECRET/70 + Add.1-3	United States, Germany	Goat-skins, kid-skins. Electric lamps.	ENZ 929,169.8	
	24.10.1956	SECRET/74 + Add.1 SECRET/75	Benelux	Oxides of zinc	ENZ 39,210.6	

Contracting party	Notification	Documents	Negotiations with	Products modified or withdrawn	Trade involved (yearly average)	Remarks
	14.8.1972	SECRET/207	---	Consacks	n.a.	Converted into XXVIII:5 negotiations as from 1.7.1973 - see SECRET/214
	21.8.1972	SECRET/208	---	Floor coverings	\$ (c.d.v.) 275,981	id.
	26.9.1972	SECRET/209	---	Fittings for loose-leaf binders	ENZ 92,954	id.
	5.10.1972	SECRET/210	---	Polyester	1,017,003	id.
NICARAGUA	8.3.1955	SECRET/32 + Add.1-9	France, Czechoslovakia, Norway, Benelux, Italy, United Kingdom, Chile, Canada, United States	Complete Annex list	n.a.	
NORWAY	13.9.1957	SECRET/88 + Add.1-7	Germany, Czechoslovakia, Sweden, Finland, United Kingdom	Handbags, Glass and glassware, Trunks.	NOK 6,490,300	
	4.8.1960	SECRET/122 + Add. 1-7	Italy, Germany, Czechoslovakia, Benelux	Lilac, Sausages, Felt hats, Wires of iron or steel, Hydro- electric conduits of steel	NOK 41,328,000	
	25.9.1969	SECRET/196 + Add. 1-4	EEC, United States	Rice, Dry yeast, Natural yeast	NOK 11,535,000	
PAKISTAN	8.3.1955	SECRET/31 + Add.1-3	France and United States	Fruit juices, Pineapples, Vegetables, Tobacco, Paints, Fountain pens, Razor blades, Typewriters, Wines	Rs. 6,216,631	
	6.9.1960	SECRET/127 + Add.1-13	Australia, France, Czechoslovakia, New Zealand, Sweden, Turkey, Benelux, United States, United Kingdom	Items listed in SECRET/127/Add.1	PRs. 63,422,300	
PERU	1.4.1955	SECRET/34 + Add.1-9	Canada, France, United States, Czechoslovakia, Benelux, Italy, United Kingdom	Products listed in SECRET/34	n.a.	
	4.8.1960	SECRET/121 + Add.1-12	Norway, Canada, India, France, Sweden, Italy, United Kingdom, Uruguay, Benelux, United States	Bars of iron or steel, Plates or sheets of iron coated with lead or zinc	Gold Soles (see SECRET/121/Add.1) 186,295,240	
ROMANIA	15.4.1993	L/6967, W.47/19 + Add.1-2 SECRET/339	Hungary	See documents	See documents	Introduction of new customs tariff; renegotiation under waiver
SENEGAL	2.8.1993	L/6784 SECRET/341 + Add.1	--	See documents	Statistics provided	Renegotiation of schedule under waiver
SOUTH AFRICA	26.1.1955	SECRET/19 + Add. 1-14	Australia, Benelux, Brazil, Burma, Czechoslovakia, Finland, France, Greece, Norway, Sweden, United Kingdom, United States	About 30 products listed in SECRET/19	£ 3,434,038.5	
	15.8.1957	SECRET/84 + Add.1-6	Austria, Benelux, Germany, United Kingdom, United States	Asparagus, Motorcars, Radios, Televisions, Combs	£ 10,800,270.4	
	7.9.1960	SECRET/128 + Add.1-17	Australia, Benelux, Ceylon, Czechoslovakia, Finland, France, Germany, Greece, Norway, Sweden, United Kingdom, United States	Products listed in SECRET/128	£ 90,385,201	

Contracting party	Notification	Documents	Negotiations with	Products modified or withdrawn	Trade involved (yearly average)	Remarks
	5.11.1963	SECRET/153 + Add. 1-10	Greece, Australia, New Zealand, Austria, EEC, Switzerland, United Kingdom, United States	Products listed in SECRET/153	R 53,344,641	
	7.10.1966	SECRET/170 + Add. 1-7	EEC, United States, Norway, Finland, Sweden, United Kingdom	Products listed in SECRET/170	R 62,035,300	
SRI LANKA	5.3.1965	SECRET/28 + Corr. 1 and Add. 1-8	Union of South Africa, New Zealand, Czechoslovakia, France, Italy, Australia, Benelux, Sweden, United States	Confectionery, fruits tinned, jams, jellies, Marmalades, Chinaware, Porcelain, glass and glassware, Wood screws (iron and steel), Agricultural implements, Leather and leather goods, Umbrellas, Exercise books, Brass/copper nails/screws.	Cey Rs 20,594,703	
	27.7.1960	SECRET/116 + Add. 1-17	South Africa, Czechoslovakia, Australia, New Zealand, Finland, Denmark, Canada, Norway, Sweden, Japan, Italy, France, Germany, Benelux, United States	Products listed in SECRET/116/Add. 1 and Add. 1/Corr. 1	Cey Rs 278,960,000	
	2.8.1978	SECRET/247 + Add. 1-4	Australia, Canada, New Zealand, South Africa	Part II of Schedule	Rs. 23,287,500	
SWEDEN	31.5.1955	SECRET/43 + Add. 1-4	Benelux, Italy, United States	Edible fruits and berries	SEK 38,513,000	
	27.7.1960	SECRET/118 + Add. 1-4	Germany, Japan, United States	Nylon socks and stockings, Tableware of porcelain, china or pottery, or of faience, Statuettes, Motor vehicles,	SEK 469,060,200	
SWITZERLAND	27.9.1966	SECRET/166 + Add. 1-2	EEC	Cheeses	n.a.	
TUNISIA	12.7.1993	SECRET/340	---	See document.	See document.	
UNITED KINGDOM	20.4.1955	SECRET/36 + Add. 1-4	Brazil, Benelux	Bananas, Fruit stocks of Malling varieties, Trees and shrubs	£11,010,875	
	9.9.1969	SECRET/194 + Add. 1	Denmark, Uruguay	Eggs in shell and other egg products	£3,202,000	
UNITED STATES	8.12.1960	SECRET/129 + Add. 1-5 L/1309	United Kingdom, Japan, Italy	Woven fabrics	n.a.	
	30.9.1969	SECRET/195 + Add. 1-2	Japan	Stainless steel knives, forks, spoons	(stainless flatware) \$17,010,600	
	5.10.1978	SECRET/249	---	Woven, knit and textile fabrics	\$4,877,000	Compensation provided for in MTN reductions
	12.10.1978	SECRET/250 + Add. 1-3	EEC, Japan	Earthenware, tableware, china- ware, dinnerware	\$ 187,588	Withdrawals
	11.10.1978	SECRET/251 + Add. 1-6	Canada, EEC, Japan, South Africa, Sweden	621 items including chemicals, metal and machinery products, textiles, etc.	\$5.5 billion	Conversion of specific and compound duties to ad valorem duties
URUGUAY	27.4.1955	SECRET/37 + Add. 1	Norway and Sweden	Paper pulp, Sulphate, sulphite cellulose	\$1,770,700	

Contracting party	Notification	Documents	Negotiations with	Products modified or withdrawn	Trade involved (yearly average)	Remarks
ZAIRE	12.7.1990	SECRET/332 + Add.1 L/7170		Whole schedule	See Add.1 of SECRET/332	Renegotiation of schedule under waivers and transposition into HS nomenclature

D. RENEGOTIATIONS UNDER THE “SYMPATHETIC CONSIDERATION” PROCEDURE AND ARTICLE XXVIII:4

Country	Decision of CPs	Documents	Negotiations with	Products modified or withdrawn	Trade involved (yearly average)	Reason for invocation
AUSTRALIA	16.10.1953	SECRET/1, SECRET/6	Czechoslovakia, Germany, Italy, United States	Lathes	EA 110,900	Tariff reclassification
	28.10.1955	SECRET/53 + Add.1-2	France and Germany	Sulphate of magnesita	EA 8,467,300	Domestic industry at severe disadvantage with certain overseas production
	26.7.1956	SECRET/69 + Add.1-6	United States	Taximetres	n.a.	Protection for infant industry
	28.6.1957	GATT/AIR/114 SECRET/94 + Add.1	Italy and France	Slide fastener tape	n.a.	Need for increased protection
AUSTRALIA	10.7.1958	GATT/AIR/135 SECRET/98 + Add.1-2	United Kingdom	Cotton yarns	EA 1,335,009	Tariff Board recommendations
	26.9.1958	SECRET/99 + Add.1-13	Czechoslovakia, Italy, United Kingdom (Hong Kong), United Kingdom, India	Buttons, almonds, drills, cotton sheeting, textiles	EA 10,334,204	Simplification and adjustment of duties
	11.2.1959	SECRET/104, SECRET/125	See SECRET/110	Woollen piece goods	---	See SECRET/110
	14.11.1959	SECRET/110 + Add.1-3	United Kingdom and France	Woollen piece goods	EA 1,169,636	Amalgamation of items (including SECRET/110) and modification of duties
	14.3.1960	GATT/AIR/182 SECRET/112, SECRET/125	United Kingdom (Hong Kong)	Boots and shoes	EA 264,544	Need for protection

Country	Decision of CPs	Documents	Negotiations with	Products modified or withdrawn	Trade involved (yearly average)	Reason for invocation
	20.4.1960	SECRET/113, SECRET/114 + Add.1-2 SECRET/125	United Kingdom, France, Benelux, Czechoslovakia, Germany, Sweden, United States	Glue, trimmings, radio/TV equipment. Copper. Linen piece goods. Electrical machines and appliances	EA 15,660,083	Need for protection
	1.3.1961	SECRET/138 + Add.1-3	India	Cotton piece goods	EA 1,854,300	Need for protection
	16.1.1963	GATT/AIR/312 SECRET/152 + Add.1-2	EEC and Uganda	Coffee, raw and kiln dried	EA 3,057,150	Development of Papua and New Guinea
	24.1.1966	GATT/AIR/259 + Corr.1 Spec(67)6, SECRET/175	EEC, Czechoslovakia	Glassware, motor vehicles	EA 13,822,500	Need for protection. Glassware: originally Article XIX action.
AUSTRIA	15.4.1969	SECRET/186 + Add.1-3	EEC, Czechoslovakia	Malt, not roasted	S 8,862,500	Rapid increase in imports
BENELUX (Netherlands Antilles)	16.2.1955	SECRET/20 + Add.1, Corr.1; L380	Canada, Dominican Republic, Haiti, Nicaragua, United States and Uruguay	About sixty products see SECRET/20	N.A. Fl. 101 827 000	Tariff review
(Surinam)	22.2.1962	SECRET/150 + Add.1	United States	Passenger motor vehicles	Surin. Fl. 2,727,000	To increase revenue
BRAZIL	7.9.1948	GATT/CP.2W.9 GATT/CP/24	United Kingdom and United States	Milk in powder, etc. Almanacs and calendars. Penicillin	Cruzeiros 35,286,579	Monetary depreciation
CANADA	15.1.1957	SECRET/76 + Add.1	United States	Potatoes	n.a.	Adjustment of duty
	5.1.1961	GATT/AIR/215 (SECRET)	Benelux, France, Italy, Peru, Japan, United Kingdom, United States, Uruguay, Germany	Textiles (about forty items)	\$88,547,600	Tariff revision
		SECRET/106 + Add.1-32	Austria, Switzerland, EEC, Czechoslovakia, India, Haiti			
CANADA	19.5.1961	SECRET/140	United States	Sodium hypochloride	n.a.	Nomenclature change
	21.6.1968	CIM/47 SECRET/183 + Add.1	EEC, United States	Chemicals and plastics	n.a.	Negotiations for delay of implementation of concessions
CHILE	12.4.1956	SECRET/60	Benelux, Canada, France, Norway, Sweden, United Kingdom, United States and Uruguay	Cotton fabrics, ammonium nitrate, aluminum, screws, bolts, cocks, faucets and valves. Wire. Refrigerators	Gold pesos 9,116,185.5	Tariff review
CUBA	14.9.1948	GATT/CP.2W.12 GATT/CP/71	United States	Trimmings, ribbons, galleons, etc. Nylon stockings, hollow tyres and inner tubes	n.a.	Developments needs

Country	Decision of CPs	Documents	Negotiations with	Products modified or withdrawn	Trade involved (yearly average)	Reason for invocation
	20.6.1949	GATT/CP.3/45 GATT/CP.3SR/28	Canada and United States	Table potatoes	n.a.	Need for protection
DENMARK	2.5.1958	SECRET/96 + Add.1 + Corr.1	Australia, Canada, France, United States	Corn products, wheat, rye, barley and oats. Mushrooms. Dates.	DKr 433,583	Protection of farm incomes
	14.11.1958	SECRET/100 + Add.1-12	France, Finland, Norway, Czechoslovakia, Switzerland, Italy, Benelux, Germany, United Kingdom, United States, Japan	Straight cast pipes. Slaves for coopers. Stones cardboard. Chandellers. Buttons. Iron and steel. Wines. Insulating glass. Boots. Shoes. Cameras. Telescopes, etc.	DKr 11,111,600	Conversion of specific into ad valorem duties on enacting new tariff (Brussels Nomenclature)
	14.11.1958	SECRET/109 + Add.1-9	Czechoslovakia, Sweden, Germany, Benelux, United States and United Kingdom, Japan	Sundry products (about 25)	DKr 47,939,700	As above
EEC	26.6.1967	SECRET/173 + Add.1	United Kingdom	Chocolate	n.a.	Modification to prevent abuses
	19.6.1992	SECRET/336 + Add.1 L/7076	---	Oilseeds and oilcakes	ECU 4,546,126,000	
FINLAND	24.9.1955	SECRET/52 and Add.1-2 L/362 + Add.1	France and United Kingdom	Cotton yarns	FIM 2,499,911,551.8	Uniformity of textile duties
	21.7.1977	SECRET/237	Canada, Hungary, New Zealand, Norway, Poland, South Africa, Switzerland, United States	Agricultural products	FIM 2,049,157,000	Conversion of specific into ad valorem duties
GREECE	2.11.1954	SECRET/15, L/391	United States and Germany	Kidskin and calfskin. Goat and sheep skins. Patent leather	Million old drachmae: 77,030.7	Need for protection
HAITI	3.10.1961	L/1568 SECRET/147 + Add.1-9	India, Benelux, Germany, UK, Norway, Canada, Denmark, France, United States	List of items renegotiated in L/1568	n.a.	Adjustments following new nomenclature
INDIA	23.10.1953	SECRET/3, SECRET/14	Sweden	Ball bearings and adapter bearings	Rs 2,239,000	Protection for new industry
INDIA	20.2.1954	SECRET/7, SECRET/11	France, Italy, UK, US, Czechoslovakia, Germany	Champagne and other sparkling wines; dyes derived from coal tar; glass beads and false pearls; safety razor blades	Rs 46,560,000	Protection of dev. industries; BOP; and low specific duties
ISRAEL	11.11.1968	L/3085 SECRET/182 + Add.1-10	Japan, Norway, Sweden, Finland, EEC, Switzerland, UK, US	List of items in SECRET/182	\$29,845,000	Need for protection
JAPAN	8.12.1961	SECRET/144 + Add.1-8	Peru, Greece, Uruguay, EEC, US, Dominican Rep.	Items listed in SECRET/144 and Add.1	\$12,784,800	Adjustments in connection with tariff revision
	15.7.1970	SECRET/201 + Add.1-2	United States	Chewing-gum	\$228,750	Development of industry

Country	Decision of CPs	Documents	Negotiations with	Products modified or withdrawn	Trade involved (yearly average)	Reason for invocation
MOROCCO	4.5.1988	L/6326 + Add.1		Sulphur, asbestos, coal, newsprint	Million dh 2,637	Tax reform aimed at introducing a fiscal levy
NEW ZEALAND	2-3.8.1954	GATT/AIR/51 (SECRET) SECRET/12 SECRET/18	Czechoslovakia and United Kingdom	Boots, shoes, etc. Slippers, n.e.i.	£NZ 213,611.25	Tariff review
	20.6.1963	SECRET/151 + Add.1-3	EEC	Woven pile & chenille fabrics of woollen or worsted thread (moquettes)	£23,822	Protection of new industry
	12.10.1964	SECRET/161 + Add.1-3	United States, EEC, Sweden	Saw blades	£ 162,954.5	Need for protection
	15.4.1969	SECRET/185	United Kingdom	Woven pile fabrics. Moquettes.	\$NZ 135,829	Nomenclature change
	23.7.1969	SECRET/190 + Add.1	United Kingdom	Yarns of man-made and synthetic fibres. Thread.	\$NZ 44,923	Rapid increase in imports
	31.5.1978	SECRET/245 + Add.1	---	Changes affected about 60 items (listed in SECRET/245)	\$NZ 75,494.05	Introduction of a revised customs tariff as from 1.7.1978.
NORWAY	14.11.1958	L/856 + Add.1 + 2 SECRET/97 + Add.1-11	Greece, Austria, Finland, Italy, Japan, Czechoslovakia, Benelux, Germany, Denmark, Sweden, UK and United States	About 40 products	n.a.	Adoption of Brussels Nomenclature and transposition of specific into ad valorem duties
	19.11.1959	SECRET/111 + Add. 1-8	France, Denmark, Benelux, Germany, UK, United States and Czechoslovakia	Glass. Thermometers. Cigars. Articles of talence, iron and steel. Gramophones. Pipes, etc.	NOK 20,402,100	Transposition of further specific duties
PAKISTAN	6.9.1948	GATT/CP.2/25 GATT/CP/5/Add.3 GATT/CP.3/57	China, Czechoslovakia, France, Netherlands, United Kingdom and United States	Camphor. Textile manufactures. Ribbons. Glass beads and false pearls. Wireless receivers, etc. Musical instruments.	n.a.	Unforeseen development of imports
	18.5.1961	SECRET/139 + Add.1-4 L/1474 SECRET/127/Add.1-4	Germany, Japan, Italy and Czechoslovakia	List of items in SECRET/139	P.Rs. 24,646,500	Adjustments to prevent distortion and increase revenue
PERU	6.12.1961	L/1611 SECRET/145 + Add.1 SECRET/146 + Add.1	Canada, United States Benelux and France	Iron or steel wire. Iron or steel tubes. Copper bars and rods, flat bars. Copper pipes.	US\$ 1,628,033.4	Development of industry
PORTUGAL	1.7.1983	SECRET/300	---	Carbon (in particular lampblack)	Escudos 338,653,00	Development of new industry

Country	Decision of CPs	Documents	Negotiations with	Products modified or withdrawn	Trade involved (yearly average)	Reason for invocation
SRI LANKA	28.8.1948	GATT/CP.3/80	Australia, Benelux, China, Czechoslovakia, France, New Zealand, Norway, South Africa, United States	Whole 1947 schedule	n.a.	Need to increase revenue: BOP reasons
SWEDEN	26.9.1958	L/848, L/950 SECRET/102 + Add.1-12	Italy, United Kingdom, Germany, Denmark, France, Benelux, Japan, Uruguay, United States and Canada	Tissues. Some fruits. Umbrellas. Yarns. Spirils. Glues. Live plants. Mustard. Extracts. Buttons. Vegetables. Sauces, etc.	SEK 83,428,400	Tariff reform and consolidation of schedule
	30.4.1973 12.1.1978	L/3825 SECRET/242	United States	Non-alcoholic prep. for making beverages. Ice-cream powder and pudding powder	SEK 20,014,000	Imposition of variable levy
UNITED KINGDOM	24.9.1953	GATT/TN.2 SECRET/16, SECRET/10	France	Fresh strawberries	n.a.	Establishment of seasonal quota
	26.3.1956	SECRET/61 + Add.1	United States	Pork, salted or pickled, other than bacon and ham	n.a.	Tariff readjustments
	9.5.1956	GATT/AIR/88 SECRET/64 and Add.1 SECRET/67/Add.1-5	Czechoslovakia, France, Germany, Sweden and United States	Bars and rods. Hot finished seamless tubes and pipes. Articles of silk or artificial silk. Trunks, bags, handbags and pochettes	£1,934,273	Incidental modification for legal and technical reasons
UNITED STATES	23.8.1954	GATT/AIR/50 (SECRET) SECRET/13, SECRET/46	Benelux	Footwear	US\$ 323,000	Nomenclature change
	26.10.1954 27.10.1954	L/237, SECRET/45	Canada	Fish, prepared or preserved, n.s.p.f.	n.a.	Classification of a new product
	12.4.1956	SECRET/63 + Add.1-2	United Kingdom	Fur felt hat bodies, etc.	n.a.	Originally Article XIX action. Court ruling on interpretation of description
	9.5.1956	SECRET/65 SECRET/66/Add.1-3	Cuba and Dominican Republic	Molasses and sugar syrups	n.a.	Equalization of tariff rates on liquid and dry sugar
	10.7.1958	L/837, GATT/AIR/132, GATT/AIR/133	Canada, Czechoslovakia, Japan	Bods, shoes or other footwear	US\$ 4,934,599	Nomenclature change to avoid circumvention
	12.10.1959	SECRET/108, SECRET/72	United Kingdom, Benelux	Woven fabrics	US\$ 53,940	Abolition of bound tariff quota because impracticable

Country	Decision of CPs	Documents	Negotiations with	Products modified or withdrawn	Trade involved (yearly average)	Reason for invocation
UNITED STATES	5.1.1961	SECRET/136 + Add.1-7 GATT/AIR/214 SECRET/129/ Add.1	Austria, Benelux, Germany, United Kingdom, Sweden, Denmark	Bicycles and spring clothespins	US\$ 16,506,366	Renegotiation of items after Article XIX action
	24.5.1962	Spec(64)123, Spec(65)1, Spec(66)5, L/2042, L/2053	See L/2592	For products, see documents quoted	n.a.	Nomenclature revision. Dried figs and toweling of flax, hemp or ramie: originally Article XIX actions.

E. RENEGOTIATIONS UNDER ARTICLE XXVIII:5

Country	Request notified	Documents	Negotiations with	Products modified or withdrawn	Trade involved (yearly average)	Remarks
AUSTRALIA	17.11.1967	SECRET/174 + Add.1-6	United States, EEC, India, Japan	Blankets, Knitted piece-goods, Lace, Valves, Hypsulphite, Cinema films, Photographic plates and films, paper	\$A 10,046,000	
	6.6.1968	SECRET/177	United States	Vehicles	\$A 2,963,000	
	15.8.1968	SECRET/178	EEC	Butchers' knives, Cooks' knives	\$A 222,500	
	17.9.1968	SECRET/179	Sweden	Spring rollers for blinds - wooden rollers	\$A 562,000	
	28.11.1969	SECRET/199 + Add.1-2	Czechoslovakia, EEC	Iron and steel products	\$A 17,019,000	
	19.12.1969	L/3299 SECRET/204 + Add.1	Japan	Shot and angular grit of iron or steel	\$A 411,000	
	30.1.1974	SECRET/218 + Add.1-3	United States, Japan	Photographic or cinematographic cameras, Tripods, Projectors	\$A 9,497,000	
	20.1.1982	SECRET/279/ Add.2-12	Norway, Sri Lanka, India, Sweden, South Africa, Chile, Czechoslovakia, Austria, Finland, Cuba, Pakistan	Whole Schedule	No statistics	
	8.2.1982	SECRET/285 + Add.1-2	...	Prepared/preserved meat (canned ham)	\$A 1,369,000	
	19.9.1983	SECRET/302	...	Refrigerators	\$A 1,954,000	
	3.10.1984	SECRET/309/Rev.1	...	Champagne, sparkling wine, still wine, vermouths	\$A 31,622,000	

Country	Request notified	Documents	Negotiations with	Products modified or withdrawn	Trade involved (yearly average)	Remarks
AUSTRALIA	3.3.1987	SECRET/324	---	Chemical products	\$A 60,972,000	
	24.9.1987	SECRET/326	---	Vegetables	\$A 29,011,000	
	8.9.1992	SECRET/337 + Add.1	---	Fruit juice and alcoholic beverage	\$A 73,944,000	Conversion of specific into ad valorem rates
AUSTRIA	9.1.1975	SECRET/226 + Add.1	EEC	Macaroni, spaghetti, etc.	S 22,638,000	
	1.12.1975	SECRET/229 + Corr.1	---	TV picture tubes	S 357,371,000	
	26.2.1976	SECRET/231 + Add.1	EEC, Switzerland	Cheese	S 71,816,000	
	20.1.1978	SECRET/243 + Add.1-4	United States, EEC, Switzerland	Food preparations and beverages	S 350,109,000	
	5.8.1982	SECRET/291 + Add.1-2	EEC	Preserved vegetables	S 72,658,700	
BRAZIL	23.12.1986	SECRET/323 + Corr.1	---	Agricultural products, gramophones, video apparatus	Million \$ 1,068,668	
	12.8.1977	SECRET/238 + Add.1-5	EEC, United States, Canada, Japan, Sweden	Fifteen items listed in SECRET/238	No statistics	
	19.4.1991	SECRET/334	---	Sodium hydrogencarbonate and salicylic acid	US\$ 53,051	
CANADA	23.6.1967	SECRET/172 + Add.1-4	Denmark, Greece, United States, Sweden, EEC	List of products in SECRET/172	No statistics	
	18.9.1968	SECRET/180 + Add.1	United States, EEC	Lithographic stones, Matrices and metal plates for printing (music) etc.	C\$ 60,540,500	
	12.4.1978	SECRET/244 + Add.1-4	United States, South Africa, Korea, EEC	Fruits and vegetables	C\$ 500,821,000	
	30.6.1980	SECRET/267 + Add.1-3	United States, EEC	Aluminum and alloys thereof; rovings and yarns; yarns and warps; grouped filaments	C\$ 163,339,000	
	28.7.1981	SECRET/276	---	Laboratory glassware	C\$ 15,976,000	
	24.4.1983	SECRET/298	---	Bulldozer parts; feed pellet mill parts; crawler lawders, crawler pipelayers	C\$ 76,621,000	
	28.10.1983	SECRET/305	---	Compressed yeast	C\$ 486,000	
	2.3.1984	SECRET/307	---	65 items listed in document SECRET/307; renegotiation in connection with entry into force of Agreement on Implementation of Article VII	C\$ 3,877,547,000 (1978)	
	1.8.1985	SECRET/316/ + Corr.1	---	Woven fabrics	C\$ 53,466,000	
CUBA	8.11.1958	SECRET/101 + Rev.1 + Add.1-2	United States	Item numbers listed in SECRET/101	No statistics	Tariff reform
DENMARK	11.1.1962	SECRET/149 + Add.1-7	Canada, United States, Australia, United Kingdom, South Africa, Uruguay	Mushrooms. Vegetables. Bananas. Fruits in general. Liver paste. Meat products. Pickles. Tomato juice. Fruit juice, etc.	Dkr 83,853,000	

Country	Request notified	Documents	Negotiations with	Products modified or withdrawn	Trade involved (yearly average)	Remarks
EEC	23.12.1974	SECRET/224 + Add.1-4	Australia, Canada	Unwrought lead and zinc	UA 185,376,000	
	1.10.1979	SECRET/259 + Add.1-7	Indonesia, Brazil, Thailand	Manioc, arrowroot, etc.	UA 471,770,000	
	16.1.1981	SECRET/270 + Add.1	Switzerland	Cheese and curd	UA 28,630,000	
	24.2.1983	SECRET/296 + Add.1	---	Sound reproducers with laser optical reading system	No statistics	
	12.4.1984	SECRET/310	---	Maize products	\$13,013,000	
	6.8.1984	SECRET/311	---	Cheddar cheese	No statistics	
	6.11.1984	SECRET/312 + Add.1-2	Canada	Newsprint	---	
	12.8.1985	SECRET/317 + Add.1	Japan	Image and sound recorders and reproducers	ECU 3,044,106,000	
	16.3.1987	SECRET/325 + Add.1	Thailand	Sweet potatoes	ECU 49,126,000	
	14.8.1990	SECRET/333	---	Sisal twine, cordage, rope and cables	ECU 12,310,000	
	26.10.1993	SECRET/343	---	Bananas ex 08030010	See documents	
	20.12.1994	SECRET/347	---	Heifers and cows	No statistics	
EGYPT	24.5.1994	SECRET/345	Australia, Canada, New Zealand, Norway, Sweden, Switzerland, United States	See documents. Renegotiation of certain concessions under waiver	See documents	Notification of conclusion of negotiations, relative to para. 7 of Marrakesh Protocol
FINLAND	7.6.1972	SECRET/206 + Add.1-2	Renegotiations not pursued. Request withdrawn in 1978	Sulphates, chemicals, sheets, plates, tubes, pipes, etc.	FIM 698,712,598	
	13.3.1980	SECRET/261 + Add.1-2	---	Pressed yeast	No statistics	
	11.6.1980	SECRET/266	---	Plants in pots	FIM 13,107	
	18.10.1985	SECRET/320 + Add.1	---	Seeds of lupin	No statistics	
	18.6.1986	SECRET/321	---	Vegetables in brine, manioc, dog/cat food	FIM 712,000 (excl. manioc)	
HUNGARY	11.6.1991	SECRET/335 + Add.1	---	Lysin, mixtures of isocyanates and colour TV sets	FF 3,713,816,000	
INDIA	4.6.1969	SECRET/188 + Add.1-2	EEC, United States	Chemicals. Wool. Paper. Machines. Zinc. Machinery. Lead. Tractors.	Rs 419,414,500	
	22.7.1976	SECRET/232 + Add.1-2	---	See documents	Rs 485,298,000	
INDIA	13.10.1993*	SECRET/342	Australia, Canada, EC, Finland, Japan, Norway, Sweden, United States	Items listed in documents SECRET/188, SECRET/227, SECRET/232	See documents	Report on results of negotiations related to notifications cited: *date provided is date of report

Country	Request notified	Documents	Negotiations with	Products modified or withdrawn	Trade involved (yearly average)	Remarks
JAPAN	4.11.1974	SECRET/223 + Add.1-2	EEC	Ski-boots	Y(million) 1,845	
	25.9.1985	SECRET/319 + Add.1-3	EEC, United States	Leather and leather footwear	Y(million) 23,885	
	1.12.1988	SECRET/328 + Add.1-2	United States	Food preparations containing sugar	No trade	One of products covered by Panel Report at 35S/163
MEXICO	11.4.1990	SECRET/330	---	Newsprint	US\$ 16,978,000	
NEW ZEALAND	28.9.1970	L/3306, SECRET/202	---	Electro-medical apparatus	\$(c.d.v.) 338,934	
	23.7.1971	SECRET/203	---	Capacity measure	\$(c.d.v.) 28,594	
	4.4.1972	SECRET/205	---	Mounted piezo-electric crystals	\$(c.d.v.) 30,729	
	13.12.1972	SECRET/211	---	Hydrometers, other measuring instruments	\$(c.d.v.) 2,149,793	
	23.1.1973	SECRET/212	---	Solder	\$NZ 2,459	
	12.3.1973	SECRET/213	---	Marine engines	\$NZ 406,251	
	30.7.1973	SECRET/215	---	Photographic plates	\$NZ 3,707,620	
	12.9.1973	SECRET/216 + Add.1	South Africa	Fruits, etc.	\$NZ 398,901	
	30.10.1973	SECRET/217	---	Electrical goods	\$NZ 3,255,192	
	22.5.1974	SECRET/220	---	Artificial resins and plastic materials	\$NZ 15,602,795	
	31.7.1974	SECRET/221	---	Blades for hand and machine saws	\$NZ 10,766,000	
	23.12.1974	SECRET/225	---	Engines and motors	\$NZ 5,595	
	15.4.1975	SECRET/228	---	Moulds, Moulding boxes, Certain dies, Other tools	\$NZ 1,134,334	
	19.1.1976	SECRET/230	EEC, United States	Results of renegotiation of items mentioned above	n.a.	
	18.6.1981	SECRET/275	---	Unmanufactured tobacco	\$NZ (c.i.f.) 12,790,986	
	15.7.1982	SECRET/289	---	Plastics	\$NZ 267,699	
NEW ZEALAND	15.7.1982	SECRET/290	---	Fountain pens	\$NZ 690,589	
	18.12.1984	SECRET/313	---	Base metal fittings and parts of motor vehicles	No statistics	
	20.3.1990	SECRET/329/Rev.1	---	Products of iron or non-alloy steel	\$NZ 14,960,136	
NORWAY	25.2.1983	SECRET/297	---	Chapters 51 to 62 (Textile products)	Statistics supplied	Simplification of national customs tariff
SOUTH AFRICA	11.4.1974	SECRET/219 + Add.1	New Zealand	Meat, Offals, Poultry, Cheese, Hop cones and lupulin	R 1,218,000	
	21.10.1974	SECRET/222 + Add.1-2	United States	Refrigerators	R 279,040	

Country	Request notified	Documents	Negotiations with	Products modified or withdrawn	Trade involved (yearly average)	Remarks
	8.5.1970	L/3297 SECRET/200 + Add.1-15	Finland, Sweden, Austria, Sri Lanka, Norway, Spain, Switzerland, United Kingdom, Greece, United States	see SECRET/200	R 429,545,609	
	3.8.1976	SECRET/233 + Add. 1-4	EEC, Sweden, Finland, Norway, United States	Cellulose film. Ball bearings. Medical instruments (including cannulae)	R 13,018,364	
	25.11.1976	SECRET/234	---	Floor glass. Polished plate glass	R 7,379,829	
	9.2.1977	SECRET/235	---	Piping and tubing	R 17,090	
	7.3.1977	SECRET/236	---	Scrapers	R 5,557,769	
	23.7.1977	SECRET/239	Greece	Epoxide resins	R 1,749,795	
	26.8.1977	SECRET/240	---	Radiographic plates and films	R 4,235,963	
	23.12.1977	SECRET/241	---	Iron or steel wire	R 1,165,408	
	12.9.1978	SECRET/248	---	Photographic plates. Films in rolls	R 2,102,994	
	12.10.1978	SECRET/252	---	Lithographic plates	R 1,314,047	
	13.2.1979	SECRET/253 + Add.1-2	Chile	Chemical products. Woven fabrics. Bungs. Medical plastic material	R 1,953,701	
	11.5.1979	SECRET/254 + Add.1	Australia	Tennis racquets and frames	R 188,960	
	16.8.1979	SECRET/258 + Add.1	Sri Lanka	Synthetic rubber latex	R 14,278,373	
	15.2.1980	SECRET/260 + Add.1	Sweden	Cranes	R 3,288,137	
	17.3.1980	SECRET/262 + Add.1	United States	Products mentioned above	---	
	3.4.1980	SECRET/264 + Add.1	Uruguay	Worsted fabrics	R 2,398,402	
SOUTH AFRICA	22.7.1980	SECRET/268	---	Tractors	R 62,662,547	
	16.1.1981	SECRET/271 + Add.1	United States	Acetic acid, reeds for looms	R 867,373	
	22.4.1981	SECRET/272	---	Acetic acid	No imports	
	17.8.1981	SECRET/277	---	Furfuryl alcohol, moulding powders, welding wire, lifting jacks	R 1,503,708	
	3.11.1981	SECRET/280 + Add.1	EEC	Products mentioned above	---	
	16.12.1981	SECRET/283	---	Gabions of wire netting	R 362,126	
	3.2.1982	SECRET/284	---	Woven fabrics	R 174,540	
	6.4.1982	SECRET/287	---	Transformers	R 5,542,502	
	28.6.1982	SECRET/288	---	Laboratory tubes	R 394,908	

Country	Request notified	Documents	Negotiations with	Products modified or withdrawn	Trade involved (yearly average)	Remarks
	31.8.1982	SECRET/292	---	Polyethylene articles	R 3,513,995	
	2.9.1982	SECRET/293	---	Cricket balls	R 151,373	
	17.11.1982	SECRET/295	---	Tall oil fatty acids	R 535,412	
	5.7.1983	SECRET/301	---	Laboratory material	R 218,412	
	23.9.1983	SECRET/303	---	Sparkling plugs (Part II)	R 402,252	
	24.9.1984	SECRET/306/Rev.1	---	Wire of high carbon steel	R 166,909	
	22.7.1985	SECRET/315	United States	Items listed in document SECRET/315	No statistics	Results of negotiations related to notifications in SECRET/277, 288, 292, 293, 295, 301
	22.8.1985	SECRET/318	EEC	Items listed in document SECRET/318	No statistics	Results of negotiations related to notifications in SECRET/254, 258, 260, 264, 268, 271, 272, 277, 283, 284, 287, 288, 292, 293
SPAIN	3.4.1984	SECRET/308+ Add. 1-2	Canada, Sweden	Pentaerythritol	Million Pesetas 303.8	
SWEDEN	19.7.1979	SECRET/257 + Add.1	EEC	Horticultural products	SEK 68,838,000	
	12.5.1980	SECRET/265 + Add.1-4	Poland, United States, Austria, EEC	Fruit and vegetable preparations	SEK 213,218,000	
SWEDEN	27.8.1981	SECRET/278	---	Fish preparations	SEK 289,378,000	
	9.6.1983	SECRET/299	---	Outer garments	SEK 2,719,028,000	
	19.6.1986	SECRET/322	---	Tomatoes (1 July-30 Sept.)	SEK 37,727,000	
	13.7.1988	SECRET/327 + Add.1-2	EEC, United States	Fresh apples and pears	SEK 48,150,000	
	15.6.1990	SECRET/331 + Add.1	Poland	Products of the milling industry	SEK 17,378,000	
SWITZERLAND	3.4.1980	SECRET/263 + Add.1-4	EEC, United States, Austria, Sweden	Food preparations. Chemical products	Sw F 139,994,000	
	5.8.1980	SECRET/269 + Add.1	EEC	Cheese	Sw F 16,880,000	
UNITED KINGDOM	18.9.1961	SECRET/148 + Add.1-2 GATT/AIR/253	Benelux and France	Strawberries, preserved	£590,264	
	9.12.1961	L/1674, L/1734	Brazil	Bananas	£21,389,974	
UNITED STATES	19.6.1979	SECRET/255	---	Carrots. Rapeseed oils	\$7,051,000	
	3.7.1979	SECRET/256	South Africa, Canada, Sweden	Polypropylene.	\$1,536,000	

Country	Request notified	Documents	Negotiations with	Products modified or withdrawn	Trade involved (yearly average)	Remarks
				Unalloyed, unwrought zinc	\$409,160	
	22.4.1981	SECRET/273	---	Ethyl alcohol	(av. 1977-79) \$19,618,000 (1980) \$71,423,000	
	22.4.1981	SECRET/274	---	Wire of iron or steel	\$18,891,000	
	11.6.1985	SECRET/314 + Add.1-2	Canada	Orange juice	See doc. SECRET/314	SECRET/314/Add.2: Invocation of Article XXVIII:3 by Canada (mushrooms)
	3.5.1994	SECRET/344 + Add.1	Canada, EC, Sweden notified interest	Durum wheat and barley	See document SECRET/344	
	14.7.1994	SECRET/346, G/SECRET/2		Tobacco	See document SECRET/346	

ARTICLE XXVIII *bis*

TARIFF NEGOTIATIONS

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I. TEXT OF ARTICLE XXVIII *bis* AND OF INTERPRETATIVE NOTE AD ARTICLE XXVIII *bis*

Article XXVIII *bis*

Tariff Negotiations

1. The contracting parties recognize that customs duties often constitute serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs and other charges on imports and exports and in particular to the reduction of such high tariffs as discourage the importation even of minimum quantities, and conducted with due regard to the objectives of this Agreement and the varying needs of individual contracting parties, are of great importance to the expansion of international trade. The CONTRACTING PARTIES may therefore sponsor such negotiations from time to time.

2. (a) Negotiations under this Article may be carried out on a selective product-by-product basis or by the application of such multilateral procedures as may be accepted by the contracting parties concerned. Such negotiations may be directed towards the reduction of duties, the binding of duties at then existing levels or undertakings that individual duties or the average duties on specified categories of products shall not exceed specified levels. The binding against increase of low duties or of duty-free treatment shall, in principle, be recognized as a concession equivalent in value to the reduction of high duties.

(b) The contracting parties recognize that in general the success of multilateral negotiations would depend on the participation of all contracting parties which conduct a substantial proportion of their external trade with one another.

3. Negotiations shall be conducted on a basis which affords adequate opportunity to take into account:

(a) the needs of individual contracting parties and individual industries;

(b) the needs of less-developed countries for a more flexible use of tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes; and

- (c) all other relevant circumstances, including the fiscal*, developmental, strategic and other needs of the contracting parties concerned.

Interpretative Note *Ad* Article XXVIII *bis* from Annex I

Paragraph 3

It is understood that the reference to fiscal needs would include the revenue aspect of duties and particularly duties imposed primarily for revenue purposes, or duties imposed on products which can be substituted for products subject to revenue duties to prevent the avoidance of such duties.

II. INTERPRETATION AND APPLICATION OF ARTICLE XXVIII BIS

B. GENERAL

Since 1947, seven “rounds” of multilateral tariff and trade negotiations have been completed within GATT: in 1947 (in Geneva), 1949 (Annecy, France), 1951 (Torquay, England), 1956 (Geneva), 1960-1961 (Geneva, the “Dillon Round”), 1964-1967 (Geneva, the “Kennedy Round”), and 1973-1979 (Geneva, the “Tokyo Round”). The eighth round of multilateral negotiations, the Uruguay Round, was launched in Punta del Este, Uruguay in September 1986 and was concluded with the Final Act signed at Marrakesh, Morocco on 15 April 1994.

Article XXVIII *bis* was added to the General Agreement as a result of agreements reached during the Review Session of 1954-55 in the Review Working Party on “Schedules and Customs Administration”. The Report of that Working Party notes that “The article would impose no new obligations on contracting parties. Each contracting party would retain the right to decide whether or not to engage in negotiations or to participate in a tariff conference”.¹ A 1985 Note by the Secretariat on “The Launching of Trade Negotiations” states:

“The General Agreement does not lay down any special procedures for the launching of negotiations nor any rules for their organization. Under Article XXV:1 the CONTRACTING PARTIES have the general power to take joint action ‘with a view ... to furthering the objectives of the (General) Agreement’, and under Article XXVIII *bis*:1 they are authorized to sponsor tariff negotiations’.”²

B. SCOPE AND APPLICATION OF ARTICLE XXVIII BIS

1. Paragraph 1: “negotiations on a reciprocal and mutually advantageous basis”

(1) *Measurement of value of concessions*

The Report of the Review Session Working Party on “Schedules and Customs Administration” records that in response to a proposal of Brazil, which wished to establish certain rules for tariff negotiations and, in particular, for the measurement of concessions:

“... The Working Party considered that governments participating in negotiations should retain complete freedom to adopt any method they might feel most appropriate for estimating the value of duty reductions and bindings. ... The Working Party noted that there was nothing in the Agreement, or in the rules for tariff negotiations which had been used in the past, to prevent governments from adopting any formula they might choose, and therefore considered that there was no need for the CONTRACTING PARTIES to make any recommendation in this matter”.³

¹L/329, adopted on 26 February 1955, 3S/205, 219, para. 36.

²Spec(85)46 p. 1.

³L/329, adopted on 26 February 1955, 3S/205, 219-220, para. 38.

The 1959 Second Report on “Tariff Reduction” of Committee I, which drew up the rules and procedures for the 1960-61 Dillon Round, notes that

“The Committee examined the proposal that the CONTRACTING PARTIES lay down rules for the evaluation of concessions based on the relative importance of a commodity in the exporting country, rather than its relative importance to the trade of the importing country. This proposal could not be accepted in view of the traditional attitude of the CONTRACTING PARTIES, reaffirmed at the review session (BISD, Third Supplement, page 219, paragraph 38) that governments participating in negotiations should retain complete freedom to adopt any method they might feel most appropriate for estimating the value of duty reductions and bindings”.⁴

(2) *Reciprocity as regards developing countries*

A Note by the Executive Secretary on “Participation of Less-Developed Countries in Trade Negotiations”, annexed to the March 1961 Report of Committee III, recalls statements in the Reports of Committee I that

“The principle underlying GATT tariff negotiations is the exchange of reciprocal and mutually advantageous concessions. This does not mean, however, that less-developed countries would always be held to strict reciprocity ... Less-developed countries should also bear in mind that concessions which they grant under the GATT are firm only for short periods, generally for three years, and that Article XXVIII gives them the right, at the end of those periods, to modify or withdraw concessions which might conflict with their development plans. Furthermore, the provisions of Article XVIII give them the possibility of re-negotiating concessions at any time, when such action is necessary for development purposes, and a special procedure has been provided to expedite such re-negotiations”.⁵

In the Conclusions of the Meeting of Ministers adopted on 30 November 1961

“the Ministers agreed that, in view of the stage of economic development of the less-developed countries, a more flexible attitude should be taken with respect to the degree of reciprocity to be expected from these countries”.⁶

The Ministerial Resolution of 21 May 1963, which inaugurated the Kennedy Round, provided

“That in the trade negotiations every effort shall be made to reduce barriers to exports of the less developed countries but that the developed countries cannot expect to receive reciprocity from the less developed countries”.⁷

See also Article XXXVI:8 and the Interpretative Note relating to that paragraph, which became effective on 27 June 1966.

The Declaration of Ministers, approved at Tokyo on 14 September 1973, inaugurating the Tokyo Round provides, *inter alia*:

“The developed countries do not expect reciprocity for commitments made by them in the negotiations to reduce or remove tariff and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of the trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. The Ministers recognize the need for special measures to be taken in the negotiations to assist the developing countries in their efforts to increase their export earnings and promote their economic development and, where appropriate, for priority attention to be given to products or areas of interest to developing countries. They also recognize the importance of maintaining and improving the Generalized System of Preferences. They further recognize the importance of the application of differential measures to developing countries in

⁴COM.I/3, adopted on 19 November 1959, 8S/103, 110, para. 10.

⁵L/1435, 10S/167, Annex A, 10S/172, paras. 3-4.

⁶10S/25, 26.

⁷12S/36, 48, para. 8.

ways which will provide special and more favourable treatment for them in areas of the negotiations where this is feasible and appropriate.

“The Ministers recognize that the particular situations and problems of the least developed among the developing countries shall be given special attention, and stress the need to ensure that these countries receive special treatment in the context of any general or specific measures taken in favour of the developing countries during the negotiations”.⁸

The Decision on “Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries” which was negotiated in the Tokyo Round and adopted on 28 November 1979 provides, *inter alia*:

“The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter’s development, financial and trade needs... Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems”.⁹

The Ministerial Declaration on the Uruguay Round, agreed at Punta del Este on 20 September 1986, launching the Uruguay Round, provides, *inter alia*:

“The CONTRACTING PARTIES agree that the principle of differential and more favourable treatment embodied in Part IV and other relevant provisions of the General Agreement and in the decision of the CONTRACTING PARTIES of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries applies to the negotiations. In the implementation of standstill and rollback, particular care should be given to avoiding disruptive effects on the trade of less-developed contracting parties.

“The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e. the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their industrial development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter’s development, financial and trade needs.

“Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

“Special attention shall be given to the particular situation and problems of the least-developed countries and to the need to encourage positive measures to facilitate expansion of their trading opportunities. Expeditious implementation of the relevant provisions of the 1982 Ministerial Declaration concerning the least-developed countries shall also be given appropriate attention”.¹⁰

⁸20S/19, 21, paras. 5, 6.

⁹L/4903, 26S/203, 204, paras. 5, 6.

¹⁰33S/21 paras. (iv)-(vii).

(3) *Negotiations on matters other than tariffs*

The procedures for the tariff negotiations held in Geneva in 1947 in connection with the negotiation of the General Agreement provided that “The various observations in this report regarding the negotiations of tariffs and tariff preferences should be read as applying (*mutatis mutandis*) to the negotiation of state-trading margins under Article 31 of the Charter”.¹¹ The procedures adopted for the negotiations in Annecy and Torquay each stated that:

“The Havana Charter provides that, in addition to customs tariffs and other charges on imports and exports, certain regulations, quotas, protection afforded through the operation of import and export monopolies, etc., shall be subject to negotiation in the manner provided in Article 17. The relevant provisions are provided in Articles 16 (including the Annexes thereto), 18, 19 and 31 [corresponding to GATT Articles I, III, IV, XVII and Annexes A through G]. Accordingly, requests may be submitted for concessions in respect of matters covered by these provisions in the same way as requests for tariff concessions”.¹²

The Rules and Procedures for the Geneva tariff conference of 1956 provided that “In addition to customs tariffs and other charges on imports, certain regulations, protection afforded through the operation of import monopolies, etc., as provided in Articles [I, II, III and IV] shall be subject to negotiation in accordance with these rules. Accordingly, requests may be submitted for concessions in respect of these matters in the same way as requests for tariff concessions”.¹³

The Rules and Procedures for the Dillon Round provided that participants could enter into negotiations in accordance with these rules in respect of not just tariffs but also the following matters: the protection afforded through the operation of import monopolies, as provided in Articles II and XVII (including the interpretative notes thereto); internal quantitative regulations as provided in paragraph 6 of Article III (mixing regulations); the level of screen quotas as provided in Article IV; import restrictions as provided in paragraph 2(c) of Article XI; the level of a subsidy which operates directly or indirectly to reduce imports; and internal taxes.¹⁴

The Ministerial Resolution of 21 May 1963 on “Arrangements for the Reduction or Elimination of Tariffs and other Barriers to Trade, and Related Matters” which launched the Kennedy Round included a provision that “the trade negotiations will deal not only with tariffs but also with non-tariff barriers.”¹⁵ During the Kennedy Round agreement was reached *inter alia* on the 1967 Agreement on Implementation of Article VI, and the Agreement Relating Principally to Chemicals.¹⁶

The Tokyo Ministerial Declaration of 14 September 1973, which launched the Tokyo Round, provided that “the negotiations should aim, *inter alia*, to: ...reduce or eliminate non-tariff measures or, where this is not appropriate, to reduce or eliminate their trade restricting or distorting effects, and to bring such measures under more effective discipline”.¹⁷ During the Tokyo Round, discussions took place both on rules regarding non-tariff barriers and on “non-tariff measures not dealt with multilaterally”. The former negotiations resulted in nine agreements: the 1979 Agreement on Implementation of Article VI, the Agreement on Interpretation and Application of Articles VI, XVI and XXIII, the Agreement on Implementation of Article VII, the Agreement on Import Licensing Procedures, the Agreement on Technical Barriers to Trade, the Agreement on Government Procurement, the Agreement on Trade in Civil Aircraft, the Arrangement Regarding Bovine Meat, and the International Dairy Arrangement.¹⁸ In the “Action by the CONTRACTING PARTIES on the Multilateral Trade Negotiations” of 28 November 1979, the CONTRACTING PARTIES note “that as a result of the Multilateral Trade

¹¹London Report p. 49, para. C.4.

¹²GATT/CP.2/26, p. 2; I/104.

¹³Report adopted 18 November 1955, 4S/74, 80, para. 4.

¹⁴L/1043+Add/1, Corr.1, adopted 19 November 1959, 8S/103, 116, para. II.(b)(ii). It was further agreed that “the inclusion of internal taxes in the negotiating rules would be subject to the understanding in the Interpretative Note to Article 17 of the Havana Charter” (*ibid.*, 8S/111, para. 16(v)). The Interpretative Note to Charter Article 17 provided that “An internal tax (other than a general tax uniformly applicable to a considerable number of products) which is applied to a product not produced domestically in substantial quantities shall be treated as a customs duty under Article 17 in any case in which a tariff concession on the product would not be of substantial value unless accompanied by a binding or a reduction of the tax”.

¹⁵12S/47.

¹⁶Texts appear in 15S/8-18, 24-35. The Agreement Relating Principally to Chemicals included provisions on valuation procedures, automobile road taxes, quantitative restrictions and reductions of preference margins in revenue duties; however, it never entered into force.

¹⁷MIN(73)1, 20S/19, 20, para. 3.

¹⁸Texts of these Agreements appear in the Twenty-sixth Supplement of the BISD and have also been published by the Secretariat.

Negotiations, a number of Agreements... have been drawn up. They further note that these Agreements will go into effect as between their parties... The CONTRACTING PARTIES also note that existing rights and benefits under the General Agreement of contracting parties not being parties to these Agreements, including those derived from Article I, are not affected by these Agreements".¹⁹

The Uruguay Round Declaration of 1986 provided that "Negotiations shall aim to reduce or eliminate non-tariff measures, including quantitative restrictions..." and that "Negotiations shall aim to improve, clarify, or expand, as appropriate, Agreements or Arrangements negotiated in the Tokyo Round of Multilateral Negotiations".²⁰ The negotiations resulted in conclusion of twelve agreements: the Agreement on Agriculture, the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Textiles and Clothing, the 1994 Agreement on Technical Barriers to Trade, the 1994 Agreement on Implementation of Article VI, the 1994 Agreement on Implementation of Article VII, the Agreement on Preshipment Inspection, the Agreement on Rules of Origin, the Agreement on Import Licensing Procedures, the Agreement on Subsidies and Countervailing Measures, and the Agreement on Safeguards. In addition, the Schedules of concessions on market access for goods include a new Part III for any concessions regarding non-tariff measures, as well as a new Part IV for commitments limiting domestic support and export subsidies on agricultural products covered by the Agreement on Agriculture.

2. Paragraph 2

(1) *"negotiations ... on a selective product-by-product basis"*

Express provisions for "selective product-by-product" negotiations on a request/offer basis were included in Article 17 of the Havana Charter, the procedures for the 1947 Geneva tariff negotiations, the negotiations in 1949 in Annecy, in 1951 at Torquay, and in 1956 in Geneva, and the 1960-1961 "Dillon Round".²¹ For example, the request-offer process in the Dillon Round of 1960-1961 proceeded as follows: in the first stage delegations presented request lists to the countries with which they wished to negotiate, and in the second stage delegations submitted consolidated offer lists. In the next stage countries gradually defined their positions in a series of bilateral meetings and finally struck a bilateral balance with each of their negotiating partners. In addition, participants negotiated for reciprocity from other countries which would benefit from the concessions which had been negotiated bilaterally, as the rules provided that "participating governments will be expected to take into account the indirect benefits which they will receive from the negotiations between other governments".²²

(2) *"or by the application of such multilateral procedures as may be accepted by the contracting parties concerned": Procedures adopted for negotiating rounds in the GATT*

The Report of the Review Session Working Party on "Schedules and Customs Administration", which drafted Article XXVIII *bis*, notes that

"Several delegations proposed to include in the new article certain rules for negotiations such as those in Article 17 of the Havana Charter, but others thought it was not necessary to burden the article with a set of rules since it is not its purpose either to prescribe or to exclude any of the rules that have been followed in the past; the article imposes no obligations, and therefore should contain nothing that is mandatory. Further, since the article clearly envisages the possibility of tariff negotiations in which some contracting parties might not be able to participate, it would be unwise to prejudge the form which these negotiations should take by prescribing procedures and rules. The procedures for holding any particular trade negotiations will have to be determined at the time the holding of the negotiations is under consideration and contracting parties will then have ample opportunity to advocate the procedures under which they would be prepared to negotiate. A contracting party that is not satisfied with the procedures adopted, would be free not to participate in the negotiations".²³

¹⁹L/4905, 26S/201, paras. 2-3.

²⁰Declaration of 20 September 1986, Min.Dec., 33S/19, 23, 25.

²¹See, respectively, Havana Charter Article 17:2; London Report 1946, p. 49; I/104; 4S/81; and 8S/118.

²²MTN/W/8, Note on "Rules and Procedures for the Dillon and Kennedy Rounds", p. 3-5, citing Dillon Round rules at 8S/118, para. VII(e).

²³L/329, adopted 26 February 1955, 3S/205, 219, para. 37.

Procedures for rounds of negotiations in the GATT have been determined in each instance. The table following lists these procedures; see also Secretariat background notes on negotiating procedures in the Dillon, Kennedy and Tokyo Rounds.²⁴

Procedures for Negotiations in the GATT	
Procedures adopted for the 1947 Geneva Tariff Conference	London Report, p. 47-49
Procedures adopted for the 1949 Annecy Tariff Conference	GATT/CP.2/26
Procedures adopted for the 1951 Torquay Tariff Conference	I/104
Procedures governing negotiations for accession	I/110
Procedures for negotiations between two or more contracting parties	I/166
Arrangements for tariff negotiations at times other than during general tariff conferences	II/166
Rules and procedures for the 1956 Geneva Tariff Conference	4S/79
Rules and procedures for the 1960-1961 Geneva Tariff Conference ("Dillon Round")	8S/114
Arrangements for the reduction or elimination of tariffs and other barriers to trade, and measures for access to markets for agricultural and other primary products (1964-1967 "Kennedy Round")	12S/47
Resolution, adopted on 6 May 1964, by the Meeting of the Trade Negotiations committee at Ministerial Level	13S/109
Declaration of Ministers, approved at Tokyo on 14 September 1973, setting out rules and procedures for the 1973-1979 Tokyo Round of Multilateral Trade Negotiations ("Tokyo Declaration")	20S/19
Ministerial Declaration on the Uruguay Round, adopted at Punta del Este on 20 September 1986, launching the 1986-1994 Uruguay Round of Multilateral Trade Negotiations	33S/19
Decisions of 28 January 1987 on negotiating structure and negotiating plans for the Uruguay Round	33S/31

(3) *"The binding against increase of low duties or of duty-free treatment shall, in principle, be recognized as a concession equivalent in value to the reduction of high duties"*

This sentence is taken from paragraph 2(d) of Article 17 of the Havana Charter. Similar statements appear in the procedures for the Geneva (1947), Annecy (1949) and Torquay (1950) trade negotiations.²⁵ The Report of the Review Session Working Party on "Schedules and Customs Administration," which drafted Article XXVIII *bis*, notes that

"The delegations of certain low-tariff countries were anxious to provide in the Agreement for certain principles to govern the tariff policy of the contracting parties in order to arrive at a better balance between the positions of the various contracting parties in this respect. While there was considerable sympathy ... it was considered inappropriate to expect contracting parties to accept any general form of commitment which would prejudice their freedom of action with respect to unbound tariffs. It was recognized, however, that in pursuit of its policies affecting international economic relations, including its tariff policy, each contracting party would have regard to the objectives of the Agreement and try to avoid unnecessary damage to the interests of other contracting parties".²⁶

²⁴Notes done for the Tokyo Round on "Rules and Procedures for the Dillon and Kennedy Rounds," MTN/W/8; "Use of Computer Facilities in the Multilateral Trade Negotiations," MTN/W/12; and "Accreditation of Delegations to the Multilateral Trade Negotiations," MTN/W/26; Notes done for the Uruguay Round on "Tariff Negotiations in the Kennedy and Tokyo Rounds," MTN.GNG/NG1/W/1; and "Data Base and Relevant Work Undertaken on Negotiating Techniques," MTN.GNG/NG2/W/1.

²⁵London Report, p. 49; GATT/CP.2/26, p. 3; I/104, 105, para. 3(d).

²⁶L/329, adopted 26 February 1955, 3S/205, 218-219, para. 35. The Review Session agreed to amend the General Agreement so as to include a new Article I on "Objectives", which would contain the text of the former Preamble; see Sec/152/54, W.9/197, 3S/240 para. 25 and the chapter in this book on the Preamble.

The Rules and Procedures for the 1956 tariff conference held in Geneva note with respect to “the binding against increase of low duties” that “This rule takes account, *inter alia*, of the position of countries which, whilst maintaining low or moderate duties on all or most of the products imported from their principal suppliers, find their exports or potential exports generally impeded by high rates of duty”.²⁷

(4) *Tariff negotiating rules, the “principal supplier rule”, and the use of formulas*

Rounds of tariff negotiations before the Kennedy Round provided for the use of the “principal supplier rule”, which typically stated that “Participating countries may request concessions on products of which they individually, or collectively, are the principal suppliers to the countries from which the concessions are asked. This rule shall not apply to prevent a country not a principal supplier from making a request, but the country concerned may invoke the principal supplier rule if the principal supplier of the product is not participating in the negotiations or is not a contracting party to the General Agreement”.²⁸

However, the use of general tariff-cutting formulas was debated since the earliest years of the GATT, as a means of reducing disparities in tariffs.²⁹ The first linear tariff offer was by the EEC in the Dillon Round.³⁰ In the Ministerial Conclusions adopted on 30 November 1961 during the Dillon Round, at the Nineteenth Session,

“The Ministers agreed that the reduction of tariff barriers on a most-favoured-nation basis in accordance with the terms of the General Agreement should be continued. They recognized, however, that while the traditional GATT techniques for tariff negotiations on a commodity-by-commodity and country-by-country basis had produced substantial results, both in the past and during the present tariff conference, they were no longer adequate to meet the changing conditions of world trade. Consideration should, therefore, be given to the adoption of new techniques, in particular some form of linear tariff reduction. The Ministers agreed to request the CONTRACTING PARTIES to establish machinery to examine this question in the light of the views and proposals put forward during the Ministers’ discussions”.³¹

The 1963 Report of the subsequently established Working Party on Procedures for Tariff Reductions recorded agreement on some basic principles.³² In the Resolution of 21 May 1963 on “Arrangements for the Reduction or Elimination of Tariffs and other Barriers to Trade, and Related Matters,” which launched the Kennedy Round, the Ministers agreed, *inter alia* on the principle

“That, in view of the limited results obtained in recent years from item-by-item negotiations, the tariff negotiations ... shall be based upon a plan of substantial linear tariff reductions with a bare minimum of exceptions which shall be subject to confrontation and justification. The linear reductions shall be equal. In those cases where there are significant disparities in tariff levels, the tariff reductions will be based upon special rules of general and automatic application”.³³

A Resolution of 6 May 1964 adopted by the Trade Negotiations Committee meeting at Ministerial Level noted that “The rate of 50 per cent has been agreed as a working hypothesis for the determination of the general rate of linear reduction ... The ultimate agreement on tariff reductions in accordance with the application of this

²⁷Report adopted 18 November 1955, 4S/74, 81, para. 11(c). The same statement appears in the Dillon Round procedures at 8S/118.

²⁸See Dillon Round rules at 8S/114, 115-116, para. II(b)(i); identical statement in Rules for the Geneva tariff conference of 1956 at 4S/79, 80, para. II.3. See also statement of “principal supplier rule” in the Procedures for the round of trade negotiations held in Geneva in 1948, in Annexure 10 of the London Report (p. 49), and paragraph 1 of the Procedures adopted for the Torquay Tariff Conference, I/104.

²⁹See, e.g., proceedings of the First Special Session of the CONTRACTING PARTIES (convened at Torquay in order to discuss proposals for reduction of disparities in European tariffs); Report of the Working Party on “The Disparity of European Tariffs,” GATT/CP.6/53, adopted 27 October 1951, II/211 (concerning discussions following on the First Special Session); Report of the Working Party on “Technical Aspects and Application of the French Proposal for the Reduction of Tariff Levels,” G/31, adopted 8 November 1952, 1S/67 (examination of proposal for automatic lowering of trade-weighted average tariff level for each sector over a three-year period, by thirty per cent compared to a reference period); Report of the Working Party on “Technical Study of the French Proposal for Reduction of Tariff Levels,” G/53, adopted 13 October 1953, 2S/67; *A New Proposal for the Reduction of Tariff Levels*, pamphlet dated January 1954, Sales No. GATT/1954-1; Note dated 22 November 1954 on “Proposals for Tariff Reduction” summarizing proposals made for the Review Session and discussions of tariff reduction plans (W.9/26); Report of the Working Party on “Plans for Tariff Reduction,” G/89, adopted 2 March 1955.

³⁰In the Dillon Round the EEC tabled an offer of a 20 per cent linear tariff reduction with some exceptions. MTN/W/8, p. 5.

³¹10S/25, 26.

³²L/2002.

³³12S/47, para. 4

hypothesis is linked with the solution of other problems arising in the negotiations, for example, tariff disparities, agricultural problems, exceptions and non-tariff problems, and, in general, with the achievement of reciprocity...".³⁴ It was necessary to specify the rates to which this hypothesis would apply and it was therefore agreed that participants would notify the base date, the base level of duties and (since the linear cut only applied to industrial products) which products would be excluded. A number of exceptions to the rule were made.³⁵

The Tokyo Ministerial Declaration of 14 September 1973, which launched the Tokyo Round negotiations, stated that "negotiations should aim, *inter alia*, to ... conduct negotiations on tariffs by employment of appropriate formulae of as general application as possible...".³⁶ In advance of the Round, the Committee on Trade in Industrial Products discussed tariff elimination in industrial products, linear tariff reduction, and tariff harmonization.³⁷ A tariff harmonization formula was later accepted and used by most developed countries in their offers.³⁸

The Ministerial Declaration on the Uruguay Round of 20 September 1986 does not refer to the use of formulas, and instead provides that "Negotiations shall aim, by appropriate methods, to reduce or, as appropriate, eliminate tariffs including the reduction or elimination of high tariffs and tariff escalation. Emphasis shall be given to the expansion of the scope of tariff concessions among all participants".³⁹

See also under Article XXVIII concerning initial negotiating rights and the decisions on floating initial negotiating rights taken in connection with tariff reductions achieved through the formula approach.

(5) Joint negotiations by more than one contracting party

The Second Report of Committee I concerning preparations for the Dillon Round notes as follows: "With respect to the proposal that contracting parties be allowed to negotiate jointly on products of common concern the Committee agreed that the traditional rule in this matter, which has been maintained in the rules annexed hereto... was designed to permit this type of negotiation. ... Moreover there were examples of joint negotiation in the history of GATT tariff conferences".⁴⁰

A Note by the Executive Secretary on "Participation of Less-Developed Countries in Trade Negotiations" annexed to the March 1961 Report of Committee III recalls the statements in the Reports of Committee I that

"there are a number of ways in which less-developed countries may participate in tariff negotiations with a view to securing meaningful concessions. For example, a country which is not a meaningful supplier of a commodity would not be excluded from making a request for concessions on that commodity on the grounds that it is not the principal supplier. In such cases it would join forces with other suppliers and take part in multilateral negotiations with the importing country and this group could be considered as the 'principal supplier' and obtain a concession which could be matched by a joint offer on the part of the group. It should also be borne in mind that the 'principal supplier rule' is applied by most importing countries with some elasticity. Secondary suppliers have joined in tariff negotiations either in cases where the principal supplier was not prepared to make a request or where the secondary suppliers wished to obtain a better concession than the one which the principal supplier accepted. Moreover, the Tariff Negotiations Committee, in 1956, was instructed to place itself at the disposal of any country or group of countries to arrange for negotiations on a triangular or multilateral basis. It was thus possible for secondary suppliers to improve the scope of concessions".⁴¹

³⁴13S/109-110.

³⁵See MTN/W/8, Note on "Rules and Procedures for the Dillon and Kennedy Rounds", p. 7-8.

³⁶20S/19, 20, para. 3(a).

³⁷L/3886, 20S/96.

³⁸Secretariat Note on "Tariff Negotiations in the Kennedy and Tokyo Rounds", MTN.GNG/NG1/W/1, dated 25 March 1987; see also *The Tokyo Round of Trade Negotiations - Report by the Director-General of GATT*, April 1979, p. 40-48, and *Supplementary Report* p. 3-7.

³⁹33S/23.

⁴⁰L/1043 and Add.1, Corr.1, 8S/103, 109, para. 9.

⁴¹L/1435, 10S/167, Annex A, 10S/171-172, para. 2.

3. Paragraph 3: “fiscal needs”

See the Interpretative Note to paragraph 3.

III. PREPARATORY WORK

The various drafts of the ITO Charter all included an Article on trade negotiations, which imposed an obligation for each Member of the ITO to enter into and carry out negotiations directed to substantial reduction of tariffs, other duties and charges, and preferences. This article also provided rules regarding, *inter alia*, the basis for negotiations and the application of negotiated reductions to reductions in margins of preference. This Article was not included in the New York Draft of the General Agreement nor in the General Agreement agreed in 1947. See above concerning the negotiating rules that were drafted and used for the round of trade negotiations held in Geneva in 1947 in conjunction with the negotiation of the General Agreement. Article 17 of the Charter on “Reduction of Tariffs and Elimination of Preferences” obligated each ITO Member to negotiate on request concerning reduction of tariffs, other charges and preferences; paragraph 3 provided that the Geneva negotiations of 1947 would be deemed to be negotiations under Article 17.

The present Article XXVIII *bis* was added in the Review Session of 1954-55. A Progress Report in 1954 by the Chairman of Review Working Party II on Tariffs, Schedules and Customs Administration notes that proposals submitted for the Review Session had suggested that an article similar to Article 17 be included in the General Agreement; that the General Agreement should include an undertaking to reduce customs duties deemed to be an obstacle to the development of trade; or that the CONTRACTING PARTIES endeavour to reach an understanding on collective automatic reduction and equalization of tariffs. It further notes the proposal that “a compromise solution might be found by inserting an article in which the obligation to negotiate would be recommendatory rather than mandatory and which would underline the principle of mutual advantage, reciprocity, etc.”.⁴²

The Report of the Review Working Party on “Schedules and Customs Administration,” which drafted Article XXVIII *bis*, introduces the discussion of this provision by noting that “The Working Party has examined the proposals for tariff reduction submitted by its Chairman, which were the result of discussions on the proposals submitted by the Benelux, German and Scandinavian delegations, and has decided to recommend the insertion of a new article in the General Agreement, dealing with tariff negotiations sponsored by the CONTRACTING PARTIES”.⁴³

The insertion of Article XXVIII *bis* was effected by the 1955 Protocol Amending the Preamble and Parts II and III, which entered into force on 7 October 1957. This Article would have become Article XXIX if the 1955 Protocol Amending Part I and Articles XXIX and XXX had entered into force.

IV. RELEVANT DOCUMENTS

Review Session

Discussion:	SR.9/16, 17, 20, 25, 26, 36, 37, 40, 47
Reports:	W.9/124, 194, 203, 204, 212 + Corr.1, 236/Add.3, L/329
Other:	L/261/Add.1, 271, 273, 275, 276 W.9/26, 39, 43, 49, 161

⁴²W.9/124, 20 December 1954, p. 5-6.

⁴³L/329, adopted 26 February 1955, 3S/205, 218, para. 34; proposals referred to appear in L/261/Add.1, L/271, L/273, L/275, and L/276.

ARTICLE XXIX

THE RELATION OF THIS AGREEMENT TO THE HAVANA CHARTER

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I. TEXT OF ARTICLE XXIX AND INTERPRETATIVE NOTE AD ARTICLE XXIX

Article XXIX

The Relation of this Agreement to the Havana Charter

1. The contracting parties undertake to observe to the fullest extent of their executive authority the general principles of Chapters I to VI inclusive and of Chapter IX of the Havana Charter pending their acceptance of it in accordance with their constitutional procedures.*

2. Part II of this Agreement shall be suspended on the day on which the Havana Charter enters into force.

3. If by September 30, 1949, the Havana Charter has not entered into force, the contracting parties shall meet before December 31, 1949, to agree whether this Agreement shall be amended, supplemented or maintained.

4. If at any time the Havana Charter should cease to be in force, the CONTRACTING PARTIES shall meet as soon as practicable thereafter to agree whether this Agreement shall be supplemented, amended or maintained. Pending such agreement, Part II of this Agreement shall again enter into force; *Provided* that the provisions of Part II other than Article XXIII shall be replaced, *mutatis mutandis*, in the form in which they then appeared in the Havana Charter; and *Provided* further that no contracting party shall be bound by any provisions which did not bind it at the time when the Havana Charter ceased to be in force.

5. If any contracting party has not accepted the Havana Charter by the date upon which it enters into force, the CONTRACTING PARTIES shall confer to agree whether, and if so in what way, this Agreement in so far as it affects relations between such contracting party and other contracting parties, shall be supplemented or amended. Pending such agreement the provisions of Part II of this Agreement shall, notwithstanding the provisions of paragraph 2 of this Article, continue to apply as between such contracting party and other contracting parties.

6. Contracting parties which are Members of the International Trade Organization shall not invoke the provisions of this Agreement so as to prevent the operation of any provision of the Havana Charter. The application of the principle underlying this paragraph to any contracting party which is not a Member of the International Trade Organization shall be the subject of an agreement pursuant to paragraph 5 of this Article.

Interpretative Note *Ad* Article XXIX from Annex I

Paragraph 1

Chapters VII and VIII of the Havana Charter have been excluded from paragraph 1 because they generally deal with the organization, functions and procedures of the International Trade Organization.

II. INTERPRETATION AND APPLICATION OF ARTICLE XXIX

The General Agreement was drafted during the intermediate stages of the negotiation of the ITO Charter. The General Agreement was intended to serve as a framework for tariff concessions negotiated in the first round in 1947, and was intended to continue in existence even after the entry into force of the ITO Charter. The function of Article XXIX was twofold: it determined the relationship between the Charter and the General Agreement, and it provided that after the final version of the rules in Part II of the General Agreement had been negotiated during the Havana Conference, and after the Havana Charter had entered into effect, this version would automatically supersede Part II of the General Agreement. However, the Havana Charter never entered into force.

The present text of Article XXIX dates from the Second Session which met in September 1948 after the Havana Conference. It was drafted by the Working Party on Modifications to the General Agreement, which also considered proposals to amend the General Agreement so that its text would immediately reflect the corresponding articles of the Havana Charter.

1. Paragraph 1

See also the material in Section III below on the origins of paragraph 1.

(1) “the general principles of Chapters I-VI inclusive and of Chapter IX of the Havana Charter”

Chapters I through VI of the Charter dealt with, respectively, Purpose and Objectives, Employment and Economic Activity, Economic Development and Reconstruction, Commercial Policy, Restrictive Business Practices, and Inter-governmental Commodity Agreements. Chapter IX included General Provisions (final provisions).

When Article XXIX was redrafted at the Second Session, Chapters VII and VIII of the Havana Charter, which dealt with the International Trade Organization and Settlement of Differences, were omitted from the reference in Article XXIX “because they generally deal with the organization, functions and procedures of the International Trade Organization”.¹ It was stated then that “by virtue of the Final Act signed at Havana, the contracting parties must regard themselves morally bound not to go back on the principles evolved at Havana. The principle of giving due regard to the economic circumstances mentioned in paragraph 2 of Article 72, as well as those in other articles of the Havana Charter, could not be disregarded even though they were not explicitly included in paragraph 1 of Article XXIX”.²

(2) Article XXIX:1 and interpretation of the General Agreement in the light of the Havana Charter

The Second Session Working Party on Modifications to the General Agreement took a generally conservative approach to amendment of the General Agreement in advance of the anticipated supersession of Part II under Article XXIX:2. In explaining this decision, the Working Party’s report notes that “... if difficulties in application were to arise before the entry into force of the Charter, the CONTRACTING PARTIES would still have the possibility under the terms of Article XXV to settle such cases in the light of the provisions of Article XXIX, paragraph 1”.³ While declining a proposal to insert Articles 26, 27 and 28 of the Havana Charter (relating to subsidies) into the General Agreement, the Working Party noted that:

¹Interpretative Note to Article XXIX; see also GATT/CP.2/SR.17, pp. 5-8.

²GATT/CP.2/SR.18, p. 2.

³GATT/CP.2/22/Rev.1, adopted on 1 and 2 September 1948, II/39, 40. para. 9.

“... It was of course understood that, in the light of Article XXIX, paragraph 1, the CONTRACTING PARTIES undertake to apply the principles of the Havana Charter relating to export subsidies to the full extent of their executive authority”.⁴

Again declining a proposal to insert the interpretative note to Article 33:1 of the Havana Charter on transit into the General Agreement, the Working Party concluded “that such insertion was not necessary, since the text of Article 33, paragraph 1, of the Charter tallied with that of Article V, paragraph 1, of the General Agreement, and the CONTRACTING PARTIES, who all signed the Final Act of the Conference of Havana, could not interpret these provisions in any way other than that laid down in the Note *ad* Article 33 of the Charter. The representative of Pakistan appreciated the justice of this conclusion and agreed to withdraw his proposal on the understanding that the working party would record this statement in its report”.⁵

Many Panel Reports adopted by the CONTRACTING PARTIES have taken account of the drafting history and provisions of the Havana Charter in interpreting corresponding GATT provisions.⁶

The 1984 Panel Report on “Canada - Administration of the Foreign Investment Review Act” addresses the interpretation of Article XXIX:1:

“The Panel considered the Canadian view ... that the word ‘requirements’ in article III:4 of the General Agreement should be interpreted in the light of Article 12 of the Havana Charter, the general principles of which the contracting parties, in Article XXIX of the General Agreement, agreed to observe to the fullest extent of their executive authority. The Panel noted that the deletion of Article XXIX of the General Agreement was proposed in 1955 and accepted by all but one contracting party, and that - although this Article is technically still in force - it refers to an instrument which itself has never been implemented and the acceptance of which is no longer pending as is assumed in Article XXIX. This leaves considerable doubt as to the manner in which its provisions would have been interpreted if they had entered into force. The Panel further noted that paragraph 1(c) of Article 12 of the Charter was to apply ‘without prejudice to existing international agreements to which Members are parties’, and that paragraph 1(a), (b) and (d) as well as paragraphs 2 and 3 of this Article tended to encourage international investments (including international co-operation in this field). It is therefore doubtful whether paragraph 1(c) which reserved the rights of Members to prescribe ‘reasonable requirements’ should by itself be considered as a ‘general principle’ in the sense of Article XXIX:1 of the General Agreement. The wording of this latter provision suggests that it was not the intention of its drafters that contracting parties should ‘undertake to observe to the fullest extent of their executive authority’ what they would in any case judge to be in their own interest, nor that they should invoke the Charter to detract from their obligations under the General Agreement, but rather that they should observe general principles which reinforced or added to these obligations. In the light of the foregoing facts and considerations the Panel could not subscribe to the assumption that the drafters of Article III had intended the term ‘requirements’ to exclude requirements connected with the regulation of international investments and did not find anything in the negotiating history, the wording, the objectives and the subsequent application of Article III which would support such an interpretation”.⁷

See also Article XX(h) and the Interpretative Note thereto, which indirectly (via a reference to ECOSOC Resolution 30 (IV) of 28 March 1947) refer to the principles of the Havana Charter relating to intergovernmental commodity agreements.

2. Paragraphs 2 and 4: Supersession of the General Agreement by the Charter

Paragraph 2 provides for supersession of the provisions of Part II of the General Agreement (which were drawn from the Geneva Draft Charter submitted by the Committee to the Conference) by the corresponding provisions to be later negotiated at the Havana Conference. The idea appearing in paragraph 4 that if the Charter should cease to be in force after it had entered into force, Part II of the General Agreement would again enter into force, replaced (except for Article XXIII) by the corresponding Charter provisions, was first proposed by a Sub-

⁴*Ibid.*, II/43, para. 24.

⁵*Ibid.*, II/44, para. 26.

⁶See references to the Havana Charter in the index.

⁷L/5504, adopted on 7 February 1984, 30S/140, 161-162, para. 5.12.

Committee the First Session in March 1948. The Report of this Sub-Committee notes in explanation that “it is considered that the form in which [Article XXIII] appear[s] in the Charter is not suitable for the General Agreement”.⁸

The supersession of the General Agreement by the Charter was limited to the provisions of Part II; thus, even after the Charter went into force the General Agreement (including Parts I and III and the Schedules of concessions) would remain in force coexisting with the Charter. When Article XXIX was revised at the Second Session, the words “and superseded by the corresponding provisions of the Charter” were deleted from paragraph 2 “in order to make it clear that when the Charter enters into force, and so long as it remains in force, the General Agreement would be limited to the provisions of Part I and Part III, including the Annexes in so far as they relate to those two parts”.⁹

3. Paragraph 3: “If ... the Havana Charter has not entered into force”

Article XXIX:3 is linked to Article 103:2(b) of the Havana Charter, which provided that if the Charter had not entered into force by 30 September 1949, the Secretary-General of the United Nations was to invite those governments which had deposited instruments of acceptance to enter into consultation to determine whether and on what conditions they desired to bring the Charter into force. The CONTRACTING PARTIES decided on 21 March 1950, when entry into force of the Charter was still pending, that the meeting referred to in Article XIX:3 “shall be held at such time as may subsequently be decided by the CONTRACTING PARTIES.”¹⁰ On 6 December 1950 the United States Department of State issued a statement indicating that the Havana Charter would not be submitted again to the United States Congress. It subsequently became evident that the establishment of the ITO would be indefinitely postponed.¹¹

The depositary of the Havana Charter was the Secretary-General of the United Nations. According to the United Nations, “The conditions for entry into force of the Havana Charter, set forth in its article 103, were not fulfilled within the prescribed time-limit. No instrument of accession was deposited with the Secretary-General”.¹²

At their Eighth Session in October 1953, the CONTRACTING PARTIES decided to convene a Session of the CONTRACTING PARTIES in October 1954 to review the operation of the General Agreement and to examine to what extent it would be desirable to amend or supplement the General Agreement. This session was the Ninth, or Review, Session which met from October 1954 to March 1955. The October 1953 decision also provided that “the review referred to in this Decision shall be deemed to fulfil the requirements of paragraph 3 of Article XXIX”.¹³

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

There is no Article in the Havana Charter corresponding to Article XXIX of the General Agreement. The initial drafts of the General Agreement did not include any provision in the text of the agreement itself on the relationship with the Charter; this matter was dealt with instead in a proposed protocol of signature. During discussions on the text of the General Agreement in the Tariff Agreement Committee at the Geneva Session of the Preparatory Committee, it was decided to drop the protocol of signature, and to include an undertaking to observe Charter principles as paragraph 1 of Article XXIX.¹⁴

During the Second Session of the CONTRACTING PARTIES held in September 1948, the Working Party on Modifications to the General Agreement considered which of the changes that had been made to the Charter text at Havana should be brought into the General Agreement, and in this connection also redrafted Article XXIX.

⁸GATT/1/21, p. 3.

⁹II/42, para. 17.

¹⁰Decision at GATT/CP.4/29, GATT/CP/61 p. 8; adoption at GATT/CP.4/SR.17 p. 7. The Third Session of the Executive Committee of ICITO was similarly postponed in 1949 until a time when the entry into force of the Charter would be imminent; see the chapter on Institutions in this Index.

¹¹Sec/36/53. The US announcement of its decision not to resubmit the ITO to Congress appears in GATT/CP/86 dated 7 December 1950.

¹²*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1992*, UN Doc. ST/LEG/SER.E/11 (1993), p. 326.

¹³Decision of 24 October 1953 on “Arrangements for a Review of the General Agreement”, 2S/28, 30.

¹⁴EPCT/199.

The Report of the Working Party notes that the re-wording of Article XXIX had been proposed “in order to eliminate certain temporary provisions and to clarify the interpretation of certain points the interpretation of which may give rise to difficulties”. The Working Party Report also notes, “As Article XXIX is contained in Part III of the General Agreement, this text as amended will remain operative after the entry into force of the Havana Charter”.¹⁵ These amendments became effective with the entry into force of the Protocol Modifying Part I and Article XXIX on 24 September 1952, and are the source of the present text of Article XXIX.

During the Review Session of 1954-55, the Review Working Party on Organizational and Functional Questions recommended the deletion of Article XXIX and its interpretative note, and of references to it and the Havana Charter throughout the General Agreement.¹⁶ However, these amendments were included in the 1955 Protocol Amending Part I and Articles XXIX and XXX, which failed to gain the requisite unanimous approval and was abandoned.¹⁷

IV. RELEVANT DOCUMENTS

Geneva

Discussion: EPCT/TAC/PV/20-22, 24, 25
 Reports: EPCT/196, 199, 204, 209,
 214/Add.1/Rev.1
 Other: EPCT/W/334, 335

Concerning the Protocol of Signature, which was
 deleted in favour of a reference in Article XXIX:1:

Discussion: EPCT/TAC/SR/4, 5, 18
 EPCT/TAC/PV/17, 20, 22
 Reports: EPCT/189, 196, 199
 Other: EPCT/207
 EPCT/W/273, 274, 285, 291, 301,
 312, 313, 332, 333

CONTRACTING PARTIES

Discussion: GATT/1/SR.2-7, 10, 11
 GATT/CP.2/SR.4, 6, 15-18
 GATT/CP.3/SR.42
 GATT/CP.4/SR.17
 Reports: GATT/1/21, 23
 GATT/CP.2/22/Rev.1, 28
 GATT/CP.4/29
 GATT/CP/61

Review Session

Discussion: SR.9/27, 38, 42, 47
 Reports: W.9/197, W.9/236/Add.3, L/327,
 3S/231
 Other: L/189, 273, 275, 276, 284/Rev.1
 W.9/57, 62
 Spec/96/55

¹⁵GATT/CP.2/22/Rev.1, adopted on 1 and 2 September 1948, II/39, 40, para. 6.

¹⁶L/327, adopted on 28 February, 5 and 7 March 1955, 3S/231, 240, para. 25. The deletion of Article XXIX was linked to the insertion of a new Article I on “Objectives”: see discussion at SR.9/42 p. 4-5.

¹⁷15S/65.

ARTICLE XXX

AMENDMENTS

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I. TEXT OF ARTICLE XXX

Article XXX

Amendments

1. Except where provision for modification is made elsewhere in this Agreement, amendments to the provisions of Part I of this Agreement or to the provisions of Article XXIX or of this Article shall become effective upon acceptance by all the contracting parties, and other amendments to this Agreement shall become effective, in respect of those contracting parties which accept them, upon acceptance by two-thirds of the contracting parties and thereafter for each other contracting party upon acceptance by it.

2. Any contracting party accepting an amendment to this Agreement shall deposit an instrument of acceptance with the Secretary-General of the United Nations within such period as the CONTRACTING PARTIES may specify. The CONTRACTING PARTIES may decide that any amendment made effective under this Article is of such a nature that any contracting party which has not accepted it within a period specified by the CONTRACTING PARTIES shall be free to withdraw from this Agreement, or to remain a contracting party with the consent of the CONTRACTING PARTIES.

I. INTERPRETATION AND APPLICATION OF ARTICLE XXX

A. SCOPE AND APPLICATION OF ARTICLE XXX

1. Paragraph 1

(1) Amendments to the General Agreement

The General Agreement has been amended a number of times. The First Session of the CONTRACTING PARTIES, which was held during the Havana Conference, agreed to three protocols of amendment: two which replaced Articles XIV and XXIV respectively with the texts of the corresponding ITO Charter Articles negotiated at Havana,¹ and the Protocol Modifying Certain Provisions of the General Agreement on Tariffs and Trade, which added Articles XXV:5(b) and (c) and XXXV and amended Articles XXXII and XXXIII.²

At the Second Session of the CONTRACTING PARTIES, a Working Party on Modifications to the General Agreement decided to replace Articles III, VI and XVIII with their Havana counterparts, to rewrite Article XXIX and to make a few other minor amendments.³ Due to the different acceptance requirements applying to different provisions of the General Agreement under Article XXX, two protocols were prepared: the Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade, signed at Geneva on 14 September 1948, which entered into force on 14 December 1948⁴ and the Protocol Modifying Part I and Article XXIX of the General Agreement on Tariffs and Trade, signed at Geneva on the same date, which entered into force on 24 September 1952.⁵

The Third Session in 1949 agreed on amendments to the territorial application provisions of Article XXVI:4. These were effected through the Protocol Modifying Article XXVI of the General Agreement on Tariffs and Trade, signed at Annecy on 13 August 1949, which entered into force on 28 March 1950.⁶ The Fifth Session in 1950 agreed to an amendment to Article XXVIII, which was effected through paragraph 6 of the Torquay Protocol to the General Agreement on Tariffs and Trade,⁷ opened for signature on 21 April 1951, which entered into force with regard to paragraph 6 on 19 October 1951.

The Review Session of 28 October 1954 to 8 March 1955 resulted in agreement on a number of amendments to the text of the General Agreement, and on an Agreement on the Organization for Trade Cooperation (OTC). These amendments were incorporated in three instruments, all done at Geneva on 10 March 1955. The Protocol Amending the Preamble and Parts II and III of the General Agreement on Tariffs and Trade⁸ entered into force on 7 October 1957 for all provisions except those providing for a later effective date. The entry into force of the Protocol of Organizational Amendments to the General Agreement on Tariffs and Trade was contingent upon the entry into force of the Agreement on the OTC; the Agreement on the OTC failed to gain the required number of acceptances by the required deadline and was abandoned. The Protocol amending Part I and Articles XXIX and XXX of the General Agreement on Tariffs and Trade failed to gain the required acceptance by all contracting parties. At their Twenty-fourth Session, the CONTRACTING PARTIES decided to abandon the Protocol if, by 31 December 1967, it had not entered into force. This condition having been fulfilled, the Protocol was abandoned.⁹

The Protocol Amending the General Agreement to Introduce a Part IV on Trade and Development¹⁰ was done at Geneva on 8 February 1965, and entered into force on 27 June 1966.

¹Special Protocol Modifying Article XIV of the General Agreement on Tariffs and Trade, signed at Havana on 24 March 1948, entered into force 9 May 1949, 62 UNTS 40; Special Protocol Relating to Article XXIV of the General Agreement on Tariffs and Trade, signed at Havana 24 March 1948, entered into force 7 June 1948, 62 UNTS 56.

²Protocol Modifying Certain Provisions of the General Agreement on Tariffs and Trade, signed at Havana 24 March 1948, entered into force 24 March 1948, 62 UNTS 30. See further in section III under Articles XXV, XXXIII and XXXV.

³Report of the Working Party on "Modifications to the General Agreement", adopted 1 and 2 September 1948, GATT/CP.2/22/Rev.1, II/39, para. 3.

⁴62 UNTS 80.

⁵138 UNTS 334.

⁶62 UNTS 113.

⁷142 UNTS 34.

⁸278 UNTS 168.

⁹15S/65.

¹⁰572 UNTS 320.

(2) “except where provision for modification is made elsewhere in this Agreement”

This phrase was introduced during the drafting of the General Agreement in Geneva to cover changes in Schedules which may be made in accordance with other provisions. Specific reference was made in the original draft to Article II:6 and Articles XXVII and XXVIII. In the course of the discussion Articles XVIII, XIX and XXIII were also mentioned.¹¹ Also, a Secretariat Note of 1956, addressing the question of whether waivers of obligations under Part I of the General Agreement could be granted by less than a unanimous vote, states:

“The phrase ‘Except where provision for modification is made elsewhere ...’ [in Article XXX:1] provides a clear exception for action taken under the provisions of Article XXV:5(a), for

- “(i) if the waiver of an obligation in Part I is not considered to represent a ‘modification’ it can hardly be a change that would require the application of the amendment procedure; and
- “(ii) if such a waiver is considered to be a ‘modification’, this phrase provides an explicit exception from the unanimity requirement for amendment for Part I. ...”¹².

(3) Procedure for submission of amendments for acceptance

(a) Majority required

During the Review Session of 1954-55, the Legal and Drafting Committee considered the procedure for deciding which amendments should be submitted to governments for acceptance pursuant to the provisions of Article XXX. The Report of the Committee on this issue notes that in the view of certain of its members, the decision to draw up a Protocol and submit it to governments as well as the determination of the contents of such a Protocol was a decision requiring only a simple majority, as the Review was “an activity of the CONTRACTING PARTIES within the terms of Article XXV of the General Agreement” for which the required majority was that specified in Article XXV:4.¹³ Other members of the Committee were of the view that the Review Session “must be regarded as in the nature of a constituent meeting of the parties to the Agreement, and the rules to be followed regarding agreement on amendments must be those generally applicable to the amendment of treaties. ...it is reasonable to seek guidance from the provisions of the General Agreement and for this purpose they consider that the provisions of Article XXX are relevant. It would, in their view, be appropriate that the incorporation of amendments in the Protocol should be subject to voting requirements analogous to the acceptance requirements laid down in that Article, i.e., that amendments which require acceptance by two-thirds of the contracting parties in order to enter into force should be adopted by a two-thirds vote, and of those requiring acceptance by all contracting parties by a unanimous vote.”¹⁴ As a practical solution, the Committee proposed the following Resolution:

“The CONTRACTING PARTIES resolve that, as a rule of procedure applicable to the discussion of Item 3 of the Ninth Session agenda, amendments to be submitted to contracting parties for acceptance pursuant to Article XXX of the General Agreement shall be approved by a majority of two-thirds of the votes cast.”¹⁵

This Resolution was approved by a vote of 31-0.¹⁶ The Protocol Amending Part I and Articles XXIX and XXX, which was agreed in the Review Session, would have amended Article XXX to provide that amendments to the provisions of the General Agreement would be submitted for acceptance to the contracting parties provided that they had been approved by the CONTRACTING PARTIES by a majority of two-thirds of the votes cast.¹⁷ This Protocol did not achieve the required acceptance by all contracting parties, and was abandoned.¹⁸

¹¹EPCT/189, p. 58.

¹²L/403.

¹³W.9/151, “Report of the Legal and Drafting Committee on the Procedure for the Approval of Amendments to the General Agreement,” dated 21 January 1955, p. 1, paras. 3-4. See also L/304, Spec/44/55.

¹⁴*Ibid.*, p. 2, para. 5.

¹⁵*Ibid.*, p. 3, para. 9.

¹⁶SR.9/36, p. 3. See also W.9/224, Note on procedures for concluding plenaries of the Steering Group, and SR.9/47, voting on amendments.

¹⁷Protocol Amending Part I and Articles XXIX and XXX.

¹⁸15S/65.

(b) *Inclusion of multiple amendments in a single Protocol*

The Legal and Drafting Committee also considered whether amendments could be combined in a single ‘amendment’, or in a single Protocol containing a number of amendments:

“The Committee agreed that, for a legal point of view, there would be no objection to including in a single Protocol all the amendments the entry into force of which is dependent on the acceptance of two-thirds of the contracting parties in accordance with paragraph 1 of Article XXX. This procedure would mean that contracting parties would have to accept or reject the amendments embodied in the Protocol as a whole, and thus would avoid the difficulties (of having several different agreements in force simultaneously) which might arise if contracting parties were free to accept some of the amendments while rejecting others.

“Such a procedure would not deprive any contracting party of any right it enjoys under the General Agreement, since the CONTRACTING PARTIES can decide what would constitute ‘an amendment’ in the sense in which the word is used in Article XXX, and can, therefore, adopt a procedure which has the effect of treating as one amendment all modifications to provisions amendments to which enter into force upon acceptance by two-thirds of the contracting parties.

“... if modifications requiring unanimous acceptance were included along with others requiring only a two-thirds majority and treated as a single amendment for the purposes of acceptance and entry into force, there would be no room left for the procedure under paragraph 2 of Article XXX even for those modifications which require acceptance by two-thirds of the contracting parties. Moreover, in that case any contracting party would have a right of veto regarding the entry into force of all modifications included in the amendment whether or not these modifications require unanimous acceptance.

“The Committee concluded that, while there would be no legal objection to treating as a single amendment all the modifications requiring acceptance by two-thirds of the contracting parties, it would not be legally possible to include as part of that single amendment any modification requiring acceptance by all the contracting parties.

“The Committee ... was of the opinion that, provided the Protocol foresaw separate conditions of acceptance and entry into force for the two types of amendments, it would not be imperative to provide for two or more protocols ...

“The general view of the Committee was, however, that the advantages of drafting two or more protocols were greater than those of drawing up a single protocol of amendments ...”.¹⁹

The amendments agreed in the Review Session were effected through three Protocols.²⁰

(4) “amendments to the provisions of Part I or to the provisions of Article XXIX or of this Article”

(a) *Unanimity requirement*

During the negotiation of the General Agreement in 1947, it was proposed that only a two-thirds majority be required for amendments to Part I since the corresponding articles in the Charter could be amended with such a majority.²¹ It was agreed, however, that the unanimity requirement for these provisions was essential for the following reasons:

¹⁹W.9/173, p. 2.

²⁰See discussion at SR.9/42, p. 4-5 (decision to draw up two protocols for amendments requiring a two-thirds majority to enter into force, and one protocol for amendments requiring unanimity, providing that amendments therein could be accepted separately). The Protocol Amending the Preamble and Parts II and III provided that it would become effective following its acceptance by two-thirds of the governments which were then contracting parties, and entered into effect generally on 7 October 1957. The Protocol Amending Part I and Articles XXIX and XXX did not enter into force due to lack of the required unanimous acceptance, and was abandoned in 1967: 15S/65. The Protocol of Organizational Amendments did not enter into force before expiry of the time-limit for signature on 7 April 1966. See *Status of Legal Instruments*.

²¹EPCT/TAC/PV/15, p. 6 et seq.

- The General Agreement is a trade agreement and the rule in ordinary trade agreements is that they “can only be modified with the unanimous consent of the parties taking part in them”. The two-thirds majority rule was exceptional and applied in the case of Part II “because there are exceptional circumstances which may justify the supersession of these provisions by the provisions of the Charter”²²; and
- “Part I ... is meant to be a provision to which are attached the Schedules embodying results of the tariff negotiations” which “have taken place specifically on the base of the provisions about the most-favoured-nation treatment and so on which will be embodied in Part I”.²³

As noted above, the only protocol of amendment to these provisions which has entered into effect is the 1948 Protocol Modifying Part I and Article XXIX of the General Agreement on Tariffs and Trade.²⁴ The 1955 Protocol Amending Part I and Articles XXIX and XXX failed to gain the requisite unanimous acceptance and was abandoned.

(b) *Modifications or rectifications of Schedules*

Paragraph 7 of Article II provides that “Schedules annexed to this Agreement are ... an integral part of Part I of this Agreement”. Hence, after 1948, various GATT Protocols of Rectification (or Rectification and Modification) amending Schedules were drawn up providing that the rectifications or modifications in the Protocol “shall become an integral part of the General Agreement on the day on which this Protocol has been signed by all the Governments which are on that day contracting parties to the General Agreement.”²⁵ Beginning in 1950, certain modifications to Schedules were circulated without inclusion in a Protocol. In 1950, the Working Party on “Modifications and Preparation of Fourth Protocol of Rectifications” examined modifications to the Schedules of Denmark and Italy. The Report of the Working Party notes in this connection:

“The working party considered that the method hitherto employed, of circulating a notification of the proposed modification with the advice that provided no objections were lodged within a specified period - usually thirty days - the modification would become effective at the close of the period, was satisfactory. The working party considered it unnecessary to incorporate modifications so agreed upon in a formal protocol in order to bring them into effect, although it would be desirable from the practical standpoint subsequently to include them in a formal document; particularly since the difficulty of obtaining signature by all the contracting parties might result in such a protocol’s not entering into effect. Consequently, these modifications have not been incorporated in a protocol. The working party suggests that the CONTRACTING PARTIES take note that no objections were lodged to the modifications mentioned above, and consequently the modifications to both schedules will become effective on the day those schedules enter into effect.”²⁶

The following year, the Working Party on “Preparation of First Protocol of Rectifications and Modifications and of First Protocol of Supplementary Concessions” examined questions relating to preparation of a protocol giving effect to various modifications and rectifications. Its Report provides:

“The working party noted that, since the third session of the CONTRACTING PARTIES, no protocol of rectifications or of modifications has come into force owing to the impossibility of obtaining the signature of all the contracting parties. Clearly, it was never the intention of Article XXX to place difficulties in the way of making rectifications of an entirely non-substantive character, or to prevent agreed modifications of the concessions contained in the schedules to the General Agreement. Since the drawing up of the First Protocol of Modifications, several modifications have in fact been made to the concessions contained in the schedules, either by decision of the CONTRACTING PARTIES or by consultations in accordance with procedures established by the CONTRACTING PARTIES and these have actually entered into force. In view of the fact that the First Protocol of Modifications had not entered into force, the CONTRACTING PARTIES were reluctant at the fourth

²²*Ibid.*, p. 10.

²³*Ibid.*, p. 7-8.

²⁴138 UNTS 334.

²⁵See, e.g., Third, Fourth and Fifth Protocols of Rectifications, and First through Ninth Protocols of Rectifications and Modifications, in each of which this phrase appears: see *Status of Legal Instruments*, section 7.

²⁶GATT/CP.4/34, adopted on 1 April 1950, II/141 and para. 4. The following year, these changes were included in the First Protocol of Rectification and Modifications, dated 26 October 1951; see II/147.

and fifth sessions to include these further modifications in a formal protocol. Nevertheless, it is clearly desirable that the text of the schedules should be formally modified in order to take account of such changes. Accordingly, the protocol, as drafted, recites that in many cases the modifications of concessions have already entered into force, in which cases the protocol provides merely for the introduction of such modification in the text of the schedules.²⁷

In the 1955 Protocol Amending Part I and Articles XXIX and XXX of the General Agreement, provision was made for a third paragraph to be added to Article XXX to read as follows:

“Any amendment to the schedules annexed to this Agreement which records rectifications of a purely formal character or modifications resulting from action taken under paragraph 6 of Article II, Article XVIII, Article XXIV, Article XXVII or Article XXVIII, shall become effective on the thirtieth day following certification to this effect by the CONTRACTING PARTIES; *Provided* that prior to such certification, all contracting parties have been notified of the proposed amendment and no objection has been raised, within thirty days of such notification, by any contracting party on the ground that the proposed amendments are not within the terms of this paragraph.”

Since this amendment had not entered into force, the CONTRACTING PARTIES decided on 17 November 1959 (but subject to the eventual entry into force of this amendment) that a procedure for the certification of rectifications and modifications should nevertheless be adopted and the practice of preparing protocols of rectifications and modifications discontinued.²⁸ Under this procedure three certifications were issued which stated: “On the date of the entry into force of paragraph 3 of Article XXX, this Decision shall constitute a certification by the CONTRACTING PARTIES on that date pursuant to paragraph 3 of Article XXX”. These certifications were then generally treated by contracting parties as if they were in effect.²⁹

Following the abandonment in 1967 of the Protocol Amending Part I and Articles XXIX and XXX, the CONTRACTING PARTIES adopted two Decisions on 19 November 1968 and 26 March 1980 on “Procedures for Modification and Rectification of Schedules of Tariff Concessions”.³⁰ These procedures deal with the modification or rectification of Schedules to reflect changes in concessions which contracting parties are already authorized to make under Articles II, XVIII, XXIV, XXVII or XXVIII. For the text of the 1980 Decision and material on GATT practice in this area, see the discussion of Schedules under Article II.

(5) “in respect of those contracting parties which accept them”

The standard text of accession protocols provides that the provisions of the General Agreement to be applied to contracting parties by the acceding government shall, except as otherwise provided in the Protocol, be the provisions of the General Agreement as of 30 October 1947, “as rectified, amended and otherwise modified by such instruments as may have become effective on the day on which [...] becomes a contracting party.”³¹ Thus, each government acceding under Article XXXIII has, through its acceptance of its accession protocol, accepted all amendments to the General Agreement which have entered into force as of the date it became a contracting party. The rights and obligations of governments succeeding to contracting party status under Article XXVI:5(c) date from the date of independence of the newly-independent State or the date of receipt of certification of a territory’s autonomy in the conduct of its external commercial relations. Thus, such governments succeed to the status of the sponsoring government on that date with regard to acceptances of amendments.

During the Review Session in 1955, the Deputy Executive Secretary confirmed in reply to a question by Chile “that a contracting party which had not accepted an amendment requiring two-thirds (of the contracting parties) would be bound by the existing text”.³² The 1955 Protocol Amending the Preamble and Parts II and III was done on 10 March 1955. On 7 October 1957, when this Protocol had been accepted by two-thirds of the contracting parties, it entered into force for those contracting parties which had accepted it. However, the last

²⁷GATT/CP.6/40, adopted on 24 October 1951, II/146, para. 2.

²⁸8S/25.

²⁹12S/20, 22; 15S/57.

³⁰16S/16 and 27S/25, respectively.

³¹See, e.g., Protocol for the Accession of Costa Rica, L/6626, 37S/7.

³²SR.9/42, p. 4.

acceptance by a government that was a contracting party before 10 March 1955 did not take place until 7 February 1969. During this period, there were two texts of the General Agreement in force for different contracting parties.

Similarly, the Protocol Amending the General Agreement to Introduce a Part IV on Trade and Development was done in Geneva on 8 February 1965. On 27 June 1966, when this Protocol had been accepted by two-thirds of the contracting parties, it entered into force for those contracting parties which had accepted it. A government which succeeds to contracting party status under Article XXVI:5(c) with rights and obligations predating the acceptance of Part IV by its sponsoring government is not bound by Part IV unless it accepts the Part IV Protocol.³³

(6) “other amendments to this Agreement shall become effective ... upon acceptance by two-thirds of the contracting parties”

It was stated in 1948 that an instrument of acceptance to an amending protocol was a notification that as long as the respective contracting party applied the General Agreement through the Protocol of Provisional Application it would apply the amendment.³⁴

During the Second Session of the CONTRACTING PARTIES in September 1948, South Africa challenged the validity with respect to it of the Protocol Modifying Certain Provisions of the General Agreement (and in particular the provisions therein adding Article XXXV) as this Protocol had been done on 24 March 1948. South Africa, as a signatory of the Geneva Final Act of 30 October 1948, asserted a legal right to accept the Protocol of Provisional Application and apply provisionally the text of the unamended General Agreement which had been attached to the Geneva Final Act.³⁵ The Chairman ruled that “the signature of the Final Act at Geneva was not an agreement between the signatories but the authentication of a text awaiting acceptance. At any time before acceptance, the signatories could agree to vary the text. If the majority agreed to the amended text, the minority accepting the original text, but not its modifications, could be taken to have accepted the amended text with a reservation”.³⁶

(7) *Reservations regarding acceptance of amendments*

At the Second Session, in response to the position of South Africa noted above, the Chairman also proposed

“... that we invite the Government of South Africa to sign the Protocol Modifying Certain Provisions of the General Agreement, but with a reservation that they do not accept Article XXXV. We can agree now that, if the Government of South Africa signs the Protocol between now and our next session, we shall give sympathetic consideration to approval of the South African reservation at our next session without altering the legal situation as it now exists. This could then have the effect that the other contracting parties would continue to regard themselves as bound by and having the right to apply the provisions of Article XXXV ... while South Africa would continue to regard themselves as not being bound and would presumably apply the General Agreement to all contracting parties ...”.³⁷

The Chairman stated that the signing of the Protocol with reservations would be legally valid if it is unanimously accepted by the contracting parties, and it would not be necessary to sign another protocol.³⁸ The proposal was adopted unanimously. South Africa then signed the Protocol subject to a reservation of non-acceptance of Article XXXV, which was examined and accepted unanimously.³⁹ This reservation was withdrawn by a notification deposited with the Secretary-General of the United Nations on 5 June 1950.⁴⁰

³³See, e.g., certification by the Director-General of admission of Maldives as a contracting party with rights and obligations dating from 26 July 1965, including a notification of acceptance by the Maldives of the Part IV Protocol, L/5481, 30S/7.

³⁴GATT/1/SR.13, p. 5.

³⁵GATT/CP.2/SR.7 p. 3-6, SR.8 p. 1-3, SR.16 p. 1-8; GATT/CP.2/10, 14-17. See also GATT/1/SR. 13, p. 5, GATT/CP.2/14.

³⁶GATT/CP.2/SR.10, p. 1; see also text of Chairman’s statement in GATT/CP.2/17.

³⁷GATT/CP.2/SR.16 p. 5-6; GATT/CP/11.

³⁸GATT/CP.2/SR.16, p. 7.

³⁹Declaration of 5 May 1949 Accepting the Reservation to Article XXXV attached to the signature of the Union of South Africa to the Protocol Modifying Certain Provisions, GATT/CP.3/19; GATT/CP.3/SR.7 p. 5.

⁴⁰Status of Legal Instruments, p. 2-1.4.

At the 1955 Review Session, on 7 March 1955 the CONTRACTING PARTIES approved a Resolution expressing their unanimous agreement to the definitive acceptance of the General Agreement under Article XXVI subject to a reservation to the effect that Part II would be applied to the fullest extent not inconsistent with legislation which existed on 30 October 1947, or, in the case of a contracting party which had acceded after 30 June 1949, the date of its accession Protocol.⁴¹ Subsequent to the Review Session a number of contracting parties accepted the Protocol Amending the Preamble and Parts II and III of the General Agreement on Tariffs and Trade only subject to a reservation for their “existing legislation”.⁴² In a Declaration of 15 November 1957 on “Statements which accompanied the acceptance of the Protocol Amending the Preamble and Parts II and III”⁴³, the CONTRACTING PARTIES

“Declare that the statements which accompanied the signatures or acceptances by certain contracting parties of the Protocol Amending the Preamble and Parts II and III of the General Agreement on Tariffs and Trade are accepted on the understanding that they confirm the legal situation existing under the instrument by which each of these governments became a contracting party. Consequently, each of those contracting parties continues to apply Part II of the General Agreement on Tariffs and Trade (as revised) to the fullest extent not inconsistent with legislation which existed on the date mentioned in the instrument by which it became a contracting party; following acceptance pursuant to Article XXVI, any contracting party will have the right to apply Part II, subject to any reservation accompanying such acceptance in the terms provided for in the Resolution approved by the CONTRACTING PARTIES on 7 March 1955”.

2. Paragraph 2

During the negotiation of the General Agreement at Geneva in 1947 the formulation of the second sentence in paragraph 2 was proposed with the suggestion that it would avoid a reference to expulsion.⁴⁴ It was stated that this provision meant that a contracting party would have the choice either to withdraw from the Agreement or, if the CONTRACTING PARTIES consent, to remain party to it without applying the provisions contained in an amendment which it does not accept.⁴⁵

A Report of the Legal and Drafting Committee in the Review Session of 1954-55 on issues related to amendment of the General Agreement states the view of the Committee with regard to decisions under paragraph 2 of Article XXX, that

“... In this way it would be possible for the CONTRACTING PARTIES, acting in full conformity with their powers under the General Agreement, to ensure that the acceptance by all contracting parties of amendments requiring a two-thirds majority was not delayed indefinitely. ...

“The procedure envisaged in paragraph 2 of Article XXX can only be applied to amendments which have entered into force and would, therefore, not be applicable to amendments which have to be accepted by all contracting parties before they enter into force. An application of that procedure to those amendments would have the effect of depriving any contracting party of the rights it acquired when it became party to the General Agreement and would be inconsistent with the spirit and the letter of it”.⁴⁶

The CONTRACTING PARTIES have never taken a decision under paragraph 2.

B. RELATIONSHIP BETWEEN ARTICLE XXX AND AGREEMENTS MODIFYING OR SUPPLEMENTING RIGHTS AND OBLIGATIONS BETWEEN CERTAIN CONTRACTING PARTIES ONLY

See the Decision of 28 November 1979 on “Action by the CONTRACTING PARTIES on the Multilateral Trade Negotiations”, in which, *inter alia*:

⁴¹3S/48. See also discussion and agreed understandings regarding this reservation, at SR.9/46 p. 3-4.

⁴²*Status of Legal Instruments*, p. 2-8.2.

⁴³6S/13.

⁴⁴EPCT/TAC/PV/15, p. 30-31.

⁴⁵EPCT/245.

⁴⁶W.9/173, p. 1-2.

“1. The CONTRACTING PARTIES reaffirm their intention to ensure the unity and consistency of the GATT system, and to this end they shall oversee the operation of the system as a whole and take action as appropriate.

“2. The CONTRACTING PARTIES note that as a result of the Multilateral Trade Negotiations, a number of Agreements covering certain non-tariff measures and trade in Bovine Meat and Dairy Products have been drawn up. They further note that these Agreements will go into effect as between the parties to these Agreements as from 1 January 1980 or 1 January 1981 as may be the case and for other parties as they accede to these Agreements.

“3. The CONTRACTING PARTIES also note that existing rights and benefits under the GATT of contracting parties not being parties to these Agreements, including those derived from Article I, are not affected by these Agreements”.⁴⁷

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

The corresponding Article in the Havana Charter is Article 100. Articles on amendment of the Charter appeared as Article 75 of the US Draft Charter, Article 85 of the London and New York Drafts of the Charter, and Article 95 of the Geneva Draft. The Havana Charter differentiated between amendments not involving a change in the obligations assumed by Members, and amendments which altered the obligations of Members. The Conference of the Members would determine by a two-thirds majority whether an amendment was of the former or latter type. The former would become effective upon approval by the Conference by a two-thirds majority of the Members; the latter would become effective for the Members accepting the amendment upon the ninetieth day after two-thirds of the Members had notified the Director-General of their acceptance and thereafter for each remaining Member upon acceptance by it. A Member not accepting the latter type of amendment would be free to withdraw.

In early drafts of the General Agreement the provisions on amendment were grouped with those on supersession by the Charter. Article XXIII of the New York Draft of the General Agreement provided that all amendments would enter into effect upon formal acceptance by two-thirds of the contracting parties. During discussions at Geneva Articles XXIX and XXX were separated and the present formulation of Article XXX was agreed. See the references to drafting history above.

A revised text of Article XXX was included in the 1955 Protocol Amending Part I and Articles XXIX and XXX. This text would have added provisions explicitly regulating submission of amendments to the contracting parties for acceptance (see page 1003 above); provisions implementing the second sentence of the present Article XXX:2; and provisions for amendments to schedules by certification in the case of rectifications or modifications implementing action under Articles II:6, XVIII, XXIV, XXVII or XXVIII (see page 1006 above). This Protocol did not enter into force and was abandoned.⁴⁸

IV. RELEVANT DOCUMENTS

Geneva

CONTRACTING PARTIES

Discussion: EPCT/TAC/SR/3, 8, 14, 15, 25
EPCT/TAC/PV/14, 15, 25

Reports: GATT/CP.6/40

Reports: EPCT/135, 189, 196, 209,
214/Add.1/Rev.1

Review Session

Other: EPCT/245
EPCT/W/272, 273, 274, 277, 278,
312, 323

Reports: W.9/198, L/327, 3S/252
Other: L/189, 273, 275, 276, 292
W.9/42, 62
Spec/52/55+ Add.1-2, 56/55, 78/55,
83/55, 117/55+ Rev.1

⁴⁷L/4905, 26S/201, paras. 1-3.

⁴⁸15S/65.

ARTICLE XXXI

WITHDRAWAL

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1. TEXT OF ARTICLE XXXI

Article XXXI

Withdrawal

Without prejudice to the provisions of paragraph 12 of Article XVIII, of Article XXIII or of paragraph 2 of Article XXX, any contracting party may withdraw from this Agreement, or may separately withdraw on behalf of any of the separate customs territories for which it has international responsibility and which at the time possesses full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement. The withdrawal shall take effect upon the expiration of six months from the day on which written notice of withdrawal is received by the Secretary-General of the United Nations.

II. INTERPRETATION AND APPLICATION OF ARTICLE XXXI

1. Withdrawal from GATT

The following contracting parties notified the Secretary-General of their withdrawal from the General Agreement:

Contracting party	Effective date of withdrawal	UN Treaty Series
Republic of China	5 May 1950	55 UNTS 196
Lebanon	25 February 1951	77 UNTS 367
Liberia	13 June 1953	163 UNTS 375
Syria	6 August 1951	90 UNTS 324

See also the material on withdrawal of provisional application, in the chapter on provisional application of the General Agreement.

See also the provision in Article XXVII permitting any contracting party “to withhold or to withdraw in whole or in part any concession ... in respect of which such contracting party determines it was initially negotiated with a government that has ... ceased to be a contracting party.”

By a letter dated 27 June 1951 the Government of Czechoslovakia submitted the following comment on the withdrawal by the United States under Article XXVII of concessions which had been initially negotiated with the Government of the Republic of China:

“With reference to the notification of the United States Government (GATT/CP/115) concerning the concessions negotiated with China, I have the honour to renew the declaration made by the Czechoslovak delegate at Torquay on 6 November 1950 that Czechoslovakia does not recognize the validity of the notification of the withdrawal of China from the General Agreement on Tariffs and Trade as the notification referred to was made by persons having no legal capacity to act on behalf of China.

“For this reason Czechoslovakia considers the United States withdrawal of the concessions negotiated with China illegal.”¹

Article XXXI refers to Articles XVIII:12, XXIII and XXX:2 because these provisions refer to withdrawal.

2. Withdrawal of provisional application

The Protocol of Provisional Application of the General Agreement and the various accession protocols provide that governments applying them “shall be free to withdraw such application, and such withdrawal shall take effect upon the expiration of sixty days from the day on which written notice of such withdrawal is received”. See also the material on this subject in the chapter on provisional application of the General Agreement.

3. Termination of Provisional Application of GATT

See material in the chapters on Article XXVI, provisional application, and Institutions and Procedure.

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

The corresponding Article in the Havana Charter is Article 102. The 30 October 1947 text of the General Agreement provided that withdrawal could only be effected after 1 January 1951. The amendments to Article XXXI which were agreed at the 1954-55 Review Session deleted this date, and added a reference to paragraph 12 of Article XVIII (which was drafted at the Review Session). These amendments were effected through the Protocol Amending the Preamble and Parts II and III, which entered into force on 7 October 1957.

IV. RELEVANT DOCUMENTS

Geneva

Discussion: EPCT/TAC/PV/25
 Reports: EPCT/135, 189, 196, 209,
 214/Add.1/Rev.1
 Other: EPCT/W/273, 274, 312

Review Session

Reports: L/327, 3S/231
 Other: L/189, W.9/62

¹CP/115/Add.1

ARTICLE XXXII

CONTRACTING PARTIES

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I. TEXT OF ARTICLE XXXII

Article XXXII

Contracting Parties

1. The contracting parties to this Agreement shall be understood to mean those governments which are applying the provisions of this Agreement under Articles XXVI or XXXIII or pursuant to the Protocol of Provisional Application.

2. At any time after the entry into force of this Agreement pursuant to paragraph 6 of Article XXVI, those contracting parties which have accepted this Agreement pursuant to paragraph 4 of Article XXVI may decide that any contracting party which has not so accepted it shall cease to be a contracting party.

II. INTERPRETATION AND APPLICATION OF ARTICLE XXXII

1. Paragraph 1

(1) “governments”

The contracting parties were defined as “governments” and not as “states” or “nations” so that governments with less than complete sovereignty could be contracting parties to GATT.¹ A number of such governments have been contracting parties, including Southern Rhodesia when it was under United Kingdom sovereignty, Hong Kong and Macau.

(2) Status as a contracting party

The government of Southern Rhodesia, upon certification by the United Kingdom of its autonomy in commercial matters, participated in the negotiation of the General Agreement during the Second Session of the Preparatory Committee for the Havana Conference, was a signatory of the Final Act of the Second Session, and accepted the Protocol of Provisional Application under paragraph 3 thereof, thereby acquiring the status of a contracting party.² On 12 November 1965, the United Kingdom delegation gave notice that “Her Majesty’s Government in the United Kingdom consider the Southern Rhodesian Government’s purported declaration of

¹EPCT/198; EPCT/TAC/PV.22, pp. 21-22. Concerning acceptance of the General Agreement by “governments” see also EPCT/TAC/PV.12, EPCT/TAC/PV.13, EPCT/TAC/SR.12, EPCT/TAC/SR.13.

²See EPCT/198, report of Sub-committee on participation as full contracting parties of Burma, Ceylon and Southern Rhodesia, and attached Declaration and statement of sponsorship of Burma, Ceylon and Southern Rhodesia by UK Government.

independence to be an act of rebellion against the authority of Her Majesty's Government and against the Constitution as by law established. It is an illegal act and ineffective in law. Her Majesty the Queen, in the exercise of the authority conferred on Her by Sections 42 and 43 of the Southern Rhodesian Constitution, has accordingly dismissed the Prime Minister and Ministers of the Southern Rhodesian Government from their offices".³ However, no determination was made that Southern Rhodesia had ceased to be a contracting party in its own right nor that this status should be suspended. The Government of Zimbabwe, which became independent on 18 April 1980, did not subsequently become a contracting party through Article XXVI:5(c) nor through Article XXXIII, but succeeded to the contracting party status of Southern Rhodesia.⁴

The Government of the United Kingdom, which was internationally responsible for the territory of Palestine under a League of Nations mandate, negotiated in 1947 on behalf of the mandated territory of Palestine for concessions, and accepted the Protocol of Protocol Application under paragraph 2 thereof on behalf of the Mandated Territory of Palestine on 20 March 1948. On 15 May 1948 the League of Nations mandate was terminated. On 9 May 1949 the CONTRACTING PARTIES adopted a Declaration providing, *inter alia*, that "Whereas the Government of the United Kingdom ceased to be responsible for the mandated territory of Palestine on 15 May, 1948" and that "the United Kingdom ceased, as from 15 May 1948, to be a contracting party in respect of the territory formerly included in the Palestine mandate ...".⁵ See also the material under Articles XXVI and XXVII on international responsibility, and changes in international responsibility, for territories in respect of which a contracting party has accepted the General Agreement or has agreed to apply provisionally the General Agreement under the Protocol of Provisional Application or a protocol of accession.

At its meeting on 19 June 1992, the Council decided that the representative of the Federal Republic of Yugoslavia should refrain from participating in the business of the Council.⁶ At its meeting on 16-17 June 1993, the Council agreed in the light of United Nations General Assembly Resolution 47/1 to modify this decision as follows: "The Council considers that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the contracting party status of the former Socialist Federal Republic of Yugoslavia in the GATT, and therefore decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for accession to the GATT and that it shall not participate in the work of the Council and its subsidiary bodies. The Council further invites other committees and subsidiary bodies of the GATT, including the Committees of the Tokyo Round Agreements and the Committee on Trade and Development, to take the necessary decisions in accordance with the above".⁷

The Czechoslovak Republic ceased to exist on December 31, 1992, and ceased to be a contracting party. It was replaced by the Czech Republic and the Slovak Republic as of 1 January 1993, which each acceded to GATT effective 15 April 1993 under Protocols of Accession which provided for entry into force of their rights and obligations as of 1 January 1993.⁸

2. Paragraph 2

The Annecy Protocol, Torquay Protocol, and subsequent Protocols of Accession state that, for the purposes of Article XXXII:2, accession to the General Agreement pursuant to the respective Protocol shall be regarded as acceptance of the Agreement pursuant to paragraph 4 of Article XXVI ("paragraph 3" in Protocols drawn up before 7 October 1957 when the present text of Article XXVI came into force).⁹ Protocols of Accession also state that the government concerned "shall, upon entry into force of this Protocol ... become a contracting party to the General Agreement, as defined in Article XXXII thereof ...".¹⁰

³L/2511.

⁴In July 1981 the Council decided to cancel arrears in contributions due by Southern Rhodesia from 1965-1980 on condition that Zimbabwe remit contributions due as from the date of its independence; see L/5170, C/M/150.

⁵II/14; see also draft declaration at CP.3/17, discussion and adoption at CP.3/SR.11 p. 1-5.

⁶C/M/257 and Corr.1.

⁷C/M/264, p. 3.

⁸See Decision of 3 December 1992 on "Czech Republic and Slovak Republic - Participation in GATT - Interim Application of the General Agreement", L/7155, 39S/6; Decision of 3 December on "Czech Republic and Slovak Republic - Protocols of Accession", L/7156, 39S/6; Protocols of Accession of Czech Republic and Slovak Republic, L/ 7181 and L/7182.

⁹E.g. Annecy Protocol, para. 8, I/79.

¹⁰See, e.g., Protocols for the Accession of Bolivia and Costa Rica, 37S/5, 7.

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

There is no equivalent Article in the Havana Charter. Article XXXII was drafted at the Geneva session of the Preparatory Committee as part of the final provisions for the General Agreement. The words “or XXXIII” were added in 1948 by the Protocol Modifying Certain Provisions of the General Agreement, consequent to the revision of Article XXXIII in that Protocol.

IV. RELEVANT DOCUMENTS

Geneva

Discussion: EPCT/TAC/SR.16
EPCT/TAC/PV/25
Reports: EPCT/135, 214/Add.1/Rev.1

ARTICLE XXXIII

ACCESSION

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I. TEXT OF ARTICLE XXXIII

Article XXXIII

Accession

A government not party to this Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING PARTIES under this paragraph shall be taken by a two-thirds majority.

II. INTERPRETATION AND APPLICATION OF ARTICLE XXXIII

A. SCOPE AND APPLICATION OF ARTICLE XXXIII

1. “government...”

The contracting parties were defined as “governments” and not as “states” or “nations” so that governments with less than complete sovereignty could be contracting parties to GATT.¹ See also Article XXXII.

At the September 1992 Council meeting, the Chairman made the following statement concerning the accession of Chinese Taipei:

¹EPCT/198; EPCT/TAC/PV.22, pp. 21-22. Concerning acceptance of the General Agreement by “governments” see also EPCT/TAC/PV.12, EPCT/TAC/PV.13, EPCT/TAC/SR.12, EPCT/TAC/SR.13.

“The Chairman said that in recent months he had carried out extensive consultations on the subject of establishing a working party to consider the possible accession of Chinese Taipei, known in the GATT as the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu. All contracting parties had acknowledged the view that there was only one China, as expressed in the United Nations General Assembly Resolution 2758 of 25 October 1971. Many contracting parties, therefore, had agreed with the view of the People's Republic of China (PRC) that Chinese Taipei, as a separate customs territory, should not accede to the GATT before the PRC itself. Some contracting parties had not shared this view. There had been, however, a general desire to establish a working party for Chinese Taipei. Taking account of all the views expressed, he had concluded that there was a consensus among contracting parties on the following terms, which also met the PRC's concerns:

“First, the Working Party on China's status as a contracting party should continue its work expeditiously, taking account of the pace of China's economic reforms, and report to the Council as soon as possible.

“Second, a Working Party on Chinese Taipei should be established at the present meeting, and should report to the Council expeditiously, with the following terms of reference and composition:

Terms of reference

‘To examine the application of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (referred to as “Chinese Taipei”) to accede to the General Agreement under Article XXXIII and to submit to the Council recommendations which may include a draft Protocol of Accession.’

“... Third, the Council should give full consideration to all views expressed, in particular that the Council should examine the report of the Working Party on China and adopt the Protocol for the PRC's accession before examining the report and adopting the Protocol for Chinese Taipei, while noting that the working party reports should be examined independently.”²

The Chairman then proposed that the Council take note of his statement and agree to establish a working party on the basis of the understanding and the terms of reference and composition he had mentioned.³

2. “two-thirds majority”

The Report of the Working Party on “Accession at Annecy” of June 1949 notes that “It was agreed that the two-thirds majority required by Article XXXIII referred to such a majority of the number of contracting parties at the time at which the decision was taken, and not of the number of contracting parties at any later time at which an acceding government accedes in consequence of the decision”.⁴

During the Review Session of 1954-55, it was agreed to amend the last sentence of Article XXXIII to read: “Decisions of the CONTRACTING PARTIES under this paragraph shall be taken by a majority comprising two thirds of the contracting parties”.⁵ However, this amendment was included in the Protocol of Organizational Amendments, which did not enter into force.

3. Procedures for accession

The Protocol of Provisional Application and the original text of the General Agreement, which were drawn up at the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, were annexed to the Final Act adopted at the conclusion of that Session, dated 30 October 1947. Paragraph 4 of the Protocol of Provisional Application specified that the Protocol was open for signature by any government signatory to the Final Act, until 30 June 1948 at the latest. All of the governments signatory to the Final Act except for Chile signed the Protocol before 30 June 1948. On 7 September 1948 the CONTRACTING PARTIES decided that “a government signatory of the Final Act of October 30, 1947 on behalf of which the

²C/M/259, p. 3-4.

³*Ibid.*, p. 4.

⁴GATT/CP.3/37, adopted on 9 June 1949, II/148, 149, para. 8.

⁵L/327, adopted on 28 February, 5 and 7 March 1955, 3S/231, 252; see Secretariat proposal at L/189, p. 19..

Protocol of Provisional Application was not signed by June 30, 1948 shall not be considered to be a 'party' within the meaning of Article XXXII of the General Agreement in its provisional application and consequently that any such government may accede to such Agreement pursuant to the accession provisions of Article XXXIII".⁶ Thus, the first government to accede under Article XXXIII was Chile, which acceded under the Protocol for the Accession of Signatories to the Final Act of 30 October 1947.⁷

The modalities of accession to the GATT were first given in-depth consideration in 1949 at the Third Session, which took place in Annecy. Procedures Governing Negotiations for Accession and a Model Protocol of Accession were agreed at that time, together with the Annecy Protocol of Terms of Accession, which provided for the accession of Denmark, the Dominican Republic, Finland, Greece, Haiti, Italy, Liberia, Nicaragua, Sweden, and Uruguay. The Procedures agreed at Annecy provide: "The secretariat, on receiving a communication from a government not party to the General Agreement which wishes to enter into negotiations with contracting parties with a view to acceding to the Agreement, would notify the contracting parties ...".⁸ Upon circulation of such a communication, the Council establishes a working party to examine the application for accession to the General Agreement and to submit recommendations to the Council which may include a draft protocol of accession. Many accession negotiations have taken place at the same time as ongoing trade negotiating rounds.

At its meeting on 27 October 1993, the Council agreed that the following procedures should henceforth be followed in the organization and pursuit of negotiations on accession to the General Agreement, without prejudice to procedures currently applied.

- "1. Upon reception of a formal request for accession to the General Agreement and its approval by the Council or by the CONTRACTING PARTIES, the Secretariat will address a communication to the acceding government in which it will outline the normal procedures followed by working parties on accession, and request that the acceding government submit a Memorandum on its Foreign Trade Régime that covers but is not limited to the topics of the outline contained in the Annex [to document L/7317]. This outline may be revised and amended as necessary in future, in the light of experience and of the results of the Uruguay Round.
- "2. It would be understood that the Secretariat will continue to make available to the government of the acceding country the necessary technical assistance facilities.
- "3. It would also be understood that in the course of its deliberations, the working party may request the Secretariat to prepare background documentation on specific issues or questions regarding the acceding government's trade policies which have arisen in the course of the examination by the working party."⁹

In current practice, after submission of the memorandum on the foreign trade régime, the CONTRACTING PARTIES invite questions from all contracting parties to which the applicant government provides written answers. The discussion in the working party is reflected in the report of the working party to the Council, to which are attached a draft Decision and Protocol of Accession. Accession tariff negotiations are held between the acceding government and those contracting parties to the GATT which wish to participate therein, in parallel with the working party. The accession schedule of concessions is annexed to the draft Protocol of Accession; it contains the concessions of the applicant government, and may include concessions of other governments. When the tariff negotiations have been concluded, the report of the accession working party together with the draft Decision and Protocol of Accession are submitted to the Council for adoption of the report and approval of the texts of the draft Decision and Protocol of Accession. A decision on accession is taken, by a two-thirds majority of the contracting parties, and the Protocol then enters into effect thirty days after signature by the applicant government.¹⁰

⁶GATT/CP/1 p. 36.

⁷62 UNTS 68, signed at Geneva on 14 September 1948, entered into force 14 September 1948.

⁸I/110.

⁹L/7317, "Accession to the General Agreement - Complementary procedures to be followed in the organization and pursuit of negotiations", with attached "Outline Format for a Memorandum on the Foreign Trade Régime".

¹⁰See INT(80)42, "The Developing Countries and Accession to the GATT", Secretariat Note dated 23 September 1980.

At the November 1994 Council meeting, the Chairman of the Council made a statement on management of accession negotiations.

“... After consultations with delegations, it has ... been possible to identify a certain number of points which may help to guide both the Secretariat and governments in handling the negotiations on accession. These points ... are of an indicative nature; their aim is to rationalize the manner of work on accession negotiations when an unusually large number of requests for accession must be dealt with. They are not intended in any way to substitute for the established procedures which are maintained.

“The points are as follows:

- “1. the management of accession negotiations in the GATT should ensure the wider acceptance and effective application of rules and disciplines under the GATT, thus contributing towards the reform processes in the applicant countries or territories, and towards the objective of further strengthening the multilateral trading system;
- “2. there shall be no lowering of present standards for terms of accession to GATT;
- “3. accession negotiations should be limited to issues related to GATT rights and obligations including market access to the applicant country or territory;
- “4. accession negotiations should be approached on a case-by-case basis, while respecting the established procedures for negotiations with all applicants;
- “5. adequate lead-time should be allowed in the preparatory stage of accession negotiations before meetings of the respective working parties are convened, in order to allow both the applicant government and members of the working party to better prepare themselves;
- “6. in line with 5 above, more than one round of questions and answers may be organized if necessary; subsequent rounds will be designed to select and clarify issues before an initial meeting of the working party;
- “7. adequate lead-time should be allowed for governments to examine documentation;¹¹ the conformity of such documentation with established procedures should be checked in advance by the Secretariat, which would inform contracting parties and the applicant government of its views;
- “8. the Secretariat may be invited to examine the technical assistance requirements of the applicant government so as to elaborate its own plans for assistance and further coordinate them with those of individual governments;
- “9. the applicant government should be encouraged to undertake the necessary in-depth preparation for the accession negotiations before the working party meetings, *inter alia*, through informal consultations with contracting parties and the Secretariat;
- “10. applicant governments should also avail themselves, to the extent possible, of the training activities of GATT as part of their preparation for negotiations and to fully use their GATT observer status, in particular, to attend meetings of other accession working parties and of various committees.”¹²

Tables on accessions appear in the Appendix.

See also the material on non-reciprocity for developing countries under Article XXXVI:8.

¹¹i.e. three to four weeks.

¹²C/COM/4, 16 November 1994.

4. “terms to be agreed between such government and the CONTRACTING PARTIES”

(1) *Provisions in protocols of accession*

Certain provisions have appeared in almost all protocols of accession since the Annecy Protocol. The following text is drawn from the Decision and Protocol of Accession of Bolivia. Cross-references are provided to the places in this Index where material on the provision concerned can be found.

“The CONTRACTING PARTIES...

“Decide, in accordance with Article XXXIII of the General Agreement, that the Government of [...] may accede to the General Agreement on the terms set out in the Protocol of Accession.

“*PROTOCOL OF ACCESSION OF [...]*”

“The governments which are contracting parties to the General Agreement on Tariffs and Trade (hereinafter referred to as ‘contracting parties’ and the ‘General Agreement’, respectively), the European Economic Community and the Government of [...] (hereinafter referred to as ‘[...]’),¹³....

“Have through their representatives agreed as follows:

PART I - GENERAL

“1. [...] shall, upon entry into force of this Protocol pursuant to paragraph 6, become a contracting party to the General Agreement, as defined in Article XXXII thereof,¹⁴ and shall apply to contracting parties provisionally and subject to this Protocol:

- (a) Parts I, III and IV of the General Agreement, and
- (b) Part II of the General Agreement to the fullest extent not inconsistent with the relevant legislation of [...] existing on the date of this Protocol.¹⁵

The obligations incorporated in paragraph 1 of Article I by reference to Article III and those incorporated in paragraph 2(b) of Article II by reference to Article VI of the General Agreement shall be considered as falling within Part II for the purpose of this paragraph.¹⁶

“2. (a) The provisions of the General Agreement to be applied to contracting parties by [...] shall, except as otherwise provided in this Protocol, be the provisions contained in the text annexed to the Final Act of the second session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as rectified, amended or otherwise modified by such instruments as may have become effective on the day on which [...] becomes a contracting party.¹⁷

¹³The reference to the European Economic Community is necessary because the EEC is not itself a contracting party.

¹⁴See material on Article XXXII in this Index.

¹⁵Concerning the definition of “existing legislation” and the relevant date for the purpose of provisional application, see the chapter on provisional application of the General Agreement.

¹⁶This sentence replaces for the acceding contracting party the provisions of the first interpretative note to Article I:1. See references to this note under Articles I and II.

¹⁷The text annexed to the Final Act of the second session of the Preparatory Committee of the United Nations Conference on Trade and Employment is the text of the General Agreement as agreed on 30 October 1947 (55 UNTS 187, UN Sales No. 1947.II/10). A list and overview of the amendments to the General Agreement can be found under Article XXX. A list of the sources of each of the provisions of the present text of the General Agreement, their effective dates and their respective citations in the United Nations *Treaty Series* or in GATT publications appears as an appendix to the text of the General Agreement published by the GATT Secretariat.

(b) In each case in which paragraph 6 of Article V, sub-paragraph 4(d) of Article VII, and sub-paragraph 3(c) of Article X of the General Agreement refer to the date of that Agreement, the applicable date in respect of [...] shall be the date of this Protocol.¹⁸

PART II - SCHEDULE

“3. The schedule in the Annex shall, upon the entry into force of this Protocol, become a schedule to the General Agreement relating to [...].

“4. (a) In each case in which paragraph 1 of Article II of the General Agreement refers to the date of the Agreement, the applicable date in respect of each product which is the subject of a concession provided for in the Schedule annexed to this Protocol shall be the date of this Protocol.¹⁹

(b) For the purpose of the reference in paragraph 6(a) of Article II of the General Agreement to the date of that Agreement, the applicable date in respect of the Schedule annexed to this Protocol shall be the date of this Protocol.²⁰

PART III - FINAL PROVISIONS

“5. This Protocol shall be deposited with the Director-General to the CONTRACTING PARTIES. It shall be open for acceptance, by signature or otherwise, by [...] until [date].²¹ It shall also be open for acceptance by contracting parties and by the European Economic Community.

“6. This Protocol shall enter into force on the thirtieth day following the day upon which it shall have been accepted by [...].

“7. [...] having become a contracting party to the General Agreement pursuant to paragraph 1 of this Protocol, may accede to the General Agreement upon the applicable terms of this Protocol by deposit of an instrument of accession with the Director-General. Such accession shall take effect on the day on which the General Agreement enters into force pursuant to Article XXVI or on the thirtieth day following the day of the deposit of the instrument of accession, whichever is the later. Accession to the General Agreement pursuant to this paragraph shall, for the purposes of paragraph 2 of Article XXXII of that Agreement, be regarded as acceptance of the Agreement pursuant to paragraph 4 of Article XXVI thereof.²²

“8. [...] may withdraw its provisional application of the General Agreement prior to its accession thereto pursuant to paragraph 7 and such withdrawal shall take effect on the sixtieth day following the day on which written notice thereof is received by the Director-General.²³

“9. The Director-General shall promptly furnish a certified copy of this Protocol and a notification of each acceptance thereof, pursuant to paragraph 6 to each contracting party, to the European Economic Community, and to [...].

“10. This Protocol shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.²⁴

¹⁸The text of each of these provisions refers to “the date of this Agreement”: see the discussion in this Index under Article XXVI:1 and each of these provisions. Article XXVI:1 provides that “The date of this Agreement shall be 30 October 1947”. This paragraph in the accession protocol replaces that date, for the purpose of the obligations of the acceding contracting party, with the date of the accession protocol.

¹⁹See the material on “date of this Agreement” under Article II:1.

²⁰See the material in this Index on Article II:6(a) and the adjustment of specific duties.

²¹The accession protocol of Cambodia, which was agreed in 1961 and provided no deadline for acceptance, has not yet been accepted by Cambodia. Later protocols of accession have provided for a deadline for acceptance by the acceding contracting party.

²²See the material under Article XXVI:4 in this Index.

²³See material on withdrawal of provisional application in the chapter of this Index on provisional application of the General Agreement.

²⁴See the discussion of registration under Article XXVI in this Index.

“DONE at Geneva on [date] in a single copy, in the English, French and Spanish languages, except as otherwise specified with respect to the Schedule annexed hereto²⁵, each text being authentic.”

(2) *Reservations in accession protocols and commitments in accession protocols*

Paragraph 4 of the protocol of accession of Switzerland provides a reservation with regard to the application of the provisions of Article XI of the General Agreement to the extent necessary to permit Switzerland to apply import restrictions pursuant to certain Swiss legislation; see under Article XI. Paragraph 5 of the same protocol provides a reservation with regard to the provisions of Article XV:6: see under Article XV:6.²⁶ By the Decision of 1 April 1966 “The CONTRACTING PARTIES, acting pursuant to Article XXXIII of the General Agreement, decide that Switzerland may accede to the General Agreement on the terms set out in the said Protocol.”²⁷

The Protocols of Accession of Poland, Romania, and Hungary (and the corresponding Decisions on accession) each provide for a reservation with respect to Article XV:6 identical to that of Switzerland.²⁸

Other protocols of accession have provided for time-limited reservations for existing measures inconsistent with the General Agreement, such as certain internal taxes of the Philippines and Thailand²⁹, the Egyptian consolidation of economic development tax and import taxes and surcharges of Costa Rica³⁰, and quantitative restrictions maintained by Costa Rica.³¹

Certain recent accession protocols also refer to additional commitments listed in specified paragraphs of the relevant accession working party report. Issues dealt with in these commitments have included, for instance: elimination of discrimination in internal taxation or of import charges in excess of bound duty rates; application of customs charges consistent with Articles II and VIII; trade effects of maximum price controls on consumer items; customs valuation practices including elimination of uplifts or official prices; publication of trade regulations; elimination of quantitative restrictions; notification and consultation on request regarding quantitative restrictions; non-discriminatory application of quantitative restrictions; non-arbitrary application of technical standards and certification requirements to imports; application of anti-dumping measures only in accordance with Article VI and of safeguard measures only in accordance with Article XIX; notification of subsidies under Article XVI and of state trading under Article XVII; reduction of certain export financing programmes; elimination of domestic-content requirements for purchasing by State enterprises; operation of free trade zones; revision of rules of regional trade groupings so as to be compatible with GATT; notification and periodic reporting on regional trade agreements to which the acceding government is a party; and acceptance of Tokyo Round agreements such as those on import licensing, customs valuation and anti-dumping procedures.³²

See also the discussion of reservations on acceptance under Article XXVI, and the discussion of reservations to protocols of amendment under Article XXX.

²⁵While each of the English, French and Spanish texts of the accession protocol itself is authentic, in order to avoid the burden of translation and authentication of other-language texts of entire tariff schedules, the Schedule of concessions attached thereto is authentic only in the language specified by the contracting party submitting it. See the material on authentic text under Article XXVI:3.

²⁶14S/7, 8-9.

²⁷14S/13, 14.

²⁸15S/46, 49-50, para. 8 (Poland); 18S/5, 8, para. 7 (Romania); 20S/3, 6, para. 8 (Hungary).

²⁹See Article III.

³⁰See Article II.

³¹See Article XI.

³²See, e.g. Protocols for Accession of Mexico (reference to commitments in paragraph 83 of L/6010, adopted on 15 July 1986, 33S/57), L/6036, 33S/3, 4, para. 2; El Salvador (reference to commitments in paragraph 58 of L/6771), L/6795, 37S/27, 28 para. 2(a); Venezuela (reference to commitments in paragraph 90 of L/6696), L/6717, 37S/72, para. 2(a); and Guatemala (reference to commitments in paragraph 47 of L/6770, adopted on 6 February 1991, 38S/3, 16), L/6826, 38S/16, 17, para. 2.

5. Provisional accession

“Provisional accession” was a concept used during the 1955-1975 period. It was first implemented in the case of Switzerland.³³ The 1956 Report of the Working Party on “Arrangements and Procedures for the Accession of Switzerland”³⁴ recommended arrangements and procedures to enable Switzerland to accede to the GATT, in the first place provisionally and then definitively. These arrangements provided that Switzerland would “enter into tariff negotiations with a view to provisional accession”³⁵ and that a declaration would be drawn up providing for entry into force of the tariff concessions for a limited period, and for trade between the signatories and Switzerland to be governed by its terms which would incorporate by reference all the provisions of the General Agreement. The Declaration would be accepted as valid even though accompanied by certain reservations by Switzerland. “The Working Party felt that it was desirable that a fixed period should be specified for the duration of the period of provisional accession. They felt that this period, which might be extended upon request of Switzerland by a decision of the CONTRACTING PARTIES, should be relatively short ...”.³⁶

Upon completion of the arrangements for provisional accession the CONTRACTING PARTIES adopted a Declaration on “Provisional Accession of the Swiss Confederation”³⁷ and a Resolution on “Participation of Switzerland in the work of the CONTRACTING PARTIES.”³⁸ At the same time they placed the following Understanding on record:

“In view of the wording of the provisions of Articles XXV and XXXII, it is not possible, from a strictly legal point of view, to give full voting rights to Switzerland. However, in the normal course of business this is not very important since the CONTRACTING PARTIES do not usually proceed to a formal vote in reaching decisions; generally the Chairman takes the sense of the meeting and Switzerland would have the same opportunity as contracting parties to express its opinion”.³⁹

A similar understanding had been recorded with respect to the 1953 Declaration on “Commercial Relations between certain Contracting Parties to the General Agreement and Japan”.⁴⁰

The Declaration on Swiss provisional accession provided that “the commercial relations between the participating countries and the Swiss Confederation shall ... be based upon the General Agreement as if the Swiss Confederation had acceded to the General Agreement in accordance with the relevant procedures and as if the schedules annexed to this Declaration were schedules annexed to the General Agreement”.⁴¹ Provisional accession subsequently granted to other governments, pending their definitive accession, was not accompanied by tariff negotiations.

The Chairman of the 1959 Working Party which recommended provisional accession for Israel explained that “although the provisions of Article XXXIII of the General Agreement did not specifically require countries to enter into tariff negotiations before accession, the Working Party had thought it desirable to follow the precedent set by the CONTRACTING PARTIES in dealing with previous requests for accession and to await the outcome of tariff negotiations before drawing up the terms for the full accession of Israel. ... As Israel will accede provisionally to the General Agreement without a schedule of tariff concessions ... the Working Party had felt that contracting parties accepting the Declaration should not have to accept direct obligations towards Israel in respect of the modification or withdrawal of tariff concessions. Israel would, however, receive the benefits of most-favoured-nation treatment under Article I of the General Agreement”.⁴²

³³Provisional accession as a concept was earlier proposed by Japan in 1953, to facilitate accession by Japan in advance of the next general round of trade negotiations (see L/109, proposal by Japan of 4 August 1953); however it was instead decided to adopt the Decision of 23 October 1953 on “Participation of Japan in the Sessions of the Contracting Parties” (2S/30) and the Declaration of 24 October 1953 on “Commercial Relations between Certain Contracting Parties to the General Agreement and Japan” (2S/31). See also L/107, Secretariat Note of 20 August 1953, and G/55/Rev.1, Report on “Arrangements for Japanese Participation”, adopted 23 October 1953, 2S/117.

³⁴L/598, adopted on 17 November 1956, 5S/40; SR.11/18, p. 203.

³⁵L/598, adopted on 17 November 1956, 5S/40, 44, para. 13.

³⁶L/598, adopted on 17 November 1956, 5S/40, 43, 44; SR.11/18, p. 203.

³⁷Declaration of 22 November 1958, 7S/19.

³⁸Resolution of 22 November 1958, 7S/18.

³⁹SR.13/1, p. 3.

⁴⁰Declaration of 24 October 1953, 2S/30-32.

⁴¹7S/19, para. 1.

⁴²SR.14/10, p. 119/120; see also 8S/60, para. 5.

There have been no formal arrangements for provisional accession since 1975, the date of the Declaration on Provisional Accession of Colombia. While there have been requests for provisional accession in a few cases, each of the governments concerned has decided to proceed directly to the accession process without the intermediate step of provisional accession.⁴³

A table of provisional accessions appears in the Appendix to this book.

6. De facto application of the General Agreement

See Article XXVI.

B. RELATIONSHIP BETWEEN ACCESSION UNDER ARTICLE XXXIII AND SUCCESSION TO CONTRACTING PARTY STATUS UNDER ARTICLE XXVI:5(c)

Article XXVI:5(c) provides that if any customs territory in respect of which a contracting party has previously accepted the Agreement possesses or acquires autonomy in respect of its external commercial relations and the other matters provided for in the General Agreement, it shall be deemed to be a contracting party if it is sponsored by the responsible contracting party through submission of a declaration establishing the fact of such autonomy. A government becoming a contracting party under Article XXVI:5(c) does so on the terms and conditions previously accepted by the metropolitan government on behalf of the territory in question, including any applicable Schedule of concessions. For this reason, some newly-independent States which were eligible to use the special procedure for succession to contracting party status under Article XXVI:5(c) have opted instead for accession under Article XXXIII.⁴⁴ For instance, Cambodia chose to accede under Article XXXIII in order not to assume the former Schedule of concessions of France for Indo-China.⁴⁵

In 1972, upon its independence, Bangladesh requested accession to GATT in accordance with the provisions of Article XXXIII. In Council discussion, a number of contracting parties considered that

“Given the undertaking of Bangladesh to accept the full obligations of a schedule of tariff bindings identical with that applied before independence, pending its renegotiation under Article XXVIII, as well as all other obligations of GATT membership ... it [was not] necessary to set up the usual working party to consider and report on the suitability of Bangladesh membership. As the circumstances in this case were unusual the CONTRACTING PARTIES should be ready to modify the usual procedures in dealing with it.”⁴⁶

An accession Protocol was drawn up on these terms and Bangladesh became a contracting party to the General Agreement.⁴⁷

⁴³See Application of Costa Rica for provisional accession in L/5830, discussion at C/M/191; Costa Rica decided to accede to the General Agreement without provisional accession.

⁴⁴See, e.g., L/3339 and C/M/61, p. 18 concerning the request for accession by the Democratic Republic of Congo, and more generally the Note by the Secretariat on “Developing Countries and Accession to the GATT”, INT(80)42 of 23 September 1980.

⁴⁵A Recommendation of 22 November 1957 (6S/10), stating that “Cambodia ... [has] possessed ... full autonomy for a considerable period and ... it would be appropriate to apply the recommended procedures [for sponsorship under Article XXVI:5(c)]” to Cambodia, provided for application of the General Agreement *de facto* by contracting parties in their relations with Cambodia (see also GATT/CP.5/50, GATT/CP.5/SR.24, p. 3). Such application was then extended “until such time as Cambodia accedes to the General Agreement” by the Decision of 17 November 1958 on “Arrangements for the Accession of Cambodia” (7S/17). In 1958 Cambodia requested accession under Article XXXIII, not Article XXVI:5(c), in order not to assume the former Schedule of concessions of France for Indo-China; see statement in L/900, Spec/275/58. Cambodia then negotiated a Protocol of Accession under Article XXXIII (11S/12), including negotiation of a Schedule of concessions. The Protocol provided that it was opened to signature by Cambodia, by contracting parties and by the European Community, with no deadline for signature. In 1964 Cambodia advised that it did not, for the moment, envisage accepting the accession Protocol (L/2271). As Cambodia has not yet signed its Protocol of Accession, this Protocol has not entered into force. The concessions initially negotiated with Cambodia by Czechoslovakia, the EEC and Norway have not been withdrawn under Article XXVII. As of August 1995, Cambodia has not requested succession to contracting party to the General Agreement under Article XXVI:5(c), and appears in the list of *de facto* contracting parties in the appendix.

⁴⁶C/M/81, p. 2. See also L/3752, Communication from Bangladesh seeking accession under Article XXXIII, and discussion at SR.28/6, p. 81-85.

⁴⁷Protocol for the Accession of the People’s Republic of Bangladesh, 19S/3; L/3771, Decision of 10 November 1972 on “Accession of the People’s Republic of Bangladesh”, 19S/6.

In 1992, Slovenia became independent and requested accession under Article XXXIII, stating at the July 1992 Council meeting that

“Slovenia intended to continue to apply the GATT’s provisions in force before its independence, including the obligations pursuant to the Schedule of Concessions of the former SFRY [Socialist Federal Republic of Yugoslavia]. Slovenia expected that the terms of accession to be agreed upon by itself and the CONTRACTING PARTIES should reflect the conditions that had prevailed thus far.... Her Government considered that the existing GATT provisions did not adequately address situations such as that of Slovenia. In the absence of more appropriate provisions, however, it had decided to seek accession to the General Agreement in accordance with the provisions of Article XXXIII, with the hope that the CONTRACTING PARTIES would be prepared to accept Slovenia as a contracting party without further negotiations and to agree that the terms of accession should reflect the conditions which had thus far prevailed.... In Slovenia’s case... there was no legal and internationally-recognized entity of the former SFRY that could make the necessary declaration on its behalf under Article XXVI:5(c). Slovenia hoped, therefore, that the Council would agree to accept its proposal, and requested the Secretariat to draft a Protocol of Accession which would include a Schedule identical to that applied before independence. ...”

A number of delegations stated that

“... they could not accept Slovenia’s immediate accession without negotiations, as had been done when Bangladesh had applied for accession ... They suggested that it would be in both Slovenia’s and the CONTRACTING PARTIES’ interests to follow the normal accession procedures of Article XXXIII, and requested that a working party with standard terms of reference be established to examine Slovenia’s request, including the memorandum on its foreign trade régime, and to prepare the necessary instruments. They would work constructively in the working party with a view to concluding the process as quickly as possible.”

The establishment of a working party in accordance with Article XXXIII procedures was accepted by Slovenia and the Council so decided.⁴⁸ See also under Article XXXII concerning the contracting party status of Yugoslavia.

On 27 November 1992, the Czech and Slovak Federal Republic (CSFR) submitted a Request for Participation in GATT of the Czech Republic and the Slovak Republic.⁴⁹ At the Forty-eighth Session in December 1992, the Chairman

“recalled that the CSFR had announced that it would cease to exist on 31 December 1992 and that, as of 1 January 1993, that State would be replaced by two successor States, the Czech Republic and the Slovak Republic. Both these States had expressed their interest in becoming GATT contracting parties and their determination to continue to fulfil the obligations incumbent upon the CSFR under the General Agreement, including in particular those set up in Schedule X. Moreover, the Czech Republic and the Slovak Republic had also undertaken to accept the Arrangement Regarding International Trade in Textiles and its Protocols of Extension, as well as the Tokyo Round Agreements and Arrangements to which the CSFR was currently a party, namely the Agreement on Technical Barriers to Trade, the Agreement on Implementation of Article VII, the Agreement on Import Licensing Procedures, and the Agreement on Implementation of Article VI.

“It appeared that contracting parties were ready to agree that the Czech Republic and the Slovak Republic accede to the General Agreement, pursuant to Article XXXIII, under the same terms as those presently applied by the CSFR, without carrying out any negotiations, and to agree on transitional arrangements for the interim period until the necessary procedures had been fulfilled”

The representative of the US then stated that

“... The Chairman’s statement had indicated that in the case of the accessions to GATT of the Czech Republic and the Slovak Republic under Article XXXIII, negotiations would not be necessary. The United

⁴⁸C/M/258 pp. 3-5.

⁴⁹L/7127, “Czech and Slovak Federal Republic - Request for Participation in GATT of the Czech Republic and the Slovak Republic,” dated 27 November 1992.

States did not intend that the participation in the GATT of the newly independent states should be on a basis that was different from that of the CSFR. However, it needed to place on record the conditions under which – in this situation and in potential similar situations in the future – it could accept that negotiations were not necessary. These conditions were: (1) that the defunct State had a high level of obligations under GATT with a bound tariff schedule at meaningful levels; (2) that the new States were fully willing and able to accept an identical level of obligations and the same tariff schedule; and, (3) that the new States were not contemplating important reorientations to their basic trade and economic policies which would nullify or impair trade opportunities enjoyed by other contracting parties in their markets.”

The CONTRACTING PARTIES took note of the statements and adopted a “Decision on Interim Application of the General Agreement”:

“The CONTRACTING PARTIES, acting pursuant to Article XXV of the General Agreement,

“*Decide*, in view of the exceptional circumstances, to apply, from 1 January 1993, the General Agreement and the relevant instruments negotiated under the auspices of the GATT, to the Czech Republic and the Slovak Republic, on an interim basis, as if they had already acceded thereto. It shall be understood that the Czech Republic and the Slovak Republic will also apply the General Agreement and the relevant instruments to the contracting parties and that their respective Protocols of Accession will provide for the acceptance and entry into force of their rights and obligations as of 1 January 1993. During the transitional period, the Governments of the Czech Republic and the Slovak Republic are entitled to participate in all activities of the CONTRACTING PARTIES and their subsidiary bodies but shall not participate in the decision-making process. This transitional arrangement shall expire on the date of entry into force of the respective Protocols of Accession to the General Agreement of the Czech Republic and the Slovak Republic, or on 1 May 1993, whichever date is the earlier.”⁵⁰

At the same time a Decision was adopted inviting the Secretariat to prepare draft protocols of accession and accession decisions for the Czech Republic and Slovak Republic, and stating that tariff schedules encompassing the concessions in Schedule X - Czechoslovakia were to be annexed to each protocol of accession.⁵¹ Pursuant to this Decision the protocols and decisions were submitted for approval by the Council at its first meeting in 1993. Upon approval at the February 1993 Council meeting, the texts of the Protocols were put to a vote, and when the required two-thirds majority had been obtained, the Protocols of Accession were opened for acceptance and entered into force for the Czech Republic and for the Slovak Republic on 15 April 1993, thirty days after each had accepted its Protocol.

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

The Article in the Havana Charter corresponding to GATT Article XXIII is Article 71.

The text of the General Agreement as adopted 30 October 1947 required the consent of all contracting parties as a precondition to accession of any new contracting party. Since Article 17 of the Havana Charter permitted contracting parties to the GATT to withhold application of concessions in their GATT Schedules with respect to the trade of an ITO Member that had not become a GATT contracting party, it was proposed during the Havana Conference “to amend the GATT to permit the admission of a country as a contracting party upon a vote of two-thirds of the contracting parties instead as of a unanimous vote as at present required”. Accordingly, the second sentence of Article XXXIII, which changed the unanimity requirement by providing for decisions taken by a two-thirds majority, was added by the 1948 Protocol Modifying Certain Provisions, which entered into force on 15 April 1948.⁵² At the same time, Articles XXXV and XXV:5(b) were added; see section III under Article XXXV.

During the Review Session it was agreed to amend Article XXXIII to provide that the terms of accession would be agreed between the acceding government and the Organization for Trade Cooperation, and that the acceding government would be required to accept the Agreement on the Organization for Trade Cooperation;

⁵⁰L/7155, Decision of 3 December 1993, 39S/6.

⁵¹L/7156, Decision of 3 December 1993, 39S/6-7; Draft Protocols and decisions on accession at C/W/725, C/W/726.

⁵²Havana Reports, p. 162, para. 7(a).

the amended Article XXXIII would also have clarified the majority requirement for accession decisions. The provisions on accession on behalf of a separate customs territory would have been moved into an interpretative note.⁵³ However, these amendments were contained in the Protocol of Organizational Amendments to the General Agreement, which did not enter into force.

IV. RELEVANT DOCUMENTS

Geneva

Discussion: EPCT/TAC/SR.16
EPCT/TAC/PV/22, 25
Reports: EPCT/135, 189, 196, 206, 209,
214/Add.1/Rev.1
Other: EPCT/W/273, 274, 285, 312

Review Session

Discussion: SR.9/38
Reports: W.9/198, W.9/215+Corr.1,
3S/233-234, 252
Other: L/189, L/292, W.9/62, W.9/93,
W.9/151

CONTRACTING PARTIES

Discussion: GATT/CP.2/SR.8, 11, 15, 20, 24
Reports: GATT/CP.2/20, 29
GATT/CP.3/37

⁵³See 3S/233-234 and 3S/252.

ARTICLE XXXIV

ANNEXES

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I. TEXT OF ARTICLE XXXIV

Article XXXIV

Annexes

The annexes to this Agreement are hereby made an integral part of this Agreement.

II. INTERPRETATION AND APPLICATION OF ARTICLE XXXIV

Article XXXIV was inserted during the negotiation of the text of the General Agreement at Geneva in 1947, to give the Interpretative Notes (Annex I) the same legal value as the provisions of the Agreement.¹ The Havana Charter also included Interpretative Notes which were negotiated concurrently with the Charter text, and an Article (105) corresponding to Article XXXIV.² At the Review Session of 1954-55 it was agreed to amend the title of Annex I to read "Notes and Supplementary Provisions". This amendment was effected through the Protocol amending the Preamble and Parts II and III, which entered into force on 7 October 1957.

III. RELEVANT DOCUMENTS

Geneva

Discussion: EPCT/A/PV/20
EPCT/TAC/PV/18, 25
Reports: EPCT/196, 214/Add.1/Rev.1

¹EPCT/TAC/PV.18, pp. 19-25. See also EPCT/A/PV/20.

²See Secretariat proposals at L/189, Legal and Drafting Committee Report at W.9/236.

ARTICLE XXXV

NON-APPLICATION OF THE AGREEMENT BETWEEN PARTICULAR CONTRACTING PARTIES

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I. TEXT OF ARTICLE XXXV

Article XXXV

Non-application of the Agreement between particular Contracting Parties

1. This Agreement, or alternatively Article II of this Agreement, shall not apply as between any contracting party and any other contracting party if:

- (a) the two contracting parties have not entered into tariff negotiations with each other, and
- (b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application.

2. The CONTRACTING PARTIES may review the operation of this Article in particular cases at the request of any contracting party and make appropriate recommendations.

I. INTERPRETATION AND APPLICATION OF ARTICLE XXXV

A. SCOPE AND APPLICATION OF ARTICLE XXXV

1. Paragraph 1

(1) “entered into tariff negotiations”

At the Second Session in September 1948, in answer to a question whether the two conditions, in (a) and (b) of paragraph 1, were meant to be independent or cumulative, the Chairman of the CONTRACTING PARTIES replied that “according to the paragraph, if two countries, one of which was a contracting party and the other of which was acceding to the General Agreement, had not entered into negotiations, either of them,

the contracting party or the acceding party, could decide that the Agreement or Article II should not apply between them when the second party became a contracting party”.¹

The Chairman of the CONTRACTING PARTIES ruled on 31 May 1949 during the round of trade negotiations held at Annecy that “delegations should be deemed to have entered into negotiations when they had held a first meeting scheduled by the Tariff Negotiations Working Party at which they had exchanged lists of offers”.² It was stated during the discussions leading to this ruling that “Article XXXV would only apply when negotiations had not been entered into. Any contracting party could avail itself of paragraph 5(b) of Article XXV when negotiations had been entered into but not satisfactorily concluded, and its case would be considered by the CONTRACTING PARTIES, acting jointly”.³

A 1965 Note by the Director-General on “The Application of Article XXXV in Relation to the Present Trade Negotiations” refers to the 1949 Chairman’s ruling, and notes that “In the case of two contracting parties which are not applying the GATT to each other by virtue of an earlier invocation of Article XXXV by one of them, the procedure in the past has been that the latter, unless it intended to withdraw its invocation of the Article, would not submit offers to the other. The ruling and the procedure ... are based on the earlier technique of tariff negotiation under which offers are made by each participant to other individual participants”. The Note discusses the application of Article XXXV in the Kennedy Round negotiations.⁴

The Torquay Protocol of 1951 included the Philippines as an acceding government. The United States invoked Article XXXV with respect to the Philippines, noting that it had not entered into tariff negotiations with the Philippines at Torquay, and citing US legislation which provided that no trade agreement should be concluded by the United States under the Trade Agreements Act so long as a 1946 agreement on trade and other matters between the two countries was in force.⁵ However, the Philippines did not sign the Torquay Protocol and acceded to the GATT in 1979.

The Report of the Working Party on “Accession of Romania” notes that “The representative of the United States said that under the legislation in force in his country, his Government would have to invoke Article XXXV of the General Agreement with regard to Romania. The United States could therefore not take part in negotiations on the Romanian import commitment; if the legislative situation changed, his Government might, however, at a later stage, after the accession of Romania to GATT, enter into negotiations with that country”.⁶

On 23 March 1994, the Council adopted the following Decision on “Interpretation of Article XXXV”:

“The CONTRACTING PARTIES,

“*Having* regard to the linked provisions of paragraph 1 of Article XXXV of the General Agreement on Tariffs and Trade;

“*Noting* that by invoking Article XXXV a contracting party on the one hand, or a government acceding to the General Agreement on the other, declines to apply the General Agreement, or alternatively Article II of that Agreement, to the other party;

“*Desiring* to ensure that tariff negotiations between contracting parties and a government acceding to the General Agreement are not inhibited by unwillingness to accept an obligation to apply the General Agreement as a consequence of entry into such negotiations;

¹GATT/CP.2/SR.18, p. 4. The immediate context was the possibility of invoking Article XXXV in order to solve problems created for certain contracting parties by the insertion of the present text of Article XXIX:1.

²II/35; see also GATT/CP.3/SR.19, p. 8.

³GATT/CP.3/SR.15 p. 5. Concerning Article XXV:5(b), which was deleted by the Protocol Amending the Preamble and Parts II and III of the GATT, see at page 1038 below.

⁴TN.64/60, paras. 3-4.

⁵GATT/CP/109, dated 13 April 1951.

⁶L/3557, adopted on 6 October 1971, 18S/94, 97, para. 16. See also discussion of Romanian accession under Article II.

“Decide as follows:

“A contracting party and a government acceding to the General Agreement on Tariffs and Trade may engage in negotiations relating to the establishment of a GATT schedule of concessions by the acceding government without prejudice to the right of either to invoke Article XXXV in respect of the other.”⁷

(2) *“or alternatively Article II of this Agreement”*

All past invocations of Article XXXV have related to the non-application of the General Agreement and not only of its Article II under the alternate clause of Article XXXV:1.

2. Paragraph 2: “review the operation of this Article”

When Article XXXV was drafted at the First Session of the CONTRACTING PARTIES in 1948, the second paragraph of Article XXXV was proposed by the United Kingdom representative.⁸ It was stated in the course of the discussion that “the draft was designed to provide for those cases where a party felt it had received inequitable treatment at the hands of another”.⁹

In 1961 the CONTRACTING PARTIES reviewed the operation of Article XXXV with respect to Japan¹⁰ and in December 1961 adopted the Report of the Working Party on “Article XXXV - Application to Japan”.¹¹ The extent of invocation of Article XXXV with respect to Japan was discussed on many occasions by the contracting parties during the decade following the accession of Japan.

3. Relationship between Article XXXV and other GATT Articles

(1) *Article XXXIII*

In 1951, Cuba declared that it was voting for the accession of several countries but invoking Article XXXV against them.¹² Also in 1951, the United States voted in favour of the accession of the Philippines while invoking Article XXXV.¹³ Although 14 of the 33 contracting parties in 1955 invoked Article XXXV with respect to Japan, Japan obtained a two-thirds majority in favour of its accession.

During Council discussion of Romania’s application of accession to GATT in October 1971, “The Chairman confirmed that there was nothing in the rules of the GATT which would prevent a contracting party from voting in favour of a decision pursuant to Article XXXIII, even if it did not consent to apply the General Agreement to the newly acceding country in accordance with Article XXXV”.¹⁴

(2) *Article XXVI:5*

In a number of instances, governments have invoked or disinvoked Article XXXV in respect of territories for which they had international responsibility at the time and in respect of which they had agreed to apply provisionally the General Agreement under paragraph 2 of the Protocol of Provisional Application.¹⁵

The Report of the Working Party on “Article XXXV - Application to Japan” discussed the question of the invocation of Article XXXV by governments assuming in their own right the status of contracting parties pursuant to Article XXVI:5(c). The Report provides that “... if Article XXXV had been invoked in respect of

⁷L/7435, Decision of 23 March 1994; see also in C/M/240, C/M/241, C/M/243, C/M/268, SR.49/1, C/M/270, C/M/271, and C/W/775.

⁸GATT/1/42.

⁹GATT/1/SR.11, p. 2.

¹⁰See L/1432, L/1531.

¹¹L/1545, adopted on 7 December 1961, 10S/69.

¹²CP/111.

¹³GATT/CP/109, dated 13 April 1951.

¹⁴C/M/73, p.2.

¹⁵See, e.g., L/3396 (disinvocation of Article XXXV by the United Kingdom in respect of certain territories for which it had international responsibility) and lists below.

that territory (or if that territory had not been specifically excluded from such an invocation), it would continue to be valid unless expressly disinvoked by the succeeding government".¹⁶

(3) Part IV

At the Second Special Session of the CONTRACTING PARTIES in 1964, the representative of Japan informed the CONTRACTING PARTIES that his Government would not be in a position to assume legally any obligations arising from Part IV with respect to those contracting parties which, through the invocation of Article XXXV, were not applying the General Agreement to Japan.¹⁷

B. INVOCATIONS OF ARTICLE XXXV

1. Continuing invocations of Article XXXV

According to the records of the Secretariat, the following invocations of Article XXXV continue to be operative as of 15 May 1995:

Invoked by	In respect of	Reference	Date
Botswana	Japan	Succession	August 1987
Haiti	Japan	L/405	August 1955
Lesotho	Japan	Succession	January 1988
Morocco	Israel	L/6192	June 1987
Tunisia	Israel	L/6712	July 1990
United States	Hungary	L/3911	September 1973
	Romania	L/3619	November 1971

2. Former invocations of Article XXXV

Article XXXV has been invoked and the invocation has subsequently been withdrawn in respect of:

In respect of	Invoked by	Invocation	Date	Withdrawal	Date
Austria	Cuba	GATT/CP/111	April 1951	L/2322	November 1964
Bangladesh	Pakistan	L/3784	December 1972	L/4146	January 1975
Cuba	Korea	L/2783	April 1967	L/3580	September 1971
Czechoslovakia	Korea	L/2783	August 1967	L/3580	September 1971
Denmark	Cuba	GATT/TN.1/33	August 1949	L/5431	November 1982
Finland	Cuba	GATT/CP/TN.1/33	August 1949	L/2332	December 1964
Ghana	Portugal	L/1764	May 1962	L/6272	November 1987
Greece	Cuba	GATT/CP/TN.1/33	August 1949	L/5433	November 1982
India	Portugal	L/1764	May 1962	L/4178	December 1974
Israel	Egypt	L/3386	May 1970	L/4929	January 1980

¹⁶L/1545, adopted on 7 December 1961, 10S/69, 73, para. 19.

¹⁷2SS/SR.2, p.7.

In respect of	Invoked by	Invocation	Date	Withdrawal	Date
Japan	Australia	L/405	September 1955	L/2228	May 1964
"	Austria	L/405	September 1955	L/4428	October 1976
"	Barbados	Succession (UK)	November 1966	L/2754	February 1967
"	Belgium	L/405	September 1955	L/2308	October 1964
"	Benin	Succession (F)	September 1963	L/3709	June 1972
"	Brazil	L/405	September 1955	L/670	August 1957
"	Burundi	Succession (B)	March 1963	L/3738	August 1972
"	Cameroon	Succession (F)	May 1963	L/4079	August 1974
"	Central African Republic	Succession (F)	May 1963	L/4041	April 1974
"	Chad	Succession (F)	July 1963	L/3517	March 1971
"	Congo	Succession (F)	March 1963	L/3920	August 1973
"	Cuba	L/405	September 1955	L/1694	December 1961
"	Cyprus	Succession (UK)	July 1963	L/6998	April 1992
"	France	L/405	September 1955	L/2129	January 1964
"	Gabon	Succession (F)	May 1963	L/3959	November 1973
"	Gambia	Succession (UK)	February 1965	L/3642	November 1971
"	Ghana	Succession (UK)	October 1967	L/1744	March 1962
"	Guyana	Succession (UK)	July 1966	L/2671	July 1966
"	India	L/405	September 1955	L/952	October 1958
"	Ireland	L/2954	December 1967	L/4215	September 1975
"	Ivory Coast	Succession (F)	December 1963	L/3429	August 1970
"	Jamaica	Succession (UK)	December 1963	L/3788	November 1972
"	Kenya	Succession (UK)	February 1964	L/4475	March 1977
"	Kuwait	Succession (UK)	May 1963	L/3444	August 1970
"	Haiti	L/405	September 1955	L/952	November 1958
"	Luxembourg	L/405	September 1955	L/2308	October 1964
"	Madagascar	Succession (F)	September 1963	L/2331	December 1964
"	Malaysia	Succession (UK)	October 1957	L/1281	August 1963
"	Maldives	Succession (UK)	April 1983	L/6346	April 1988
"	Mali	Succession (F)	June 1960	L/7235	May 1993
"	Malta	Succession (UK)	November 1964	L/3099	October 1968
"	Mauritania	Succession (F)	September 1962	L/4144	October 1968
"	Netherlands	L/405	September 1955	L/2308	October 1964
"	New Zealand	L/405	September 1955	L/1744	March 1962
"	Niger	Succession (F)	December 1963	L/3421	July 1970
"	Nigeria	Succession (UK)	December 1960	L/4236	October 1975
"	Portugal	L/1764	May 1962	L/3690	March 1972
"	Rhodesia and Nyasaland	L/405	September 1955	L/2054	August 1963

In respect of	Invoked by	Invocation	Date	Withdrawal	Date
Japan	Rwanda	Succession (B)	January 1966	L/3448	September 1970
"	Senegal	Succession (F)	September 1963	L/4288	December 1975
"	Sierra Leone	Succession (UK)	May 1961	L/3931	September 1973
"	South Africa	L/405	September 1955	L/5873	September 1985
"	Spain	L/3352	February 1970	L/3646	December 1971
"	Swaziland	Succession (UK)	September 1968	L/7321	December 1993
"	Tanzania	Succession (UK)	December 1961	L/4070	July 1974
"	Togo	Succession (F)	March 1964	L/4061	July 1974
"	Trinidad & Tobago	Succession (UK)	October 1962	L/2665	June 1966
"	Uganda	Succession (UK)	October 1962	L/3466	November 1970
"	United Kingdom	L/405	September 1955	L/1992 (for UK customs territory only); L/2208, L/2896, L/3396 (for UK overseas territories)	April 1963 March 1964 (L/2208) November 1967 (L/2896) May 1970 (L/3396)
"	Upper Volta	Succession (F)	May 1963	L/3484	November 1970
Korea	Czechoslovakia	L/2783	April 1967	L/6551	July 1989
"	Romania	L/3626	November 1971	L/6678	May 1970
Nicaragua	Cuba	GATT/CP/TN.1/33	August 1949	L/4810	November 1979
Nigeria	Portugal	L/1764	May 1962	L/6448	December 1988
Peru	Cuba	GATT/CP/111	April 1951	L/5430	November 1982
Poland	Korea	L/2874	October 1967	L/3580	September 1971
Portugal	Egypt	L/3386	May 1970	L/4937	January 1980
"	Ghana	L/1764	May 1962	L/6272	November 1987
"	India	L/1764	May 1962	L/4178	December 1974
"	Nigeria	L/1764	May 1962	L/6448	December 1988
South Africa	Egypt	L/3386	May 1970	L/7414	February 1994
"	India	GATT/CP.2/4	January 1948	L/7547	October 1994
"	Morocco	L/6192	June 1987	L/7498	June 1994
"	Pakistan	GATT/CP.2/4	July 1948	L/610	December 1956
"	Tunisia	L/6713	July 1990	L/7443	April 1994
Sweden	Cuba	GATT/TN.1/33	August 1949	L/5429	November 1982
Turkey	Cuba	GATT/CP/111	April 1951	L/5432	November 1982
Yugoslavia	Korea	L/2783	April 1967	L/3580	September 1971
Zimbabwe	Egypt	L/3386	May 1970	L/6360	Independence of Zimbabwe

- Notes: (1) In cases of invocation by succession, the contracting party originally invoking Article XXXV has been indicated as B (Belgium), F (France), or UK (United Kingdom). The date indicated for "invocation" is the date of independence of the country in question.
- (2) Dates indicated for invocations or withdrawals are the effective date indicated in the document in question. Where the document does not indicate any effective date for withdrawal of invocation of Article XXXV, the date indicated is the date of circulation of the document.

The Declaration of 27 September 1951 on “Suspension of Obligations between Czechoslovakia and the United States under the Agreement”¹⁸, which does *not* refer to Article XXXV, provided that the CONTRACTING PARTIES declare “that the Governments of the United States and Czechoslovakia shall be free to suspend, each with respect to the other, the obligations of the General Agreement on Tariffs and Trade”, and “*Affirm* that any measures which may be taken either by the United States or by Czechoslovakia shall not in any way modify the obligations of that Government under the General Agreement towards the other contracting parties”.¹⁹ At the Council meeting of November 1992:

“The representative of the Czech and Slovak Federal Republic ... recalled that in their Declaration of 27 September 1951 ... the CONTRACTING PARTIES had stated that the Governments of Czechoslovakia and the United States were free to suspend, with respect to each other, obligations under the General Agreement. Since the reasons for the suspension of obligations between the two Governments had ceased to exist, his Government believed that the suspension was no longer desirable. The Czech and Slovak Federal Republic would therefore consider GATT obligations between the two Governments as being fully restored from 3 November, which would be confirmed by an exchange of letters between them. He expressed his Government's satisfaction that after more than forty years this abnormal situation had finally been resolved, and that normal trade relations respecting the GATT would be restored between the two countries. He asked the Council to take note that the 1951 Declaration was no longer in effect.

“The representative of the United States confirmed that the United States and the Czech and Slovak Federal Republic had agreed to exchange letters stating that they no longer desired to invoke the suspension of GATT obligations in respect of each other. Accordingly, the United States considered that the CONTRACTING PARTIES' Declaration of 27 September 1951 allowing the two Governments to suspend with respect to each other obligations under the General Agreement, was no longer operative. It was unfortunate that circumstances had been such that for more than forty years it had been necessary to engage in a mutual suspension of GATT obligations. The United States was gratified that it was now in a position to restore GATT relations with the Czech and Slovak Republic, and asked the Council to take note of the end of this suspension of GATT obligations. This action was without prejudice to whether either Government would, in the future, maintain GATT obligations with respect to new states emerging from each other's current territories.

“The Council took note of the statements and also that the CONTRACTING PARTIES' 1951 Declaration on the suspension of obligations between the United States and Czechoslovakia ... was no longer operative.”²⁰

III. PREPARATORY WORK

The text of the General Agreement as of 30 October 1947 provided for accession by unanimous vote, and consequently contained no provision equivalent or similar to Article XXXV.

At the First Session of the CONTRACTING PARTIES, which took place during the Havana Conference in early 1948, it was agreed to amend Article XXXIII to change the unanimity rule for accession to a two-thirds majority, and to add Article XXXV.

The substance of paragraph 1 appeared first as a proviso in the new draft for Article XXXIII.²¹ It was stated that the amendment of Article XXXIII from unanimity to a two-thirds majority “gives rise to certain problems of relations between the new contracting party and those old contracting parties with which no negotiations have taken place, and to meet these difficulties alternative provisos have been inserted”.²² It was also pointed out that such a safeguard was necessary, otherwise “two thirds of the contracting parties would

¹⁸II/36.

¹⁹II/36.

²⁰C/M/260, p. 61-62, 39S/302.

²¹GATT/1/21, pp.3, 10.

²²GATT/1/SR.6, p. 2.

oblige a contracting party to enter a trade agreement with another country without its consent".²³ A new draft was then suggested to become a new Article XXXV.²⁴

In the same discussions, it was also agreed to add Article XXV:5(b) through (d), which permitted the CONTRACTING PARTIES to authorize one contracting party to withhold the benefit of concessions in its Schedule from another contracting party in certain circumstances; see *supra* Article XXV.²⁵ These changes were summarized by one of their drafters during discussions on accession at Annecy:

"It had been realized at Havana that the original Article XXXIII of GATT, which required a unanimous decision with respect to accession had actually given a veto power to each of the contracting parties. This was remedied by the adoption of the provision for a decision by a two-thirds majority. However, the effect of this amendment could have been to coerce a contracting party to reach a trade agreement against its will. The balance had been redressed by the insertion of the new Article XXXV and by the ability of a contracting party to utilize paragraph 5(b) of Article XXV".²⁶

These changes were implemented by the 1948 Protocol Modifying Certain Provisions of the General Agreement, which entered into force on 24 March 1948.

At the 1955 Review Session, it was agreed to delete Article XXV:5(b), which had never been invoked, and as a consequential amendment to delete the words "without prejudice to the provisions of paragraph 5(b) of Article XXV" from Article XXXV.²⁷ This deletion was effected through the Protocol Amending the Preamble and Parts II and III of the General Agreement, which entered into force on 7 October 1957.

IV. RELEVANT DOCUMENTS

CONTRACTING PARTIES (1948-51)

Discussion: GATT/1/SR.6, 7, 10, 11
GATT/CP.2/SR.18
GATT/CP.3/SR.18, 19
GATT/CP.5/SR.24, 25
GATT/TN.1/HDeI/1
GATT/TN.1/SR.4

Reports: GATT/1/21, 42
GATT/TN.1/18, 33
GATT/TN.1/A/14
GATT/TN.1/A/W/7
GATT/CP.2/4,
GATT/CP.5/9
GATT/CP.6/20/Rev.1
GATT/CP/109, 111

Review Session

Reports: W.9/212, L/327 (3S/231)
Other: L/189, L/261/Add.1, L/273

²³GATT/1/SR.7, p. 5.

²⁴For a discussion of this draft see GATT/1/SR.7, pp. 4-7.

²⁵Protocol Modifying Certain Provisions of the General Agreement on Tariffs and Trade, 24 March 1948.

²⁶GATT/CP.3/SR.15 p. 4.

²⁷3S/216, para. 25.

PART IV

TRADE AND DEVELOPMENT

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I. TEXT OF INTERPRETATIVE NOTE AD PART IV

Interpretative Note *Ad* Part IV from Annex I

The words “developed contracting parties” and the words “less-developed contracting parties” as used in Part IV are to be understood to refer to developed and less-developed countries which are parties to the General Agreement on Tariffs and Trade.

II. INTERPRETATION AND APPLICATION OF PART IV

A. GENERAL

The CONTRACTING PARTIES at their Twelfth Session decided to appoint a Panel of Experts to report on trends in international trade, “in particular the failure of the trade of less developed countries to develop as rapidly as that of industrialized countries, excessive short-term fluctuations in prices of primary products, and widespread resort to agricultural protection”.¹ The Report on “Trends in International Trade” was submitted and discussed at the Thirteenth Session²; the CONTRACTING PARTIES then decided to initiate consideration of a plan of action and established three committees of which Committee III had the mandate “to consider and report to the CONTRACTING PARTIES regarding other measures for the expansion of trade, with particular reference to the importance of the maintenance and expansion of the export earnings of the less developed countries to the development and diversification of their economies”.³ A Declaration on “Promotion of the Trade of Less-Developed Countries” was adopted by Ministers on 30 November 1961 and by the CONTRACTING PARTIES on 7

¹Decision of 29 November 1957, 6S/18.

²*Trends in International Trade*, October 1958, Sales No. GATT/1958-3. The report is also known as the “Haberler Report” after Gottfried Haberler, its chairman. The other Panel members were Roberto da Oliveira Campos, James Meade, and Jan Tinbergen.

³Decision of 17 November 1958, 7S/27-29. See also reports of Committee III: First report adopted 29 May 1959, COM.III/1, 8S/132; second report adopted 19 November 1959, L/1035, 8S/135; third report adopted 24 May 1960, L/1162, 9S/120; fourth report adopted 14 November 1960, L/1321, 9S/144; Report on Meeting of 21-28 March 1961, L/1435, 10S/167; fifth report adopted 15 November 1961, L/1554, 10S/175; special report listing principal findings and recommendations, adopted 15 November 1961, L/1557, 10S/185.

December 1961.⁴ The Decision on “Implementation of Conclusions of Ministers” established a programme of further work in Committee III.⁵

The Conclusions and Resolutions adopted at the Ministerial meeting on 21 May 1963 initiated negotiations on an amendment of the General Agreement to introduce a Part IV. In discussing measures for the expansion of trade of developing countries as a means of furthering their economic development: “The Ministers recognized the need for an adequate legal and institutional framework to enable the CONTRACTING PARTIES to discharge their responsibilities in connection with the work of expanding the trade of the less-developed countries”. A Committee on the Legal and Institutional Framework of GATT in Relation to Less-Developed Countries was established to undertake further work in this connection, under the oversight of the Action Committee.⁶ The Committee on Legal and Institutional Framework drafted a new Chapter on Trade and Development for inclusion in the General Agreement.⁷

At the Second Special Session of the CONTRACTING PARTIES, on 8 February 1965, the Chairman, in presenting for approval the Protocol Introducing Part IV on Trade and Development, made the following statement:

“This new Part showed clearly that the promotion of the trade of less-developed countries and the provision of increased access for their products in world markets, were among the primary objectives of the CONTRACTING PARTIES. These objectives were now set forth in a new Article XXXVI. Article XXXVII laid down the commitments in the field of commercial policy which contracting parties would accept in order to promote these objectives. Article XXXVIII provided for joint action by the contracting parties, both within the framework of the GATT and in collaboration with other intergovernmental bodies, to further the objectives.”⁸

The Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development, which was done on 8 February 1965, entered into force on 27 June 1966.⁹ The time-limit for acceptance of the Protocol was extended annually by decisions of the CONTRACTING PARTIES until the close of their thirty-fifth session in 1979¹⁰, when the Protocol had been accepted by all contracting parties. Acceptances by some contracting parties were accompanied by Declarations.¹¹

In the Committee on Legal and Institutional Framework, one developing country proposed the inclusion of the following commitments by contracting parties:

“in establishing their agricultural policies for the maintenance of agricultural income, to avoid restrictive measures that limit imports of raw or processed products of particular interest to less-developed countries and inhibit their consumption”;

“to adjust and moderate agricultural protective measures, in order to facilitate exports of agricultural products by less-developed countries”.

However, it was agreed that instead of including specific provisions in Part IV, a statement on this subject by the Chairman should be included in the record of the second special session of the CONTRACTING PARTIES at which agreement was finally reached on the text of Part IV.¹² This statement, after having noted that the importance of trade in agricultural products had been stressed in the Committee and a specific proposal had been discussed, observed that the CONTRACTING PARTIES had agreed to seek solutions to problems of agricultural trade in the course of the Kennedy Round and had agreed that in these trade negotiations every effort would be made to lower barriers to exports from developing countries. It concluded with the following paragraph:

⁴10S/28.

⁵Decision of 7 December 1961, 10S/32. See reports of Committee III: L/1732, adopted 16 November 1962, 11S/168; L/1768, adopted 16 November 1962, 11S/176; L/1989, report submitted to Ministerial Meeting May 1963, 12S/88; L/2080, report adopted 16 March 1964, 12S/110, L/2181 part B, report adopted 19 March 1964, 12S/131.

⁶12S/36, para. 28, 12S/47.

⁷See 12S/87, para. 15.

⁸2SS/SR.5.

⁹13S/2.

¹⁰14S/16, 15S/65, 16S/8, 17S/14, 18S/22, 19S/6, 20S/17, 21S/23, 22S/7, 23S/5, 24S/11, 25S/5.

¹¹GATT - Status of Legal Instruments, 2-14.

¹²L/2314/Rev.1.

“Although a specific paragraph to cover all the specific concerns expressed by those less-developed contracting parties particularly interested in agricultural trade problems has not been included in Part IV, agricultural products are covered by the general provisions of Part IV. However, it is understood that at a later stage and in the light of the forthcoming trade negotiations, interested contracting parties will be entitled to revert to this matter in the Committee on Trade and Development.”¹³

At the Fiftieth Session of the CONTRACTING PARTIES in December 1994, the Chairman of the Committee on Trade Development summed up the conclusions of a debate held at the Committee’s session in November 1994, which had addressed the substantive issue of the participation of developing countries in the international trading system by focusing on whether developing countries had recently increased their share in world trade and whether international trade had contributed to their economic growth.

“Ten main conclusions emerged from the debate: (1) The developing countries’ percentage share in world trade had been growing. (2) This growth had been uneven: the least-developed countries, and recently Africa, had seen a decrease in their share in trade, while other regions, such as South-East Asia, had significantly increased their share. (3) This had resulted as much from domestic policies as from the general international environment, since these different trends could not be attributed to the international environment alone. (4) The Uruguay Round had represented a significant opportunity for developing countries to increase their share in trade, because of the integration of sectors previously outside the GATT system (such as agriculture and textiles) into WTO rules, and because the Round had dealt with internal policies (and not just border measures) that restricted trade. (5) Therefore future participation of developing countries in world trade would be determined by the effectiveness with which the Uruguay Round agreements would be implemented. (6) Though participation in world trade of both developing and developed countries had increased in the past twenty years, the opposite had occurred for the former Socialist states, which seemed to indicate the importance of market forces, or a reduction of State intervention, for trade development. (7) Product composition of the trade of developing countries had been important, as the substantial rise in trade of manufactures had been the key to the increased participation of some of these countries. The growth of intra-regional trade had also been relevant. (8) It was important to make an examination of changes and to see whether higher or lower hindrances to trade in recent years could explain the developing countries’ share in world trade. (9) In future, developing countries would make greater commitments in the WTO, and in this context all WTO members should note that developing countries accounted for 25 per cent of world trade. (10) Finally, it was necessary to integrate the autonomous liberalization measures taken by developing countries into the multilateral system aimed at facilitating, promoting and liberalizing trade.”¹⁴

B. “DEVELOPED” AND “LESS-DEVELOPED” CONTRACTING PARTIES

The Interpretative Note *Ad* Part IV provides that these expressions refer to developed and less-developed countries which are parties to the General Agreement.

The Decision of 28 November 1979 on “Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries” notes: “The words ‘developing countries’ as used in this text are to be understood to refer also to developing territories”.¹⁵

The 1964 Committee on Legal and Institutional Framework had discussed the problems concerned with identifying the less-developed contracting parties and defining the term “less-developed contracting party”. Two main views emerged in the Committee:

“On the one hand, some members considered that it was not at this stage either necessary or feasible to attempt a definition of a less-developed contracting party and that if a problem as to identification arose such a problem could be dealt with at that time. On the other hand, some members felt that it was possible

¹³2SS/SR.5.

¹⁴SR.50/1, p. 5.

¹⁵L/4903, Decision of 28 November 1979, 26S/203, footnote 1.

by a systematic identification of either less-developed contracting parties or developed contracting parties to resolve the matter at a later stage.”¹⁶

The terms of reference of the Committee on Trade and Development include: “to consider any questions which may arise as to the eligibility of a contracting party to be considered as a less-developed contracting party in the sense of Part IV ...”.¹⁷

See also the Note *Ad* Article XVIII, material under Article XVIII:4, and material on the Enabling Clause in the chapter on Article I.

C. RELATIONSHIP BETWEEN PART IV AND OTHER GATT ARTICLES

1. General

The Panel Report of 1989 on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile” concluded that the EEC import restrictions at issue were inconsistent with Articles XI and XIII. After finding that these restrictions were inconsistent with Article XI, the Panel examined Chile’s claim under Part IV, noting generally as follows:

“... the Panel noted that the commitments entered into by contracting parties under Article XXXVII were additional to their obligations under Parts I-III of the General Agreement, and that these commitments thus applied to measures which were permitted under Parts I-III. As the Panel had found the EEC’s import restrictions to be inconsistent with specific obligations of the EEC under Part II of the General Agreement, it therefore did not consider it necessary to pursue the matter further under Article XXXVII.”¹⁸

2. Articles I and XIII

When the text of Part IV was submitted to the CONTRACTING PARTIES for approval in November 1964, the Chairman said: “it was well known that many less-developed countries had hoped to have provisions relating to preferences in the new text. This had not been possible, but the CONTRACTING PARTIES had agreed to a working procedure for dealing with this important and controversial issue”.¹⁹

A summary of the discussions during the drafting of Part IV as to the relation of Part IV to Article I appears under Article XXXVII *infra*. For the waivers granted in respect of the Generalized System of Preferences on 25 June 1971²⁰ and in respect of trade negotiations among developing countries on 26 November 1971²¹, see under Article I. See also the material under Article I on the Decision on “Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries” of 28 November 1979 (the “Enabling Clause”).²²

In the Working Party on “United Kingdom Temporary Import Charges” in 1964-66, less-developed countries urged the United Kingdom to exempt from the charges products of which they were the principal suppliers and products which had social implications in their countries (e.g. hand-made products and products of cottage industries). They considered that such exemption would be “fully in accord with the spirit of the new Part IV”. “Without prejudice to the principle of non-discrimination as embodied in the General Agreement”, the Working Party felt that any such special treatment which the United Kingdom might feel able to give “should not be considered by other trading partners as creating a justification for them to press for special treatment for their own trade”.²³ The United States dissented from this view. Further concerning the application of import surcharges to exports of developing countries, see also the material under Article XII in this Index on the relationship between Article XII and Articles I and XIII.

¹⁶L/2195/Rev.1, para.7.

¹⁷13S/76.

¹⁸L/6491, adopted on 22 June 1989, 36S/93, 134, para. 12.32.

¹⁹2SS/SR.4, p. 26.

²⁰18S/24.

²¹18S/26.

²²26S/203.

²³L/2395 & Corr.1, paras. 16 and 17.

The Report of the Working Party on the "Trade Arrangement between India, the United Arab Republic and Yugoslavia" which examined the Trade Expansion and Economic Co-operation Agreement between India, United Arab Republic and Yugoslavia in 1968, recorded opposing views concerning the relationship between Part IV and Article I. Several representatives, while recognizing the importance of Part IV, considered that "it did not override the obligations of other parts of the General Agreement". In their view the Tripartite Agreement "was inconsistent with the basic most-favoured-nation provision of Article I". The representatives of the three participating countries considered that "the Agreement was in pursuance of their obligations under Part IV and consistent with the spirit of the General Agreement".²⁴ Similar differences of view are mentioned in the 1973 Report of the Working Party on "Trade Arrangements between India, the Arab Republic of Egypt and Yugoslavia".²⁵ Similar differences of view were expressed in the 1977 Report of the Working Party on the "First Agreement on Trade Negotiations Among Developing Member Countries of the Economic and Social Commission for Asia and the Pacific - Bangkok Agreement".²⁶ See material on this agreement under Article I.

The 1973 Interim Panel Report on "United Kingdom - Dollar Area Quotas" sets out, among the "Considerations of the Panel":

"The Panel noted the contention of the United States delegation that the restrictions were in contravention of Articles XI and XIII of the General Agreement and that delegation's request that the restrictions be eliminated. The Panel also noted that the United Kingdom had never denied that the Dollar Area Quotas were in formal contravention of the provisions of the General Agreement on quantitative restrictions, and for the time being reserved its findings on this question. The Panel noted as well the argument put forward by the Caribbean countries and territories that the restrictions must be viewed in the context of the General Agreement as a whole and with particular regard to Part IV of the Agreement. According to these delegations, the continued application of the quotas was justified in the light of Part IV which was designed to deal with the special circumstances of developing countries."²⁷

The Panel Report on the same matter notes the withdrawal of the complaint and refrains from pronouncing on the interpretation of Part IV.²⁸

The Report of the Committee on Trade and Development in 1976 notes the view of a developed contracting party that Part IV does not require the exempting of products originating in developing countries from temporary import restrictions administered on a most-favoured-nation basis in accordance with Article XIII.²⁹

The 1980 Panel Report on "Norway - Restrictions on Imports of Certain Textile Products" concludes that Norway's import restrictions were inconsistent with Article XIII. The Panel also concludes: "In the case before the Panel, Norway had in early 1978 concluded long-term bilateral arrangements with six textile-supplying countries. ... for these arrangements no derogation or provision of Parts I-III of GATT had ever been invoked by Norway. While noting that provision for some developing exporting countries of assured increase in access to Norway's textile and clothing markets might be consistent for those countries with the spirit and objectives of Part IV of the GATT, this cannot be cited as justification for actions which would be inconsistent with a country's obligations under Part II of the GATT".³⁰

The 1984 Panel Report on "United States - Imports of Sugar from Nicaragua" found the United States sugar quota to be inconsistent with Article XIII. The Panel Report notes that "having found the quota reduction to be inconsistent with a specific obligation of the United States under Part II of the General Agreement, the Panel saw no need to pursue the question whether the action was also contrary to the United States' more general commitments under Part IV".³¹ In discussion on this panel report in the GATT Council, "several representatives

²⁴L/3032, adopted on 14 November 1968, 16S/83, 87, paras. 12, 13.

²⁵L/3950, adopted on 7 November 1973, 20S/224-229.

²⁶L/4635, adopted on 14 March 1978, 25S/109, 110, 111, paras. 5, 7.

²⁷L/3843, adopted on 30 July 1973, 20S/230, 235, para. 1.

²⁸L/3891, adopted on 30 July 1973, 20S/236.

²⁹L/4438, adopted on 22 November 1976, 23S/32, 34, para. 12.

³⁰L/4959, adopted on 18 June 1980, 27S/119, 125-26, para. 15.

³¹L/5607, adopted on 13 March 1984, 31S/67, 74, para. 4.6.

of developing countries ... considered that the United States measure contravened Part IV of the General Agreement and the 1982 Ministerial Declaration.”³²

In this connection see also the unadopted panel reports of 1993 and 1994 respectively on “EEC - Member States’ Import Regimes for Bananas”³³ and “EEC - Import Regime for Bananas”.³⁴

3. Article III

The 1970 Report of the Working Party on “Border Tax Adjustments” notes that

“Some members pointed out that the question of forward shifting of internal taxes on domestic products did not arise in the case of products which were not domestically produced by developed countries. They therefore emphasized that the destination principle regarding tax adjustments was not relevant in the case of products of export interest to developing countries which were not produced in developed countries, and that in order to ensure trade neutrality as required under GATT rules no internal taxes should be levied by developed countries on such products.

“Members from developing countries drew attention to the Ministerial Conclusions of 1963 and Article XXVII of the GATT, which stressed that developed contracting parties should endeavour to suppress taxes on products imported essentially from developing countries. ...

“In referring to the proposal to suppress taxes on products not produced in developed countries, some countries considered that it was of great importance not to introduce into fiscal policies considerations and preoccupations relating to trade policy.”³⁵

The Report of the Working Party on the “Accession of Costa Rica” includes a discussion of Costa Rica’s selective consumption levy. Some members of the Working Party stated that “neither Part IV nor Article XVIII of the General Agreement authorized the discriminatory application of levies contrary to Article III”.³⁶

4. Article XVI

The Report of the Working Party on a 1967 consultation under Article XXII:2 on the “United States Subsidy on Unmanufactured Tobacco” discusses the application of Part IV in relation to an export subsidy of a developed country competing with a developing country. See further under Article XXXVI:3 and Article XXVII:3. The Chairman of the CONTRACTING PARTIES noted “that the report of the Working Party contained no conclusive indication as regards damage to the trade interests of other tobacco producers arising from the existence of the United States subsidy. However, as it appeared that, to some extent, the provisions of Part IV were involved and as it was conceivable that the trade interests of other producers could be affected”, he suggested, and it was so agreed, that CONTRACTING PARTIES urge the United States to give sympathetic and urgent consideration to the requests made by certain members of the Working Party.³⁷ These members had requested that the US remove the subsidy and consult before taking action to extend the existing subsidy.³⁸

In the panel proceeding on “European Communities - Refunds on Exports of Sugar - Complaint by Brazil,” Brazil argued, *inter alia*, that the Community system and its application were inconsistent with commitments under Part IV of the General Agreement, in particular Article XXXVI:2, 3, 4 and 9, and XXXVII:2(a) and (e).³⁹ The EC representative argued that “the provisions of Article XXXVI constituted principles and objectives and could not be understood to establish precise, specific obligations.”⁴⁰ The conclusions provide:

³²C/M/176, p. 9.

³³DS/32R, unadopted, dated 3 June 1993, paras. 369-372.

³⁴DS38/R, unadopted, dated 11 February 1994, para. 162.

³⁵L/3464, adopted on 2 December 1970, 18S/97, 105-106, paras. 28-29, 32.

³⁶L/6589, adopted on 7 November 1989, 36S/26, 33, para. 32.

³⁷SR.24/13, p. 166.

³⁸15S/125, paras. 27, 28.

³⁹L/5011, adopted on 10 November 1980, 27S/69, 79-80, para. 2.25.

⁴⁰*Ibid.*, para. 2.28.

“The Panel recognized the efforts made by the European Communities in complying with the provisions of Articles XXXVI and XXXVIII. It nevertheless felt that increased Community exports of sugar through the use of subsidies in the particular market situation in 1978 and 1979, and where developing contracting parties had taken steps within the framework of the [International Sugar Agreement] to improve the conditions in the world sugar market, inevitably reduced the effects of the efforts made by these countries. For this time-period and for this particular field, the European Communities had therefore not collaborated jointly with other contracting parties to further the principles and objectives set forth in Article XXXVI, in conformity with the guidelines given in Article XXXVIII.”⁴¹

See further material from this Panel Report under Article XXXVI.

5. Article XVII

Article XXXVII:3(a) provides: “The developed contracting parties shall: (a) make every effort, in cases where a government directly or indirectly determines the resale price of products wholly or mainly produced in the territories of less-developed contracting parties, to maintain trade margins at equitable levels”.

6. Article XIX

The drafting history of Part IV of the General Agreement indicates that an escape clause action would fall within paragraph 1(b) of Article XXXVII.⁴² In 1971-72, after the introduction of Part IV, the Committee on Trade and Development discussed whether it was necessary to re-examine Article XIX in this new context.⁴³ Some delegations from developing countries proposed that for equity reasons and in light of Part IV imports from developing countries should be exempted from the scope of action under Article XIX.⁴⁴ Representatives of several developed countries stated, *inter alia*, that to require the discriminatory use of this Article might in fact encourage the use of quantitative restrictions and limit the ability of contracting parties to accept commitments for trade liberalization. One of these representatives felt that “serious injury” would be among the “compelling reasons” mentioned in Article XXXVII and this would place Article XIX situations outside the scope of paragraph 1(b) of the Article. A 1976 Secretariat Note on the application of Part IV of the General Agreement mentions that “some developed countries stated that they could not accept that Part IV allowed a departure from the principle of non-discrimination with regard to Article XIX, which ought to be applied across the board on a most-favoured-nation basis”.⁴⁵

7. Article XXXV

At the Second Special Session of the CONTRACTING PARTIES in 1975, the representative of Japan informed the CONTRACTING PARTIES that his Government would not be in a position to assume legally any obligations arising from Part IV with respect to those contracting parties which, through the invocation of Article XXXV, were not applying the General Agreement to Japan.⁴⁶

D. COMMITTEE ON TRADE AND DEVELOPMENT

At their meeting on 26 November 1964, the CONTRACTING PARTIES decided that the Committee on Trade and Development should be established with the following terms of reference:

“1. To keep under continuous review the application of the provisions of Part IV of the General Agreement.

“2. To carry out, or arrange for, any consultation which may be required in the application of the provisions of Part IV.

⁴¹Ibid., pp. 97-98, para. (h).

⁴²L/2195/Rev.1, L/4679, p. 8.

⁴³L/3625, paras. 19-21; L/3760, paras. 43-46.

⁴⁴L/4679, p. 9.

⁴⁵COM.TD/W/239, p. 16, para. 39.

⁴⁶2SS/SR.2, p.7.

“3. To formulate proposals for consideration by the CONTRACTING PARTIES in connection with any matter relating to the furtherance of the provisions of Part IV.

“4. To consider any questions which may arise as to the eligibility of a contracting party to be considered as a less-developed contracting party in the sense of Part IV and to report to the CONTRACTING PARTIES.

“5. To consider, on the basis of proposals referred to it by the CONTRACTING PARTIES for examination, whether modification of or additions to Part IV are required to further the work of the CONTRACTING PARTIES in the field of trade and development and to make appropriate recommendations.

“6. To carry out such additional functions as may be assigned to the Committee by the CONTRACTING PARTIES.”⁴⁷

The Committee also took over the functions of Committee III, of the Action Committee and its subsidiary bodies, and of the Working Party on Preferences.

The Committee was also given a mandate to deal with outstanding issues relating to the amendment of the General Agreement which had not been finished by the Committee on Legal and Institutional Framework, including: (a) a review of Article XVIII, taking into account an Australian proposal⁴⁸; (b) a review of Article XXIII, in the light of experience of its operation and taking into consideration the proposal by Brazil and Uruguay; and other proposals put forward by contracting parties; and (c) a proposal relating to the imposition of import surcharges by less-developed contracting parties to safeguard their balance of payments.⁴⁹ The work on Article XXIII resulted in the Decision of 5 April 1966 on Procedures under Article XXIII, for disputes between less-developed and developed contracting parties. The text of these Procedures and material on their drafting and application appears under Article XXIII in this Index. The work on import surcharges did not have an immediate result; see the material on import surcharges under Articles XVIII and XII. Generally concerning this work, see the reports and documents of the Committee.⁵⁰

For a survey of the various activities of the Committee on Trade and Development see the regular Committee reports published in the BISD series, as well as the Secretariat Note of December 1982 on Activities of the Committee on Trade and Development.⁵¹

The GATT Work Programme of 1979 provided:

“The rôle of the Committee on Trade and Development should be strengthened and should cover, inter alia,

“1. work on trade policy and development policies including trade liberalization in areas of special interest to developing countries;

“2. primary responsibility for supervision of the implementation of points 1 and 4 of the ‘Framework’ texts;

“3. examination of protective action by developed countries against imports from developing countries;

“4. work on structural adjustment and trade of developing countries; and

“5. special attention to the special problems of least developed countries.”⁵²

⁴⁷13S/75-76.

⁴⁸See L/2165.

⁴⁹L/2281, Annex II.

⁵⁰See the 1966 Report of the Committee, L/2614, adopted on 5 April 1966, 14S/129, 139-141.

⁵¹TC(82)189, summarizing CTD activities 1965-1980.

⁵²L/4884/Add.1/Annex VI, adopted on 29 November 1979, 26S/219, 221, para. 5.1.

In December 1994, the Preparatory Committee for the World Trade Organization agreed to new terms of reference, as follows, for the Committee on Trade and Development to be established under the Marrakesh Agreement Establishing the World Trade Organization:

- “1. To serve as a focal point for consideration and coordination of work on development in the World Trade Organization (WTO) and its relationship to development-related activities in other multilateral agencies.”⁵³
- “2. To keep under continuous review the participation of developing country Members in the multilateral trading system and to consider measures and initiatives to assist developing country Members, and in particular the least-developed country Members, in the expansion of their trade and investment opportunities, including support for their measures of trade liberalization.”⁵⁴
- “3. To review periodically, in consultation as appropriate with the relevant bodies of the WTO, the application of special provisions in the Multilateral Trade Agreements and related Ministerial Decisions in favour of developing country Members, and in particular least-developed country Members, and report to the General Council for appropriate action.
- “4. To consider any questions which may arise with regard to either the application or the use of special provisions in the Multilateral Trade Agreements and related Ministerial Decisions in favour of developing country Members and report to the General Council for appropriate action.
- “5. To provide guidelines for, and to review periodically, the technical cooperation activities of the WTO”⁵⁵ as they relate to developing country Members.
- “6. The Committee will establish a programme of work which may be reviewed as necessary each year.”⁵⁶

A Decision adopted on 8 December 1994 by the CONTRACTING PARTIES and by the Preparatory Committee for the WTO, on “Transitional Arrangements - Avoidance of Procedural and Institutional Duplication” provides *inter alia* that

“In the period between the date of entry into force of the WTO Agreement and the date of the termination of the legal instruments through which the contracting parties apply the GATT 1947 and of the Tokyo Round Agreements the following notification and coordination procedures shall apply under the GATT 1947, the Tokyo Round Agreements and the WTO Agreement:

...

- “2. The coordination procedures set out in paragraphs 3 and 4 below shall apply in the relations between the bodies referred to in sub-paragraphs (a) to (d) below:

...

“Committee on Trade and Development, ...

- “3. The bodies established under the GATT 1947 or a Tokyo Round Agreement that are referred to in paragraph 2 above shall hold their meetings jointly or consecutively, as appropriate, with the corresponding WTO bodies. In meetings held jointly the rules of procedure to be applied by the WTO body shall be followed. The reports on joint meetings shall be submitted to the

⁵³Note 1 to the terms of reference provides: “It is understood that matters relating to activities in other multilateral agencies will come under the guidance of the General Council”.

⁵⁴Note 2 to the terms of reference provides: “The Committee would give consideration, *inter alia*, to any report that the Committee on Agriculture may decide to refer to it following paragraph 6 of the ‘Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries’ and Article XVI of the Agreement on Agriculture”.

⁵⁵Note 3 to the terms of reference provides: “The technical cooperation activities referred to in this provision do not include technical assistance for accession negotiations”.

⁵⁶PC/IPL/4, dated 25 November 1994. See also PC/IPL/M/9.

competent bodies established under the GATT 1947, the Tokyo Round Agreements and the WTO Agreement.

- “4. The coordination of activities in accordance with paragraph 3 above shall be conducted in a manner which ensures that the enjoyment of the rights and the performance of the obligations under the GATT 1947, the Tokyo Round Agreements and the WTO Agreement and the exercise of the competence of the CONTRACTING PARTIES to the GATT 1947, the Committees established under the Tokyo Round Agreements and the bodies of the WTO are unaffected.”⁵⁷

The WTO General Council at its first meeting on 31 January 1995 established the Committee on Trade and Development with the terms of reference decided by the Preparatory Committee.⁵⁸

1. Review of implementation of Part IV and operation of the Enabling Clause

In order to enable the Committee on Trade and Development to keep under continuous review the application of the provisions of Part IV, the Committee agreed, in March 1965, on Reporting Procedures.⁵⁹ The Committee on Trade and Development also adopted Guidelines for the submission of notifications, the preparation of reports and the carrying out of reviews on the implementation of Part IV, which provide that notifications made by governments should be as exhaustive and comprehensive as possible and should relate both to measures specifically mentioned in paragraphs 1 and 3, or paragraph 4, as the case may be of Article XXXVII, as well as to all steps and measures of interest to the CONTRACTING PARTIES in relation to the objectives and provisions of Part IV.⁶⁰ Every year the Secretariat issues an airgram inviting contracting parties to make the relevant information available.

The reviews of the implementation of Part IV are a regular feature of the sessions of the Committee on Trade and Development. They take the form of reviews of and discussions on notifications submitted by governments on measures taken in the implementation of Part IV commitments, discussion of reports of the Sub-Committees of the Committee, and discussion of Secretariat reports on issues relevant to Part IV and the Enabling Clause.

The Committee on Trade and Development adopted Procedures for the elimination of import restrictions affecting the exports of developing countries, on 21 November 1967.⁶¹

Procedures for “Consultations Concerning the Implementation of Provisions of Part IV” were adopted by the Committee on Trade and Development on 23 March 1970 as well as by the CONTRACTING PARTIES at their Twenty-sixth Session in April 1971.⁶² However, these consultation procedures have never been utilized.

In January 1971, the Committee on Trade and Development established a “Group of Three”, which was requested to present proposals, *inter alia*, for the fuller implementation of the provisions of Part IV. The Group presented three reports⁶³. With the recognition that the Tokyo Round multilateral trade negotiations were expected to deal, *inter alia*, with the trade problems of developing countries in accordance with the provisions of the Tokyo Declaration, the Committee on Trade and Development agreed at its meeting in October 1973, that the work of the Group could be suspended for the time being.⁶⁴

The Decision of 28 November 1979 on “Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries”⁶⁵ (widely referred to as the “Enabling Clause”) provides in its paragraphs 1 and 4:

⁵⁷PC/11, L/7582, adopted 8 December 1994.

⁵⁸WT/L/46.

⁵⁹13S/79.

⁶⁰COM.TD/24, paragraph 10.

⁶¹15S/144.

⁶²18S/61.

⁶³18S/70, 19S/31, 20S/73.

⁶⁴18S/64.

⁶⁵26S/203.

“1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.”

“4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:

“(a) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;

“(b) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties.”⁶⁶

As noted above, the Committee on Trade and Development was given primary responsibility for the supervision of these two paragraphs.

The GATT Ministerial Declaration adopted on 29 November 1982, includes a decision and annex on “GATT Rules and Activities Relating to Developing Countries”⁶⁷, in which the CONTRACTING PARTIES, *inter alia*

“1. Decide, in order to improve the review and surveillance procedures in regard to the implementation of Part IV, that:

“(a) the Committee on Trade and Development, bearing in mind particularly the special responsibility of the developed contracting parties in this regard, shall adopt a programme of consultations with contracting parties individually or collectively, as appropriate, to examine how individual contracting parties have responded to the requirements of Part IV;

“(b) each such consultation shall be based on information supplied by the contracting party or parties in question and additional factual material prepared by the secretariat;

“(c) the Committee on Trade and Development shall also examine other aspects of existing procedures for reviewing the implementation of Part IV and for dealing with problems relating to the application of its provisions, and prepare guidelines for their improvement.

“2. Invite the Committee on Trade and Development to review the operation of the Enabling Clause as provided for in its paragraph 9, with a view to its more effective implementation, *inter alia*, with respect to objectivity and transparency of modifications to GSP schemes and the operation of consultative provisions relating to differential and more favourable treatment for developing countries; ...”⁶⁸

Information on these consultations is provided in the reports and proceedings of the Committee on Trade and Development.

See also Secretariat Notes of November 1994 on “Developing Countries and the Uruguay Round: An Overview”, “Notes on the Participation of Developing Countries in the World Trading System”, “A Description of Provisions Relating to Developing Countries in the Uruguay Round Agreements, Legal Instruments and Ministerial Decisions”, and the minutes of discussions on this topic in the 1994 Report of the Committee on Trade and Development.⁶⁹

⁶⁶26S/204, para. 4.

⁶⁷29S/13 and Annex at 29S/22.

⁶⁸Annex to Ministerial Decision, 29S/22, paras. 1-2.

⁶⁹COM.TD/W/512, dated 10 November 1994; COM.TD/W/513, dated 11 November 1994; COM.TD/W/510, dated 2 November 1994; and L/7567, dated 7 December 1994.

2. Sub-Committee on Trade of Least-Developed Countries

In July 1980, the Committee on Trade and Development established the Sub-Committee on Trade of Least-Developed Countries with the following terms of reference:

“In the light of paragraph 6 of the Tokyo Declaration, to give special attention to the particular situation and trade problems of the least-developed among the developing countries in GATT’s work programme following the Tokyo Round, including that relating to the results of the Multilateral Trade Negotiations, and to keep under review the special treatment which could be accorded these countries in the context of any general or specific measures taken in favour of developing countries, ... [and to] ... report to the Committee on Trade and Development”.⁷⁰

Up to December 1994 the Sub-Committee had held fifteen meetings.⁷¹

See also the Secretariat Note of 3 November 1994 on the provisions concerning least-developed countries in the Uruguay Round agreements, legal instruments and Ministerial Decisions.⁷²

3. Sub-Committee on Protective Measures

In the Decision on “Examination of Protective Measures Affecting Imports from Developing Countries” of 28 November 1979, the CONTRACTING PARTIES, *inter alia*,

“Decide that the Committee on Trade and Development establish a Sub-Committee to examine any case of future protective action by developed countries against imports from developing countries in the light of relevant provisions of the GATT, particularly Part IV thereof.

“This examination shall be without prejudice to the rights of contracting parties under the GATT or the competence of other GATT bodies.

“The membership of the Sub-Committee shall be open to all contracting parties. Developing countries not contracting parties to GATT may, upon notification to the Director-General of GATT, participate in the proceedings of the Sub-Committee in an observer capacity.

“The Sub-Committee will report on such examination to the Committee on Trade and Development and through it to the Council.

“These arrangements will be reviewed and revised as appropriate”.⁷³

The Sub-Committee on Protective Measures which was established in accordance with the above Decision on “Protective Measures” in March 1980 held eight sessions up to the end of 1985.⁷⁴ In November 1986 the Committee on Trade and Development decided that with the start of the Uruguay Round the Sub-Committee should remain on call, to be activated as and when the Committee should deem it necessary.⁷⁵

E. TECHNICAL COOPERATION AND TRAINING ACTIVITIES

The Committee on Trade and Development reviews periodically the technical cooperation programme of the Secretariat. For a review of recent technical assistance activities, see the Secretariat Note of November 1994 on “Technical Cooperation with Developing Countries”, which refers to technical assistance to developing countries in preparation of market access offers in goods and services negotiations; provision of

⁷⁰COM.TD/105.

⁷¹See the reports of the Sub-Committee, COM.TD/LLDC/1-16.

⁷²COM.TD/LLDC/W/54.

⁷³L/4899, 26S/219. This Decision implemented paragraph B.8 of UNCTAD Resolution 131(V), which invited GATT to examine in an appropriate body any case of future protective action by developed countries against imports from developing countries. See discussion at C/M/135, C/M/137, and L/4884/Add.1.

⁷⁴See the reports of the Sub-Committee, COM.TD/SCPM/1-8.

⁷⁵L/6092, Report of the Committee on Trade and Development, adopted on 24 November 1986, 33S/116, 126, para. 32.

data on trade flows, tariffs and non-tariff measures; technical missions to present and explain the Uruguay Round results; technical missions and workshops to explain the Uruguay Round results; briefing sessions in Geneva for delegations and officials; technical assistance in preparation for reviews under the Trade Policy Review Mechanism (TPRM); and joint technical assistance with other international organizations.⁷⁶

Paragraph H.2 of the 1989 Decision on Improvements to the GATT Dispute Settlement Rules and Procedures provides that “The Secretariat shall conduct special training courses for interested contracting parties concerning GATT dispute settlement procedures and practices so as to enable contracting parties’ experts to be better informed in this regard.”⁷⁷ The most recent such dispute settlement course took place in September 1994 for developing and developed contracting parties.

In addition, paragraph H.1 of the 1989 Decision provides that “the Secretariat shall make available a qualified legal expert within the Technical Cooperation Division to any developing contracting party which so requests”. Such assistance has been provided on a number of occasions since 1989.

Since 1955, the Secretariat has organized training courses in Geneva for government officials from developing countries (both contracting parties and others) involved in the formulation and development of trade policy. The courses deal with the theory and practice of trade policy and negotiations, including simulation exercises in dispute settlement and trade negotiations. In recent years courses have also been organized for officials of economies in transition.⁷⁸

III. RELEVANT DOCUMENTS

Background documents and negotiating history of Part IV:

Declaration on “Promotion of the Trade of Less-Developed Countries” adopted by Ministers on 30 November 1961: 10S/28.

Conclusions and Resolutions adopted by Ministers on 21 May 1963: 12S/45-46.

Interim Report of the Committee on the Legal and Institutional Framework of the GATT in Relation to Less-Developed Countries: L/2195/Rev.1.

Discussion of Interim Report by the CONTRACTING PARTIES: SR.21/11.

Report of the Committee on Legal and Institutional Framework: L/2281.

Discussion of the Report in the Council: C/M/23.

Report of the Legal Drafting Group: L/2297.

Final texts submitted for approval: L/2314/Rev.1.

Final discussion at the Second Special Session of the CONTRACTING PARTIES of the reports and draft texts to be adopted: 2SS/SR.2, 4, 5.

Final Act of the Second Special Session and Protocol Introducing Part IV: 13S/1-11.

⁷⁶COM.TD/W/511, dated 16 November 1994.

⁷⁷36S/61, 65.

⁷⁸See L/7543, Note by the Director-General, “Training Activities: the GATT Trade Policy Courses”, 28 October 1994.

ARTICLE XXXVI

PRINCIPLES AND OBJECTIVES

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I. TEXT OF ARTICLE XXXVI AND INTERPRETATIVE NOTE AD ARTICLE XXXVI

Article XXXVI

Principles and Objectives

- 1.* The contracting parties,
- (a) recalling that the basic objectives of this Agreement include the raising of standards of living and the progressive development of the economies of all contracting parties, and considering that the attainment of these objectives is particularly urgent for less-developed contracting parties;
 - (b) considering that export earnings of the less-developed contracting parties can play a vital part in their economic development and that the extent of this contribution depends on the prices paid by the less-developed contracting parties for essential imports, the volume of their exports, and the prices received for these exports;
 - (c) noting, that there is a wide gap between standards of living in less-developed countries and in other countries;
 - (d) recognizing that individual and joint action is essential to further the development of the economies of less-developed contracting parties and to bring about a rapid advance in the standards of living in these countries;
 - (e) recognizing that international trade as a means of achieving economic and social advancement should be governed by such rules and procedures _ and measures in conformity with such rules and procedures _ as are consistent with the objectives set forth in this Article;
 - (f) noting that the CONTRACTING PARTIES may enable less-developed contracting parties to use special measures to promote their trade and development;

agree as follows.

2. There is need for a rapid and sustained expansion of the export earnings of the less-developed contracting parties.

3. There is need for positive efforts designed to ensure that less-developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development.

4. Given the continued dependence of many less-developed contracting parties on the exportation of a limited range of primary products,* there is need to provide in the largest possible measure more favourable and acceptable conditions of access to world markets for these products, and wherever appropriate to devise measures designed to stabilize and improve conditions of world markets in these products, including in particular measures designed to attain stable, equitable and remunerative prices, thus permitting an expansion of world trade and demand and a dynamic and steady growth of the real export earnings of these countries so as to provide them with expanding resources for their economic development.

5. The rapid expansion of the economies of the less-developed contracting parties will be facilitated by a diversification* of the structure of their economies and the avoidance of an excessive dependence on the export of primary products. There is, therefore, need for increased access in the largest possible measure to markets under favourable conditions for processed and manufactured products currently or potentially of particular export interest to less-developed contracting parties.

6. Because of the chronic deficiency in the export proceeds and other foreign exchange earnings of less-developed contracting parties, there are important inter-relationships between trade and financial assistance to development. There is, therefore, need for close and continuing collaboration between the CONTRACTING PARTIES and the international lending agencies so that they can contribute most effectively to alleviating the burdens these less-developed contracting parties assume in the interest of their economic development.

7. There is need for appropriate collaboration between the CONTRACTING PARTIES, other intergovernmental bodies and the organs and agencies of the United Nations system, whose activities relate to the trade and economic development of less-developed countries.

8. The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.*

9. The adoption of measures to give effect to these principles and objectives shall be a matter of conscious and purposeful effort on the part of the contracting parties both individually and jointly.

Interpretative Note *Ad* Article XXXVI from Annex I

Paragraph 1

This Article is based upon the objectives set forth in Article I as it will be amended by Section A of paragraph 1 of the Protocol Amending Part I and Articles XXIX and XXX when that Protocol enters into force.

Paragraph 4

The term “primary products” includes agricultural products, *vide* paragraph 2 of the note *ad* Article XVI, Section B.

Paragraph 5

A diversification programme would generally include the intensification of activities for the processing of primary products and the development of manufacturing industries, taking into account the situation of the particular contracting party and the world outlook for production and consumption of different commodities.

Paragraph 8

It is understood that the phrase “do not expect reciprocity” means, in accordance with the objectives set forth in this Article, that the less-developed contracting parties should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments.

This paragraph would apply in the event of action under Section A of Article XVIII, Article XXVIII, Article XXVIII *bis* (Article XXIX after the amendment set forth in Section A of paragraph 1 of the Protocol Amending Part I and Articles XXIX and XXX shall have become effective), Article XXXIII, or any other procedure under this Agreement.

II. INTERPRETATION AND APPLICATION OF ARTICLE XXXVI

1. General

The Panel Report on “European Communities - Refunds on Exports of Sugar - Complaint by Brazil” examined, *inter alia*, Brazil’s argument

“... that the Community system for granting refunds on exports of sugar and its application were inconsistent with commitments under Part IV of the General Agreement. The increased Community sugar exports effected through the use of subsidies, had severely depressed world market prices, and had displaced Brazilian exports and led to reduced sales opportunities and to reduced export earnings for Brazil, contrary to the provisions of Article XXXVI:2. By enlarging its market share, the European Communities had failed to make positive efforts as indicated in Article XXXVI:3, thus impeding that Brazil could be secured a share of the growth in international sugar trade compatible with its needs of economic developments. By refusing to participate in the International Sugar Agreement, 1977, and restricting its exports accordingly, the European Communities had seriously jeopardized the attainment of the objectives of that Agreement, contrary to the provisions of Article XXXVI:4. Furthermore, concerning sugar, the European Communities had not acted in a manner as to give effect to the implementation of the relevant principles and objectives contained in Article XXXVI, as stipulated in Article XXXVI:9. ...

“... the Community representative recalled the very considerable Community efforts made in favour of developing countries. These efforts comprised an innovative aid policy which through the STABEX system guaranteed export receipts for a number of least developed countries. In the field of primary commodities, the European Communities had always pursued an active and constructive policy towards the setting up of international agreements. With regard to Community participation in the International Sugar Agreement, 1977, there was no use in recalling the reasons for the present state of affairs.

“He furthermore argued that the provisions of Article XXXVI constituted principles and objectives and could not be understood to establish precise, specific obligations. It was therefore not possible by definition to ascertain that these principles had been infringed through the application of any specific measure. He also argued that it was not possible to imagine that the Community system of export refunds for sugar could have objectives contrary to those of Article XXXVI. Given the legal analogy between the provisions of Articles XXXVI and XXXVIII, the comments made in connexion with the former are also valid for the latter.”¹

The Panel findings provide in this regard:

“The Panel noted the principles and objectives stipulated in Article XXXVI and the guidelines for joint action given in Article XXXVIII to further the objectives set forth in Article XXXVI, and that Brazil being a developing country could expect to enjoy benefits in accordance with these provisions. In this connection, the Panel also noted that the European Communities had made considerable efforts in favour of a number of developing countries and had pursued an active and constructive policy towards the setting-up of international agreements.

“However, the Panel also noted that in the particular situation in the sugar market in 1978 and 1979, when Brazil and other developing countries took action through the ISA to improve the market situation, the European Communities increased its subsidized sugar exports to an extent that inevitably reduced significantly the effects of the measures taken by Brazil and other sugar exporters. It was evident that the magnitude of subsidized Community sugar exports together with the extensive use of maximum export refunds, tended to accentuate the detrimental effect on export earnings of other sugar exporters directly faced with the competition from Community sugar. The Panel felt that even though the European Communities was not a party to the ISA and not bound by the same obligations as members to that Agreement, it would nevertheless be appropriate to collaborate with other contracting parties in conformity

¹L/5011, adopted 10 November 1980, 27S/69, 79-80, paras. 2.25, 2.27-2.28.

with the guidelines given in Article XXXVIII and thus further the principles and objectives of Article XXXVI”.²

The Panel concluded:

“The Panel recognized the efforts made by the European Communities in complying with the provisions of Articles XXXVI and XXXVIII. It nevertheless felt that increased Community exports of sugar through the use of subsidies in the particular market situation in 1978 and 1979, and where developing contracting parties had taken steps within the framework of the ISA to improve the conditions in the world sugar market, inevitably reduced the effects of the efforts made by these countries. For this time-period and for this particular field, the European Communities had therefore not collaborated jointly with other contracting parties to further the principles and objectives set forth in Article XXXVI, in conformity with the guidelines given in Article XXXVIII.”³

The 1989 Report of the Panel on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile” examined, *inter alia*, a claim by Chile “that in restricting imports of apples from Chile the Community had paid no regard to the special needs of Chile as a developing country as it was obliged to do under Part IV. It made no conscious and purposeful effort to ensure that Chile secure a share of growth in international trade in apples commensurate with the needs of its economic development. It did not provide in the largest possible measure more favourable and acceptable conditions of access to world markets for these products, as required under Article XXXVI”; and the argument of the EEC that “it did take these commitments seriously and that it made every effort to avoid having to take restrictive measures against a developing country ... Part IV did not, and could not, mean that the EEC should forego its rights or be obliged to discriminate against other contracting parties”.⁴ The Panel findings provide:

“The Panel examined the EEC measures in relation to the objectives and commitments embodied in Articles XXXVI and XXXVII of Part IV of the General Agreement ... The Panel found that the EEC's import measures on dessert apples did affect a product of particular export interest to less-developed contracting parties. It noted that the EEC had held consultations with affected suppliers and had amended its regulations, but these consultations and amendments had been general in scope and had not related specifically to the interests of less-developed contracting parties in terms of Part IV. Following a careful examination of this issue, the Panel could not find that the EEC had made appropriate efforts to avoid taking protective measures on apples originating in Chile. ...”⁵

See also the references to this report under Article XXXVII.

2. Paragraph 1: “basic objectives of this Agreement”

As stated in the Note *Ad* Article XXXVI:1, the “basic objectives” referred to are those which would have been set forth in Article I of the General Agreement, if the Protocol Amending Part I and Articles XXIX and XXX had entered into force. For the text of this amendment, see the chapter on the Preamble. The Protocol Amending Part I and Articles XXIX and XXX failed to gain the requisite unanimous approval by 31 December 1967 and was abandoned.

3. Paragraph 3: “share in the growth of international trade”

The Report of the Working Party on a 1967 consultation under Article XXII:2 on the “United States Subsidy on Unmanufactured Tobacco” discusses the application of Article XXXVI in relation to an export subsidy of a developed country competing with a developing country. The Report notes that during the consultation Malawi suggested that Article XXXVI:3 “could be interpreted as meaning that the share of less-

²*Ibid.*, 27S/95-96, paras. 4.30-4.31.

³*Ibid.*, 27S/97-98, para. (h).

⁴L/6491, adopted on 22 June 1989, 36S/93, 118-19, paras. 8.4-8.5.

⁵*Ibid.*, 36S/133-34, paras. 12.31-12.32.

developed countries in world trade in a particular commodity could grow at a faster rate than world trade as a whole, and the rate of export growth by industrialized countries”.⁶

4. Paragraph 4: “primary products”

See also the corresponding provisions in Article XXXVIII:2(a). The Note *Ad* Article XXXVI:4 refers to the definition in paragraph 2 of the Note *ad* Section B of Article XVI. The definition of “primary product” in that paragraph is the same as the definition of “primary commodity” in Article 56:1 of the Havana Charter, which defined the scope of the Charter provisions on commodity agreements.

See also Articles XVIII:5, XX(h), XXII:2 and the material on them in this Index.

5. Paragraph 8: “do not expect reciprocity”

Conclusions reached at the meeting of Ministers of 27-30 November 1961 include the following: “... the Ministers agreed that, in view of the stage of economic development of the less-developed countries, a more flexible attitude should be taken with respect to the degree of reciprocity to be expected from these countries”.⁷

The Committee on Trade and Development discussed the interpretation of the provisions of paragraph 8 and of the Interpretative Note and the possibility of working out *a priori* rules for the application of the principle of non-reciprocity. Some developed countries stated in discussions on this question that they did not consider that Article XXXVI:8 relieved developing countries of their obligations under Article XXVIII to maintain a general level of concessions during renegotiations.⁸

In the GATT Council meeting of November 1975, the application of Article XXXVI:8 was discussed in connection with the request by Brazil for a waiver of Article II to the extent necessary to enable the Government of Brazil to apply the rates of duty in its new Customs Tariff, pending completion of renegotiation of its Schedule pursuant to Article XXVIII. The considerations stated by the contracting parties who participated in the discussion are summarized in the Council Minutes. In the light of the discussion, the preamble of the draft waiver was amended to recognise the desirability of maintaining a general level of mutually advantageous concessions that would favour high and expanding levels of trade, and the decision maintained a reference in the decision to Part IV of the General Agreement including Article XXXVI:8, as follows:

“Part IV of the General Agreement, including Article XXXVI:8, is applicable to the negotiations between Brazil and the contracting parties which have accepted the Protocol amending the General Agreement on Tariffs and Trade to introduce a Part IV on Trade and Development; and other contracting parties, negotiating with Brazil, likewise accept the principle enunciated in Article XXXVI:8, as applicable to the negotiations.”⁹

A number of other such Article II waiver decisions in the period 1973-1977 also included such a reference to Article XXXVI:8.¹⁰

See also the Decision of 28 November 1979 on “Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries”¹¹ whose paragraph 5 provides:

“The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make,

⁶L/2925, adopted on 22 November 1967, 15S/116, 123-124, para. 23.

⁷Conclusions adopted 30 November 1961, 10S/25, 26.

⁸16S/92-94, paras. 13-17; COM.TD/89; COM.TD/W/239, p. 9-10.

⁹C/M/110; see “Brazil - Renegotiation of Schedule III”, L/4259, Decision of 26 November 1975, 22S/10, 11, para. 2.

¹⁰20S/28, para. 3; 20S/29, para. 2; 23S/9, para. 3; 24S/16, para. 2.

¹¹26S/203.

concessions that are inconsistent with the latters' development, financial and trade needs."¹²

Paragraph 6 sets out special provisions for the least-developed countries:

"Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems."¹³

Paragraphs 7 and 8 provide:

"The concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement. Particular account shall be taken of the serious difficulty of the least-developed countries in making concessions and contributions in view of their special economic situation and their development, financial and trade needs."¹⁴

See also the discussion of the scope of Article XXXVI:8 in the unadopted 1994 panel report on "EEC - Import Régime for Bananas".¹⁵

III. PREPARATORY WORK

See the chapter on Part IV.

IV. RELEVANT DOCUMENTS

See the chapter on Part IV.

¹²26S/204, para. 5.

¹³26S/204, para. 6.

¹⁴26S/205, paras. 7, 8.

¹⁵DS38/R, dated 11 February 1994, paras. 160-162.

ARTICLE XXXVII

COMMITMENTS

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I. TEXT OF ARTICLE XXXVII AND INTERPRETATIVE NOTE AD ARTICLE XXXVII

Article XXXVII

Commitments

1. The developed contracting parties shall to the fullest extent possible – that is, except when compelling reasons, which may include legal reasons, make it impossible – give effect to the following provisions:

- (a) accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to less-developed contracting parties, including customs duties and other restrictions which differentiate unreasonably between such products in their primary and in their processed forms;*
- (b) refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed contracting parties; and
- (c)
 - (i) refrain from imposing new fiscal measures, and
 - (ii) in any adjustments of fiscal policy accord high priority to the reduction and elimination of fiscal measures,

which would hamper, or which hamper, significantly the growth of consumption of primary products, in raw or processed form, wholly or mainly produced in the territories of less-developed contracting parties, and which are applied specifically to those products.

2. (a) Whenever it is considered that effect is not being given to any of the provisions of sub-paragraph (a), (b) or (c) of paragraph 1, the matter shall be reported to the CONTRACTING PARTIES either by the contracting party not so giving effect to the relevant provisions or by any other interested contracting party.

(b) (i) The CONTRACTING PARTIES shall, if requested so to do by any interested contracting party, and without prejudice to any bilateral consultations that may be undertaken, consult with the contracting party concerned and all interested contracting parties with respect to the matter with a view to reaching solutions satisfactory to all contracting parties concerned in order to further the objectives set forth in Article XXXVI. In the course of these consultations, the reasons given in cases where effect was not being given to the provisions of sub-paragraph (a), (b) or (c) of paragraph 1 shall be examined.

(ii) As the implementation of the provisions of sub-paragraph (a), (b) or (c) of paragraph 1 by individual contracting parties may in some cases be more readily achieved where action is taken jointly with other developed contracting parties, such consultation might, where appropriate, be directed towards this end.

(iii) The consultations by the CONTRACTING PARTIES might also, in appropriate cases, be directed towards agreement on joint action designed to further the objectives of this Agreement as envisaged in paragraph 1 of Article XXV.

3. The developed contracting parties shall:

- (a) make every effort, in cases where a government directly or indirectly determines the resale price of products wholly or mainly produced in the territories of less-developed contracting parties, to maintain trade margins at equitable levels;
- (b) give active consideration to the adoption of other measures* designed to provide greater scope for the development of imports from less-developed contracting parties and collaborate in appropriate international action to this end;
- (c) have special regard to the trade interests of less-developed contracting parties when considering the application of other measures permitted under this Agreement to meet particular problems and explore all possibilities of constructive remedies before applying such measures where they would affect essential interests of those contracting parties.

4. Less-developed contracting parties agree to take appropriate action in implementation of the provisions of Part IV for the benefit of the trade of other less-developed contracting parties, in so far as such action is consistent with their individual present and future development, financial and trade needs taking into account past trade developments as well as the trade interests of less-developed contracting parties as a whole.

5. In the implementation of the commitments set forth in paragraph 1 to 4 each contracting party shall afford to any other interested contracting party or contracting parties full and prompt opportunity for consultations under the normal procedures of this Agreement with respect to any matter or difficulty which may arise.

Interpretative Note *Ad* Article XXXVII from Annex I

Paragraph 1 (a)

This paragraph would apply in the event of negotiations for reduction or elimination of tariffs or other restrictive regulations of commerce under Articles XXVIII, XXVIII *bis* (XXIX after the amendment set forth in Section A of paragraph 1 of the Protocol Amending Part I and Articles XXIX and XXX shall have become effective), and Article XXXIII, as well as in connection with other action to effect such reduction or elimination which contracting parties may be able to undertake.

Paragraph 3 (b)

The other measures referred to in this paragraph might include steps to promote domestic structural changes, to encourage the consumption of particular products, or to introduce measures of trade promotion.

II. INTERPRETATION AND APPLICATION OF ARTICLE XXXVII

A. SCOPE AND APPLICATION OF ARTICLE XXXVII

1. Paragraph 1

(1) “to the fullest extent possible”

In 1964 the Committee on the Legal and Institutional Framework of the GATT in Relation to Less-Developed Countries stated in its Report that it “recognized that the phrase ‘to the fullest extent possible’ would have the effect of leaving the applicability of the provisions of sub-paragraphs (a), (b) and (c) of paragraph 1 exclusively to the judgement of each contracting party subject to them”. Some developing contracting parties expressed concern “that this phrase might be used in a way that would considerably detract from the effectiveness of the paragraph”. For this reason, the Committee “agreed to incorporate in the commitment an interpretation of the phrase ‘to the fullest extent possible’ and to make provision for consultations”.¹

A 1976 Secretariat Note on the application of Part IV states:

“... the draft model chapter on trade and development prepared initially by the secretariat on the basis of proposals from delegations for incorporation as Part IV of the General Agreement, did not contain any qualifying clause. The words, ‘to the fullest extent possible,’ appear to have been inserted in the draft later as most of the developed countries considered that they would not be in a position to accept commitments in this area unless there were provisions for exceptions in appropriate cases. The developing countries, on the other hand, were concerned that the phrase ‘to the fullest extent possible’ might be used by developed contracting parties ‘in a way that would considerably detract from the effectiveness of this paragraph’. As a compromise, it was agreed that the term ‘to the fullest extent possible’ should be explained further by stating that it means ‘except when compelling reasons, which may include legal reasons, make it impossible’. It was also agreed to provide in paragraph 2 of Article XXXVII for a procedure for consultations in cases of non-compliance so as to ensure as far as possible that the commitments were honoured and implemented by the contracting parties concerned. ...

“With respect to the language qualifying the commitments in Article XXXVII:1, it is not possible to say how it has weighed with governments in meeting their commitments including the undertaking to refrain from introducing new, or increasing the incidence of existing, barriers to the trade of developing countries (Article XXXVII:1(b)). However, in the course of the reviews undertaken by the Committee, representatives of developed contracting parties have been able to indicate the reasons underlying any specific measures which may have been introduced, including new barriers to trade or the intensification of existing restrictions.”²

The 1980 Panel Report on “EEC - Restrictions on Imports of Apples from Chile” concluded that the EEC import restrictions at issue were not in conformity with Article XIII. In response to a claim of Chile regarding the application of Part IV,

“The Panel examined the EEC measure in relation to the objectives and commitments embodied in Articles XXXVI and XXXVII; in particular XXXVII:1(b) ... Although the EEC measure did affect the

¹L/2281, para. 4.

²COM.TD/W/239, p. 5, paras. 9-10.

ability of a developing country to export into the EEC market, the Panel noted that the EEC had taken certain actions, including bilateral consultations in order to avoid suspending imports of apples from Chile. After a careful examination, the Panel could not determine that the EEC had not made serious efforts to avoid taking protective measures against Chile. Therefore the Panel did not conclude that the EEC was in breach of its obligations under Part IV.”³

The 1989 Panel Report on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile” examined the EEC’s system of restrictive licensing applied to imports of apples under various provisions of the General Agreement:

“The Panel examined the EEC measures in relation to the objectives and commitments embodied in Articles XXXVI and XXXVII of Part IV of the General Agreement, particularly XXXVII:1(b) which states that ‘the developed contracting parties shall to the fullest extent possible ... refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less developed contracting parties’; and XXXVII:3(c), which requires developed contracting parties to ‘have special regard to the trade interests of less-developed contracting parties when considering the application of other measures permitted under this Agreement to meet particular problems and explore all possibilities of constructive remedies before applying such measures where they would affect essential interests of those contracting parties’.

“The Panel found that the EEC’s import measures on dessert apples did affect a product of particular export interest to less-developed contracting parties. It noted that the EEC had held consultations with affected suppliers and had amended its regulations, but these consultations and amendments had been general in scope and had not related specifically to the interests of less-developed contracting parties in terms of Part IV. Following a careful examination of this issue, the Panel could not find that the EEC had made appropriate efforts to avoid taking protective measures on apples originating in Chile. However, the Panel noted that the commitments entered into by contracting parties under Article XXXVII were additional to their obligations under Parts I - III of the General Agreement, and that these commitments thus applied to measures which were permitted under Parts I - III. As the Panel had found the EEC’s import restrictions to be inconsistent with specific obligations of the EEC under Part II of the General Agreement, it therefore did not consider it necessary to pursue the matter further under Article XXXVII.”⁴

(2) *“accord high priority”*

See the Interpretative Note to paragraph 1(a).

The 1976 Secretariat Note on the application of Part IV states:

“In so far as according ‘high priority’ to the removal of trade barriers on products of export interest to developing countries is concerned, it has been suggested that any such action needed to be considered in the context of the existing legal or other authority available to the contracting party concerned for initiating such action and the extent to which such action may have to be considered in the light of measures affecting trade relations with other developed contracting parties.”⁵

³L/5047, adopted on 10 November 1980, 27S/98, 117, paras. 4.22-4.23.

⁴L/6491, adopted on 22 June 1989, 36S/93, 133-34, para. 12.31-12.32.

⁵COM.TD/W/239, p. 6, para. 12.

(3) “refrain from introducing”; “refrain from imposing”; “products ... of particular export interest to less-developed contracting parties”

(a) Trade measures taken for balance-of-payments purposes

The Report of the 1971 Working Party on “United States Temporary Import Surcharge” includes the following paragraphs:

“A number of representatives of developing countries said that they could not accept the United States contention that exemption from the surcharge for exports of developing countries could be construed as discrimination, impermissible under the General Agreement. Article XXXVII clearly established that, in the absence of compelling reasons, developed contracting parties must abstain from introducing or increasing tariff or non-tariff barriers vis-à-vis developing countries. They did not consider that the United States had advanced compelling reasons since there could be no serious economic effects for the United States in exempting developing countries from the surcharge. They, therefore, drew the conclusion that Article XXXVII was not being respected and stressed the fundamental importance to developing countries of this Article - the sole commitment of developed countries towards developing countries. In the view of some of these delegations, this Article should be considered as being parallel in application to other Articles in the GATT. Moreover, they considered that the surcharge was inconsistent with current trends in international co-operation, as exemplified by the Generalized System of Preferences and with recent developments in other international organizations.

“The representative of the United States drew attention to the fact that Article XXXVII provided for a standstill only as regards ‘products’ of export interest to developing countries and stated that the United States had endeavoured to exempt such products from the surcharge by the exclusion of duty-free items. He further stated that it was neither possible nor proper to identify those countries that were ‘responsible’ for the balance-of-payments difficulties and to exclude all others from the operation of the surcharge.”⁶

The 1976 Secretariat Note on the application of Part IV states:

“During the review of the application of Part IV in the Committee on Trade and Development in 1968/69, some developing countries have mentioned that import surcharges and import deposit schemes when introduced or maintained by developed countries should not be applied to imports from developing countries in the light of the provisions of Part IV. Developed countries which had resorted to such measures for balance-of-payments reasons stated that they had endeavoured to abide by the obligations assumed by them under Part IV and had given special consideration to the interests of developing countries. For example, some developed countries had exempted from import deposit or surcharge schemes, raw materials and certain semi-finished products which constituted a substantial share in the exports of developing countries to their markets. It was, however, not possible for them to consider complete exemption from such schemes of imports from developing countries as this would weaken the effectiveness of the measures taken and might thus necessitate emergency measures being continued for a longer period ... It may be mentioned that one country exempted from its import surcharge imports entering under its Generalized System of Preferences.”⁷

The 1979 “Declaration on Trade Measures taken for Balance-of-Payments Purposes” provides, *inter alia*:

“If, notwithstanding the principles of this Declaration, a developed contracting party is compelled to apply restrictive import measures for balance-of-payments purposes, it shall, in determining the incidence of its measures, take into account the export interests of the less-developed contracting parties and may exempt from its measures products of export interest to those contracting parties.”⁸

⁶L/3573, adopted on 16 September 1971, 18S/212, 221-222, para. 37-38.

⁷COM.TD/W/239, p. 14, para. 36 (for exemption of GSP products see the Working Party Report on “Danish Temporary Import Surcharge”, L/3648, adopted on 12 January 1972, 19S/120, 125-126, 129-130, paras. 18, 22, 41, 42).

⁸L/4904, adopted on 28 November 1979, 26S/205, 206, para. 2.

See also the material under Article XII in this Index on the relationship between Article XII and Articles I and XIII.

(b) *Safeguard measures under Article XIX*

The drafting history of Part IV of the General Agreement indicates that an escape clause action would fall within paragraph 1(b) of Article XXXVII.⁹

The 1976 Secretariat Note on the application of Part IV states:

“At the eighteenth session of the Committee on Trade and Development in July 1971, a proposal for differential treatment in favour of developing countries was made in relation to Article XIX, having regard to Part IV and in particular Article XXXVII (COM.TD/82). Further discussion on this issue has taken place at subsequent meetings of the Committee on Trade and Development (COM.TD/84, L/3760, 3873) and in the MTN Group ‘Safeguards’. Developing countries have suggested that the general rule should be that safeguard measures should not be applied by developed countries to imports from developing countries. Exceptions should be made to this rule only in specific and clearly delineated circumstances, subject to objective criteria and appropriate justification procedures, and only after prior consultations had taken place with the affected developing countries and after the safeguard measures had been authorized by an appropriate multilateral body. They have also expressed the view that safeguard action should only be taken in cases of proven actual material injury and not in cases of potential injury. Such action should take into account, *inter alia*, actual material injury to the export industries of developing countries. More emphasis should be put on adjustment assistance measures in developed countries to make sure as far as possible that future safeguard actions were not necessary.

“Developing countries have also called for special provisions to be elaborated in order to facilitate the application by developing countries of safeguard measures, in accordance with their particular needs and interests.

“It might be noted that in discussions in the Committee on Trade and Development, developed countries, although agreeing that careful consideration should be given to the interests of developing countries when safeguard action was contemplated, generally considered that it would be inappropriate to revise Article XIX along the lines proposed by developing countries. They maintained that such differential treatment, by reducing the ‘safety-valve’ value of Article XIX, would make contracting parties reluctant to make tariff concessions which they would be otherwise prepared to make and might encourage the taking of action by importing countries inconsistent with the GATT. Some developed countries stated that they could not accept that Part IV allowed a departure from the principle of non-discrimination with regard to Article XIX, which ought to be applied across the board on a most-favoured-nation basis.”¹⁰

A 1978 Secretariat Note on “Modalities of Application of Article XIX”¹¹ stated that as of that time there had been no instances where Article XXXVII had been relied upon to exempt developing countries from actions taken under Article XIX.

(c) *Fiscal measures*

The Conclusions and Resolutions adopted by Ministers on 21 May 1963, include, *inter alia*:

“Industrialized countries shall progressively reduce internal charges and revenue duties on products wholly or mainly produced in less-developed countries with a view to their elimination by 31 December 1965.”¹²

⁹L/2195/Rev.1.

¹⁰COM.TD/W/239, p. 15-16, paras. 37-39.

¹¹L/4679, para. 29.

¹²12S/36, 37, para. (vi).

The 1970 Report of the Working Party on “Border Tax Adjustments” notes that

“Members from developing countries drew attention to the Ministerial Conclusions of 1963 and Article XXXVII of the GATT, which stressed that developed contracting parties should endeavour to suppress taxes on products imported essentially from developing countries ... Representatives of developed countries considered that a distinction should be made between internal charges of a general application and selective or specific taxes, since many of the taxes imposed such as cumulative turnover taxes and the tax on value added affected all products and were, in their view, not covered by Article XXXVII:1(c), which refers to fiscal measures applied specifically to those products in raw or processed form wholly or mainly produced in the territories of developing contracting parties. Representatives of developing countries pointed out that in the process of change-over to [value-added taxes], selective excise taxes were replaced by general consumption taxes. They therefore considered that the provisions of Article XXXVII:1(c) were applicable.”¹³

2. Paragraph 2: “The CONTRACTING PARTIES shall ... consult with the contracting party concerned”

In 1965-66, an Ad Hoc Group on Legal Amendments established by the Committee on Trade and Development drew up “Procedures under Article XXIII” for complaints by developing contracting parties. Paragraph 11 of these Procedures provides that “If consultations, held under paragraph 2 of Article XXXVII, relate to restrictions for which there is no authority under any provisions to the General Agreement, any of the parties to the consultations may, in the absence of a satisfactory solution, request that consultations be carried out by the CONTRACTING PARTIES pursuant to paragraph 2 of Article XXIII and in accordance with the procedures set out in the present decision, it being understood that a consultation held under paragraph 2 of Article XXXVII in respect of such restrictions will be considered by the CONTRACTING PARTIES as fulfilling the conditions of paragraph 1 of Article XXIII if the parties to the consultations so agree.”¹⁴

In March 1970, the Committee on Trade and Development adopted Procedures for “Consultations Concerning the Implementation of Provisions of Part IV”.¹⁵ The terms of reference of the Committee on Trade and Development also provide for a review at each of its meetings of the implementation of the provisions of Part IV. The Committee has agreed to undertake, at least once a year, a full review of developments on the basis of notifications submitted by governments. Concerning the mandate and work of the Committee, see further the chapter on Part IV.

No consultations have ever been held under Article XXXVII:2 and paragraph 11 of the 1966 Procedures has never been invoked.

3. Paragraph 3

(1) “give active consideration to the adoption of other measures”

See the Interpretative Note to paragraph 3(b).

(2) “have special regard to the trade interests of less-developed contracting parties when considering the application of other measures”

According to the 1976 Secretariat Note on the application of Part IV, the drafting history of Part IV shows that “escape clause action and countervailing and anti-dumping duties” were among the “other measures” intended as being subject to the provisions of Article XXXVII:3(c). During the discussions relating to the drafting of Part IV, one developing country had suggested that paragraph 3(c) of Article XXXVII should be strengthened by providing that developed contracting parties should “refrain from applying” measures such as countervailing and anti-dumping duties if they affected the essential interests of developing countries. From the records of

¹³L/3464, adopted on 2 December 1970, 18S/97, 105, paras. 29, 30.

¹⁴14S/18, 20, para. 11. See also discussion of this work in the Report of the Committee on Trade and Development, L/2614, adopted on 5 April 1966, 14S/129, 139-141, paras. 40-47.

¹⁵COM.TD/74, adopted on 23 March 1970, 18S/61-62.

discussions it would appear that this and other similar proposals to make the provisions of paragraph 3(c) of Article XXXVII more specific were not acceptable to developed countries which considered that the indiscriminate use of subsidies for the promotion of exports of manufactured products would not be in the interests of developing countries themselves.¹⁶

The Report of the Working Party on a 1967 consultation under Article XXII:2 on the "United States Subsidy on Unmanufactured Tobacco" notes that during the consultation, Malawi, supported by other members of the Working Party, stated that while prior consultations were not explicitly required under Article XXXVII:3(c), such consultations "would enable a less-developed country concerned to express its views which might not otherwise be known to the industrialized country contemplating action".¹⁷ The United States stated in reply that Article XXXVII:3(c) "did not obligate a contracting party to hold consultations prior to the introduction of the subsidy".¹⁸ The Chairman of the CONTRACTING PARTIES later noted "that the report of the Working Party contained no conclusive indication as regards damage to the trade interests of other tobacco producers arising from the existence of the United States subsidy. However, as it appeared that, to some extent, the provisions of Part IV were involved and as it was conceivable that the trade interests of other producers could be affected," he suggested, and it was so agreed, that CONTRACTING PARTIES urge the United States to give sympathetic and urgent consideration to the requests made by certain members of the Working Party.¹⁹ These members had requested that the US remove the subsidy and consult before taking action to extend the existing subsidy.²⁰

During the Council discussions in October 1974 of United States countervailing duties on imports of non-rubber footwear from Brazil, the representative of Brazil stated that countervailing duties were among the "other measures" referred to in Article XXXVII:3(c). The representative of the United States said that the countervailing measures had met the requirements of Part IV.²¹

Article 13 of the 1979 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, which was agreed in the Tokyo Round, provides that:

"It is recognized that special regard must be given by developed countries to the special situation of developing countries when considering the application of anti-dumping measures under this Code. Possibilities of constructive remedies provided for by this Code shall be explored before applying anti-dumping duties where they would affect the essential interests of developing countries."²²

The Decision of 5 May 1980 of the Committee on Anti-Dumping Practices provides that:

"The Committee, cognizant of the commitment in Article 13 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade that special regard must be given by developed countries to the special situation of developing countries when considering the application of anti-dumping measures under the Agreement, takes the following decision concerning the application and interpretation of the Agreement in relation to developing countries:

"(i) In developing countries, governments play a large rôle in promoting economic growth and development in accordance with their national priorities, and their economic régimes for the export sector can be different from those relating to their domestic sectors resulting *inter alia* in different cost structures. This Agreement is not intended to prevent developing countries from adopting measures in this context, including measures in the export sector, as long as they are used in a manner which is consistent with the provisions of the General Agreement on Tariffs and Trade, as applicable to these countries.

¹⁶COM.TD/W/239, p. 14, paras. 32, 34.

¹⁷L/2925, adopted on 22 November 1967, 15S/116, 124, para. 23.

¹⁸*Ibid.*, p. 124, para. 24.

¹⁹SR.24/13, p. 166.

²⁰15S/125, paras. 27, 28.

²¹C/M/100, p. 13-14.

²²26S/184.

“(ii) In the case of imports from a developing country, the fact that the export price may be lower than the comparable price for the like product when destined for domestic consumption in the exporting country does not *per se* justify an investigation or the determination of dumping unless the other factors mentioned in Article 5:1 are also present. Due consideration should be given to all cases where, because special economic conditions affect prices in the home market, these prices do not provide a commercially realistic basis for dumping calculations. In such cases the normal value for the purposes of ascertaining whether the goods are being dumped shall be determined by methods such as a comparison of the export price with the comparable price of the like product when exported to any third country or with the cost of production of the exported goods in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits ...”²³

4. Relationship between Article XXXVII and other Articles

(1) *Articles I and XIII*

The 1976 Secretariat Note on the application of Part IV states:

“With respect to the standstill, one view which has been expressed in the Committee by representatives of some developed countries has been the need to take measures which do not distinguish between different sources of supply. While developing countries have sought the exemption of their exports from the scope of any new measures raising trade barriers in developed country markets, developed countries have generally stated that such a distinction was not appropriate because of the legal provisions of GATT (e.g. Articles I and XIII) or because any such exemption would weaken the effect of the measures in question and mean their maintenance for a longer period of time than would otherwise be necessary. On the other hand, it has been stated that while developing country exports could not be exempted as a general rule from across-the-board actions, careful consideration had been given to the exclusion from such actions of products or product areas of interest to developing countries, taking into account the need not to impair the essential purpose or objectives which the measures have been intended to serve.”²⁴

The same Secretariat Note also states:

“At the time of the drafting of Part IV, preference schemes in favour of developing countries and between developing countries were under discussion. In this respect, consideration was given to whether provision should be made for these matters on a legal and formal basis. In the Committee on the Legal and Institutional Framework of GATT in Relation to Less-Developed Countries, it was suggested in 1963 that in Article I of the General Agreement, the most-favoured-nation provision should be amended to provide for new preferential agreements in favour of less-developed countries (Spec(63)276). Subsequently, the ‘Model Chapter’ which was drawn up by the secretariat on the basis of proposals made by contracting parties included the following sub-paragraph in the section dealing with joint action in relation to economic development:

‘(b) that nothing in the General Agreement shall prevent effect being given to arrangements agreed upon in the furtherance of the commitments outlined in [Article XXXVII:1-5].’

“This was accompanied by the comment that the sub-paragraph would provide a legal basis for giving effect to preferences accorded by developed countries to imports from developing countries and to preferences accorded by developing countries to each other even if they deviated from other provisions of the General Agreement. It would appear that it was found impossible to agree on any such enabling clause and, rather than delay the implementation of Part IV, it was decided that, while excluding such a reference from the final provisions, work should continue on the question of preferences.

“Some developing countries suggested, at the time of the discussion in GATT on the provision of a legal basis for the Generalized System of Preferences, that Article XXXVII:3(b) provided such a basis for preferences in favour of developing countries. ... Developed countries could not agree that this provision

²³ADP/2, 27S/16-17.

²⁴COM.TD/W/239, p. 5, para. 11.

provided authority for action which in their view was inconsistent with objectives under other provisions of the General Agreement and it was eventually decided that a legal basis for the Generalized System of Preferences should be provided by means of a waiver from the provisions of Article I. ... A similar waiver was provided to cover preferences between developing countries under 'The Protocol Relating to Trade Negotiations Among Developing Countries', although some countries considered that Article XXXVII:4 provided an adequate legal basis."²⁵

A separate legal basis was later established for preferences for and between developing countries by the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (Enabling Clause) of 28 November 1979.²⁶ See further concerning this Decision under Article I.

See also related material under Part IV and the material under Article XII on the relationship between Article XII and Articles I and XIII.

(2) Article XVI

See the material at page 1066 above on the Report of the Working Party on a 1967 consultation under Article XXII:2 on the "United States Subsidy on Unmanufactured Tobacco".

(3) Article XXIII

See under Article XXIII; see also material on the 1966 Procedures under Article XXIII, in the chapter on Article XXIII and above at page 1065.

B. EXCEPTIONS AND DEROGATIONS

On 19 May 1965, Australia accepted the Protocol Introducing Part IV with a Declaration stating the understanding that

"(a) because of its own development needs and policies it would be inappropriate for Australia, one of the contracting parties referred to in Article XVIII:4(b) of the General Agreement, the economy of which is in the course of industrial development and which is seeking to avoid an excessive dependence on a limited range of primary products for its export earnings but which is not a less-developed country, to undertake to give effect to the provisions of paragraphs 1, 2 and 3 of Article XXXVII to the same extent or in the same manner as the other contracting parties to which those paragraphs apply; and

"(b) the provisions of those paragraphs of Article XXXVII will be applied to the fullest extent consistent with Australia's development needs and policies and responsibilities".²⁷

III. PREPARATORY WORK

See the chapter on Part IV.

IV. RELEVANT DOCUMENTS

See the chapter on Part IV.

²⁵*Ibid.*, p. 7-8, paras. 17-18.

²⁶26S/203.

²⁷See Status of Legal Instruments, p. 2-14.2. See also statements of Australia, New Zealand and South Africa, 2SS/SR.4 and 5.

ARTICLE XXXVIII

JOINT ACTION

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I. TEXT OF ARTICLE XXXVIII

Article XXXVIII

Joint Action

1. The contracting parties shall collaborate jointly, within the framework of this Agreement and elsewhere, as appropriate, to further the objectives set forth in Article XXXVI.
 2. In particular, the CONTRACTING PARTIES shall:
 - (a) where appropriate, take action, including action through international arrangements, to provide improved and acceptable conditions of access to world markets for primary products of particular interest to less-developed contracting parties and to devise measures designed to stabilize and improve conditions of world markets in these products including measures designed to attain stable, equitable and remunerative prices for exports of such products;
 - (b) seek appropriate collaboration in matters of trade and development policy with the United Nations and its organs and agencies, including any institutions that may be created on the basis of recommendations by the United Nations Conference on Trade and Development;
 - (c) collaborate in analysing the development plans and policies of individual less-developed contracting parties and in examining trade and aid relationships with a view to devising concrete measures to promote the development of export potential and to facilitate access to export markets for the products of the industries thus developed and, in this connexion, seek appropriate collaboration with governments and international organizations, and in particular with organizations having competence in relation to financial assistance for economic development, in systematic studies of trade and aid relationships in individual less-developed contracting parties aimed at obtaining a clear analysis of export potential, market prospects and any further action that may be required;
 - (d) keep under continuous review the development of world trade with special reference to the rate of growth of the trade of less-developed contracting parties and make such recommendations to contracting parties as may, in the circumstances, be deemed appropriate;
 - (e) collaborate in seeking feasible methods to expand trade for the purpose of economic development, through international harmonization and adjustment of national policies and regulations, through technical and commercial standards affecting production, transportation and marketing, and through export promotion by the establishment of facilities for the increased flow of trade information and the development of market research; and
 - (f) establish such institutional arrangements as may be necessary to further the objectives set forth in Article XXXVI and to give effect to the provision of this Part.
-

II. INTERPRETATION AND APPLICATION OF ARTICLE XXXVIII

1. Paragraph 1: “The contracting parties shall collaborate ... to further the objectives”

The Report of the Panel on “European Communities - Refunds on Exports of Sugar - Complaint by Brazil”, notes that the Brazilian representative argued that by maintaining its sugar subsidy system, resulting in increased exports and reduced imports, and by refusing to participate in the International Sugar Agreement, 1977 (“ISA”), the European Communities had acted inconsistently with Article XXXVIII:1, 2, 2(a) and 2(e).¹ The Panel findings provide as follows:

“The Panel noted the principles and objectives stipulated in Article XXXVI and the guidelines for joint action given in Article XXXVIII to further the objectives set forth in Article XXXVI, and that Brazil being a developing country could expect to enjoy benefits in accordance with these provisions. In this connection, the Panel also noted that the European Communities had made considerable efforts in favour of a number of developing countries and had pursued an active and constructive policy towards the setting-up of international agreements.

“However, the Panel also noted that in the particular situation in the sugar market in 1978 and 1979, when Brazil and other developing countries took action through the ISA to improve the market situation, the European Communities increased its subsidized sugar exports to an extent that inevitably reduced significantly the effects of the measures taken by Brazil and other sugar exporters. It was evident that the magnitude of subsidized Community sugar exports together with the extensive use of maximum export refunds, tended to accentuate the detrimental effect on export earnings of other sugar exporters directly faced with the competition from Community sugar. The Panel felt that even though the European Communities was not a party to the ISA and not bound by the same obligations as members to that Agreement, it would nevertheless be appropriate to collaborate with other contracting parties in conformity with the guidelines given in Article XXXVIII and thus further the principles and objectives of Article XXXVI.”²

The Panel concluded:

“The Panel recognized the efforts made by the European Communities in complying with the provisions of Articles XXXVI and XXXVIII. It nevertheless felt that increased Community exports of sugar through the use of subsidies in the particular market situation in 1978 and 1979, and where developing contracting parties had taken steps within the framework of the ISA to improve the conditions in the world sugar market, inevitably reduced the effects of the efforts made by these countries. For this time-period and for this particular field, the European Communities had therefore not collaborated jointly with other contracting parties to further the principles and objectives set forth in Article XXXVI, in conformity with the guidelines given in Article XXXVIII.”³

2. Paragraph 2(f): “The CONTRACTING PARTIES shall ... establish ... such institutional arrangements as may be necessary”

The CONTRACTING PARTIES established the Committee on Trade and Development on 26 November 1964 to “keep under continuous review the application of the provisions of Part IV” and to carry out various other tasks related to the implementation of Part IV.⁴ See the chapter on Part IV concerning the mandate and activities of the Committee and its Sub-Committees.

IV. PREPARATORY WORK AND RELEVANT DOCUMENTS

See Part IV.

¹L/5011, adopted on 10 November 1980, 27S/69, 80, para. 2.25.

²*Ibid.*, 27S/95, paras. 4.30 - 4.31.

³*Ibid.*, 27S/97, para. (h).

⁴13S/75.

PROVISIONAL APPLICATION OF THE GENERAL AGREEMENT

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I. TEXT OF THE PROTOCOL OF PROVISIONAL APPLICATION

1. The Governments of the COMMONWEALTH OF AUSTRALIA, the KINGDOM OF BELGIUM (in respect of its metropolitan territory), CANADA, the FRENCH REPUBLIC (in respect of its metropolitan territory), the GRAND-DUCHY OF LUXEMBURG, the KINGDOM OF THE NETHERLANDS (in respect of its metropolitan territory), the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND (in respect of its metropolitan territory), and the UNITED STATES OF AMERICA, undertake, provided that this Protocol shall have been signed on behalf of all the foregoing Governments not later than 15 November 1947, to apply provisionally on and after 1 January 1948:

- (a) Parts I and III of the General Agreement on Tariffs and Trade, and
- (b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation.

2. The foregoing Governments shall make effective such provisional application of the General Agreement, in respect of any of their territories other than their metropolitan territories, on or after 1 January 1948, upon the expiration of thirty days from the day on which notice of such application is received by the Secretary-General of the United Nations.

3. Any other government signatory to this Protocol shall make effective such provisional application of the General Agreement, on or after 1 January 1948, upon the expiration of thirty days from the day of signature of this Protocol on behalf of such Government.

4. This Protocol shall remain open for signature at the Headquarters of the United Nations (a) until 15 November 1947, on behalf of any government named in paragraph 1 of this Protocol which has not signed it on this day, and (b) until 30 June 1948, on behalf of any other Government signatory to the Final Act adopted at the conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment which has not signed it on this day.

5. Any government applying this Protocol shall be free to withdraw such application, and such withdrawal shall take effect upon the expiration of sixty days from the day on which written notice of such withdrawal is received by the Secretary-General of the United Nations.

6. The original of this Protocol shall be deposited with the Secretary-General of the United Nations, who will furnish certified copies thereof to all interested Governments.

IN WITNESS WHEREOF the respective Representatives, after having communicated their full powers, found to be in good and due form, have signed the Protocol.

DONE at Geneva, in a single copy, in the English and French languages, both texts authentic, this thirtieth day of October one thousand nine hundred and forty-seven.

II. NOTES ON PROVISIONAL APPLICATION

A. GENERAL

Pending its entry into force under the provisions of Article XXVI:6, the General Agreement ("GATT 1947") has been applied provisionally. Contracting parties listed in the Preamble apply the General Agreement under the provisions of the Protocol of Provisional Application (PPA). Contracting parties which have acceded since 1948 apply the Agreement under the provisions of their protocols of accession. A government becoming a contracting party under Article XXVI:5(c) does so on the terms and conditions previously accepted by the metropolitan government on behalf of the territory in question, including those in the PPA or accession protocols.¹ For these reasons, not only the governments signatory to the PPA, but also the governments that became contracting parties through accession under Article XXXIII or succession under Article XXVI:5(c), have the right to apply the General Agreement only to the fullest extent not inconsistent with their existing legislation, and to cease to apply the General Agreement on sixty days' notice.

The CONTRACTING PARTIES have on a number of occasions considered the question of whether provisional application under the PPA and protocols of accession should be replaced by definitive application under Article XXVI.²

The WTO Agreement provides in its Article II:2 that the agreements and associated legal instruments included in Annexes 1A, 2 and 3 are integral parts of that Agreement and binding on all Members. A Member that has accepted or acceded to the WTO Agreement is thus bound definitively by "GATT 1994", as defined in Annex 1A of the WTO Agreement. On 8 December 1994, at their Sixth Special Session, the CONTRACTING PARTIES adopted a Decision on "Transitional Co-existence of the GATT 1947 and the WTO Agreement", which provides *inter alia*:

"The legal instruments through which the contracting parties apply the GATT 1947 are herewith terminated one year after the date of entry into force of the WTO Agreement. In the light of unforeseen circumstances, the CONTRACTING PARTIES may decide to postpone the date of termination by no more than one year."³

A. INTERPRETATION AND APPLICATION OF PROVISIONS ON PROVISIONAL APPLICATION

1. Paragraph 1 of the Protocol of Provisional Application and corresponding provisions in accession protocols

(1) "Part II of that Agreement"

(a) Part II of the original General Agreement

The "grandfather clause" for existing legislation was intended to apply provisionally pending the entry into force of the Havana Charter. Article XXIX:2 of the General Agreement text as of 30 October 1947 provided that

¹L/1545, Working Party Report on "Article XXXV - Application to Japan", adopted on 7 December 1961, 10S/69, 73, para. 19; see also the chapter on Article XXVI.

²See 3S/48, 3S/247-250 (1955 Review Session); SR.12/16, p. 123-124; L/2375 (1965); 24S/61, CG.18/W/20 (1977); MTN/GNG/NG7/W/70, MTN/GNG/NG7/W/71 (1990).

³PC/12, L/7583.

“On the day on which the Charter of the International Trade Organization enters into force, Article I and Part II of this Agreement shall be suspended and superseded by the corresponding provisions of the Charter”.

During the Geneva session of the Preparatory Committee, the Tariff Negotiations Working Party requested delegations to inform it of the steps which would be necessary to put the General Agreement into force.⁴ A number of delegations stated that definitive entry into force might take substantial time.⁵ To avoid undue delay in application of the tariff concessions, and provide “early proof ... to the world of the benefits accruing from the present negotiations”, the full draft of the General Agreement produced by the Tariff Negotiations Working Party included an Article XXXII on provisional application.⁶ The working party stated in this respect:

“It will be noted that application of Part II is to take place ‘to the fullest extent not inconsistent with existing legislation’. The position of governments unable to put Part II of the Agreement fully into force on a provisional basis without changes in existing legislation is, therefore, covered.”⁷

The Panel on “Norway - Restrictions on Imports of Apples and Pears” examined whether Norway’s system of restrictive licensing for apples and pears was consistent with the existing legislation clause.

“The Panel began its examination by analysing the historical origin of the Protocol and relevant decisions of the CONTRACTING PARTIES relating to the existing legislation clause.

“The Panel noted in the first place that paragraph 1(b) of the Protocol served a well determined purpose in a particular historical situation. It was to enable, in 1947, governments to accept the obligations of Part II of the General Agreement without having to adjust their domestic legislation. The drafters of the Protocol expected the General Agreement to be superseded soon by the ITO Charter and they felt that legislative changes should not be required at that time because such changes would have delayed the acceptance of the obligations under the General Agreement and could have prejudged the outcome of the negotiations on the Charter. ... In the light of this purpose of the existing legislation clause, the Panel considered that it would not be justified to give this clause four decades after the entry into force of the Protocol an interpretation that would extend its functions beyond those it was originally designed to serve.”⁸

The Note *Ad Article I:1* provides that “The obligations incorporated in paragraph 1 of Article I by reference to paragraphs 2 and 4 of Article III and those incorporated in paragraph 2(b) of Article II by reference to Article VI shall be considered as falling within Part II for the purposes of the Protocol of Provisional Application.” This provision was intended to reserve legislation regarding preferential internal taxes until definitive application of the General Agreement.⁹ Protocols of accession contain a similar standard provision; see under Article XXXIII.

(b) *Subsequent amendments to Part II*

In the “Resolution of 7 March 1955 Expressing the Unanimous Agreement of the CONTRACTING PARTIES to the Attaching of a Reservation on Acceptance pursuant to Article XXVI”, the contracting parties unanimously agreed, *inter alia*,

“that an acceptance pursuant to Article XXVI shall be valid even if accompanied by a reservation to the effect that Part II of the General Agreement will be applied to the fullest extent not inconsistent with legislation which existed on 30 October 1947 or, in the case of a contracting party which since 30 June 1949 has acceded to the Agreement, the date of the Protocol providing for such accession”.¹⁰

⁴EPCT/100.

⁵See EPCT/TAC/SR 1, 2, 6.

⁶EPCT/135 p. 8-9, 63-65.

⁷*Ibid.*, p. 9.

⁸L/6474, adopted on 22 June 1989, 36S/306, 319, para. 5.4-5.5.

⁹EPCT/TAC/PV.26, p. 10.

¹⁰3S/48; see also 3S/247-248. For examples of such reservations, see Status of Legal Instruments at p. 2-8.3ff.

In a Declaration of 15 November 1957 on “Statements which Accompanied the Acceptance of the Protocol Amending the Preamble and Parts II and III”, the CONTRACTING PARTIES declared

“that the statements which accompanied the signatures or acceptances by certain contracting parties of the Protocol Amending the Preamble and Parts II and III of the General Agreement on Tariffs and Trade are accepted on the understanding that they confirm the legal situation existing under the instrument by which each of these governments became a contracting party. Consequently, each of those contracting parties continues to apply Part II of the General Agreement on Tariffs and Trade (as revised) to the fullest extent not inconsistent with legislation which existed on the date mentioned in the instrument by which it became a contracting party; following acceptance pursuant to Article XXVI, any contracting party will have the right to apply Part II, subject to any reservation accompanying such acceptance in the terms provided for in the Resolution approved by the CONTRACTING PARTIES on 7 March 1955”.¹¹

Consequently, Part II of the General Agreement, as revised by the Protocol Amending the Preamble and Parts II and III, applies to the fullest extent not inconsistent with “existing legislation” on the relevant date.

The three Panel reports on income tax practices maintained by Belgium, France and the Netherlands note the argument by the United States that the language of the Review Session amendments to the General Agreement introducing Article XVI:4, the 1960 Declaration giving effect to Article XVI:4, and the Standstill Declaration, meant that the contracting parties adhering to the 1960 Declaration had an obligation to cease granting any subsidies whether or not the subsidies were granted pursuant to legislation existing in 1947, unless a specific reservation was made. The Panel reports state in this respect:

“The Panel considered that the fact that these arrangements might have existed before the General Agreement was not a justification for them and noted that Belgium [France, Netherlands] had made no reservation with respect to the standstill agreement or to the 1960 Declaration”.¹²

(1) “not inconsistent with existing legislation”

(a) Date of reference for the phrase “existing legislation”

On the question whether the phrase “existing legislation” in paragraph 1(b) of the Protocol of Provisional Application refers to legislation existing on the date of the Protocol or on that of signature of the Protocol by the government concerned, the Chairman ruled on 11 August 1949 that it refers to legislation existing on 30 October 1947, the date of the Protocol as written at the end of its last paragraph.¹³ It was stated, however, that “particular attention should be given to the special and exceptional circumstances of Pakistan, i.e. those attendant upon the coming into existence of the new state”.¹⁴

The 1984 Panel Report on “United States Manufacturing Clause” “noted that, according to paragraph 1(b) of the Protocol, Part II of the General Agreement is to be applied ‘to the fullest extent not inconsistent with existing legislation’, that is, mandatory legislation in force on 30 October 1947”.¹⁵

For contracting parties applying the General Agreement under the provisions of a protocol of accession, the relevant date is that specified in the protocol of accession. The standard text of protocols of accession provides that the government in question will apply “Part II of the General Agreement to the fullest extent not inconsistent with the relevant legislation of [the acceding government] existing on the date of this Protocol”.¹⁶ The report of

¹¹6S/13.

¹²Reports adopted on 7 December 1981: L/4423, 23S/114, 126, para. 56; L/4424, 23S/127, 136, para. 43; L/4425, 23S/137, 146, para. 43.

¹³Discussion at GATT/CP.3/SR.40 p. 4-7; decision text at II/35-36.

¹⁴“Pakistan became a state on August 14th, 1947 and when the Protocol was opened for signature, there was no Pakistan legislation as such. The Pakistan Parliament did not meet until 1948 at which time it proceeded to enact legislation to replace the legislation previously applicable to the whole continent of India. This in some cases differed from the previous existing legislation. [The Chairman] felt that if any case ever arose out of these circumstances, the contracting parties should give special attention and sympathetic consideration to such a case.” GATT/CP.3/SR.40 p. 5.

¹⁵L/5609, adopted on 15 May 1984, 31S/74, 88, para. 35.

¹⁶The two exceptions are in the accession protocols of Switzerland and Israel, in which cases the reference dates are the dates of the

the 1949 Working Party on "Accession at Annecy" which first considered the subject of accession to the General Agreement notes that "It was considered that, although there were arguments for applying the same limitation to the exception for existing legislation - namely, that existing at the date of the Protocol of Provisional Application - this might in fact be a considerable obstacle to accession. It might require an acceding government to amend legislation enacted prior to the formal completion of the negotiations, which had not been the case for the present contracting parties at Geneva".¹⁷

(b) *Mandatory character of "existing legislation"*

During the discussions in the Tariff Agreement Committee at Geneva, it was stated that:

"... the intent is that it should be what the executive authority can do -- in other words, the Administration would be required to give effect to the general provisions to the extent that it could do so without either (1) changing the existing legislation or (2) violating existing legislation. If a particular administrative regulation is necessary to carry out the law... that regulation would, of course, have to stand; but to the extent that the Administration had authority within the framework of existing laws to carry out these provisions, it would be required to do so".¹⁸

In 1949 at the Third Session, a working party considered notifications of pre-existing measures under paragraphs 6 or 11 of Article XVIII, which at that time permitted maintenance of certain measures if they had been notified and had received the concurrence of the CONTRACTING PARTIES. It was argued that this notification process was unnecessary in the case of measures permitted by the Protocol of Provisional Application. The 1949 Working Party report on "Notifications of Existing Measures and Procedural Questions" states:

"The Working Party directed its attention to the question of whether a government is obliged to notify [under Article XVIII:6 or XVIII:11] if the measure in question is permitted during the period of provisional application by virtue of sub-paragraph 1(b) of the Protocol of Provisional Application or sub-paragraph 1(a)(ii) of the Annecy Protocol of Terms of Accession. The working party agreed that a measure is so permitted, provided that the legislation on which it is based is by its terms or expressed intent of a mandatory character -- that is, it imposes on the executive authority requirements which cannot be modified by executive action."¹⁹

In the discussion when this report was adopted, the United States representative suggested the addition of the words "without departing from the intent of a measure embodied in the legislation" to the last sentence cited, so as to cover the case of legislation which was mandatory in intent but couched in permissive terms. The representative of Brazil "inquired whether [this] proposed ... wording would cover the case of specific measures taken by the executive power in pursuance of a general authorization of the legislature". The Chairman felt that this interpretation would be contrary to the conclusion reached by the Working Party as the sentence states: 'imposes on the executive authority requirements which cannot be modified by executive action'. It was agreed that the United States position would be met by the insertion of the wording "by its terms or expressed intent". In response to a further inquiry, the Chairman stated that "The proposed amendment by the United States only broadened the concept of mandatory legislation to include legislation which was mandatory by its expressed intent. Any further interpretation would depend on the particular cases".²⁰

The 1949 Working Party Report on "Brazilian Internal Taxes" examined Brazilian law 7404 of 1945, which imposed taxes which discriminated between products of national origin and like products supplied by other contracting parties, in the light of Article III and the Protocol of Provisional Application. The report notes that the "Brazilian delegate informed the working party that any change in the rates of tax established by this law could not have been effected by administrative action, but would have required amending legislation to be enacted by the Brazilian Congress. The working party therefore concluded that in view of the mandatory nature of law 7404 the taxes imposed by it, although discriminatory and hence contrary to the provisions of Article III, were

preceding declarations providing for provisional accession.

¹⁷GATT/CP.3/37, adopted on 9 June 1949, II/148, 151, para. 19.

¹⁸EPCT/TAC/PV/5, p. 20.

¹⁹GATT/CP.3/60/Rev.1, adopted on 10 August 1949, II/49, 62, para. 99.

²⁰GATT/CP.3/SR.40, p. 6-7.

permitted by the terms of the Protocol of Provisional Application and need not be altered so long as the General Agreement was being applied only provisionally by the Government of Brazil".²¹

The 1950 "Report on the Use of Quantitative Restrictions for Protective and Other Commercial Purposes" notes that "during the period of provisional application of the Agreement contracting parties may be entitled under paragraph 1 of the Protocol of Provisional Application ... to maintain certain export restrictions required by existing legislation which are not consistent with Part II of the Agreement".²²

In the 1952 Panel report on "Belgian Family Allowances"

"The Panel noted ... that, in another case, the CONTRACTING PARTIES agreed that the Protocol of Provisional Application had to be construed so as to limit the operation of the provisions of paragraph 1(b) of the Protocol to those cases where 'the legislation on which [the measure] is based is, by its tenor or expressed intent, of a mandatory character - that is, it imposes on the executive authorities requirements which cannot be modified by executive action' (Volume II, page 62). The Panel, although recognizing that the relevant provisions of the Belgian royal decree appeared to be of a mandatory character, noted that, as pointed out by the Danish and the Norwegian representatives and admitted by the Belgian representative, it had been possible for the Belgian executive authorities to grant an exemption to a country whose system of family allowances did not meet fully the requirements of the law. Even if it might be difficult for the Belgian authorities to take similar action in similar cases, the Panel did not feel that it had been proved to its satisfaction that the Belgian legislation fulfilled all the conditions laid down by the CONTRACTING PARTIES to justify an exception under the Protocol of Provisional Application".²³

In the report of the Review Session Working Party on "Organizational and Functional Questions", the Working Party noted:

"it is plain from the wording of the Protocol of Provisional Application that the exception can only be applicable to legislation which is, by its terms or expressed intent of a mandatory character, that is, it imposes on the executive authority requirements which cannot be modified by executive action. The representatives of Cuba and Chile reserved their positions on this interpretation of the Protocol of Provisional Application".²⁴

In 1957, the Working Party on "Import Restrictions of the Federal Republic of Germany" examined certain residual restrictions maintained after disinvocation of Article XII.

"a number of delegations ... were unable to accept the claim that the German Marketing Laws were covered by the qualifying clause in the Torquay Protocol relating to existing legislation. These Laws seemed to them to require that the goods in question (cereals, meat, fat and sugar) be imported under State monopoly, not that imports be restricted. Under paragraph 1(a)(ii) of the Torquay Protocol contracting parties are required to apply Part II of the General Agreement, including Article XI, 'to the fullest extent not inconsistent with the legislation existing' on 21 April 1951. In their view, this provision applied only in respect of legislation which was of a mandatory character, i.e. which imposed on the executive authority requirements which could not be modified by executive action. This meant that if 'existing legislation' left the German Government no discretion but to act contrary to Article XI the German Government would be entitled to suspend the application of the provisions of that Article to the extent necessary to conform to that legislation. On the other hand, where 'existing legislation' gave the Federal Government discretion between action which was in conflict with that Article and action which was consistent with it, then action in accordance with Article XI would not be inconsistent with its national legislation; there would thus be no ground for deviating from Article XI".²⁵

²¹GATT/CP.3/42, adopted on 30 June 1949, II/181, 182, para. 5.

²²GATT/CP.4/33.

²³G/32, adopted on 7 November 1952, 1S/59, 61, para. 6-7.

²⁴L/327, adopted on 28 February, 5 and 7 March 1955, 3S/231, 249, para. 58.

²⁵L/768, adopted on 30 November 1957, 6S/55, 60, para. 12.

The same report also notes the same delegations' observation that "Should the view be accepted that all action under existing legislation was *ipso facto* exempt from the rules of Part II of the Agreement, most contracting parties would be entitled to claim the right to apply or maintain quantitative restrictions irrespective of their balance-of-payments position, and to take many other measures contrary to the provisions of the GATT; this would mean that Part II of the Agreement would have no binding force, and *inter alia*, the tariff concessions could therefore be completely nullified with impunity, a situation which would lead to a complete breakdown of the General Agreement".²⁶ Some other delegations disagreed with this interpretation. Similar differences of view are recorded in the second Working Party report, adopted on 2 May 1958, on "Import Restrictions Maintained by the Federal Republic of Germany".²⁷ The waiver granted on 30 May 1959 to the Federal Republic of Germany for maintenance of certain import restrictions contains the following *considerandum*:

"The Federal Republic contends that it is entitled to maintain restrictions on imports of products specified in the Agricultural Marketing Laws because (a) the German Marketing Laws impose on the German executive mandatory requirements for the application of restrictions on imports and (b) in any case this legislation does not need to impose a mandatory requirement in order to be covered by paragraph 1(a)(ii) of the Torquay Protocol; but most contracting parties do not accept this contention ...".²⁸

The 1988 Panel Report on "Canada - Import, Distribution and Sale of Alcoholic Drinks by Provincial Marketing Agencies" examined a claim by Canada that the Importation of Intoxicating Liquors Act 1928 constituted "existing legislation" under paragraph 1(b) of the PPA. "The Panel noted that the CONTRACTING PARTIES had decided in August 1949 that this paragraph only referred to legislation of a mandatory character The Panel *concluded* that the Importation of Intoxicating Liquors Act did not make mandatory restrictions on points of sale and discriminatory listing requirements."²⁹

The 1989 Panel on "Norway - Restrictions on Imports of Apples and Pears" examined a seasonal restriction programme for apples and pears operated by Norway under a licensing scheme. According to Norway, the system of restrictive licensing was covered by the "existing legislation" clause in the Protocol of Provisional Application because it implemented parliamentary acts predating the Protocol.

"The Panel further recalled that paragraph 1(b) of the Protocol had in various circumstances in the past been interpreted by the CONTRACTING PARTIES so as to further the full application of the General Agreement. ...

"(a) In a report approved by the CONTRACTING PARTIES on 10 August 1949, a Working Party agreed that the existing legislation clause applied only to:

'legislation which is of a mandatory character by its terms or expressed intent - that is, it imposes on the executive authority requirements which cannot be modified by executive action' (BISD II/49, paragraph 99, at 62).

"This position was on several occasions reconfirmed by the CONTRACTING PARTIES ... The Panel noted that the parties to the present dispute agreed that this interpretation applied in the present case.

"(b) [The Panel referred to the Panel report on the Manufacturing Clause, as cited below.]

"It follows from the foregoing that to be eligible as "existing legislation" under the Protocol, such legislation must:

"(a) be legislation in a formal sense,

²⁶*Ibid.*, 6S/61, para. 13.

²⁷L/821, adopted on 2 May 1958, 7S/99, 104-107, paras. 14-22.

²⁸8S/31, para. 2. The 1990 Panel Report on "United States - Restrictions on the Importation of Sugar and Sugar-Containing Products applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions" notes that "Germany had obtained a waiver for the restrictions but nevertheless insisted that they were covered by the existing legislation clause in the protocol by which it acceded to the General Agreement". 37S/228, 260 para. 5.19.

²⁹L/6304, adopted on 22 March 1988, 35S/37, 91, para. 4.28.

“(b) predate the Protocol and

“(c) be mandatory in character by its terms or expressed intent.

“The Panel then proceeded to examine the 1934 Act and the other declarations cited by Norway in the light of these criteria.

“The Panel recalled that Norway argued that, under the constitutional system of Norway, the executive authorities had no option but to restrict imports of apples and pears on the basis of the 1934 Act, after the agricultural policies to be followed by the executive authorities had been defined in the Common Political Programme of 1945 and the Government’s principles of agricultural policies had been endorsed in the Storting in 1947. ...

“In relation to the legislative measures relied upon by Norway, the Panel noted that the application of the 1946 Act (Annex II), which had prohibited all imports save those for which the King had granted express dispensation, was discontinued on the occasion of the introduction of a revised system of import licensing in 1958. The 1934 Act (Annex I) was then revived as the basis for import licensing. The relevant part of the 1934 Act provided that the ‘King can decide that ... it should be prohibited to import from abroad ... articles or goods, indicated by the King ...’. Under the terms of this Act, the King had discretion to prohibit the import of any commodity. The Panel found nothing in the text of the 1934 Act expressing the intent of rendering the institution of such restrictions mandatory. The Panel recalled that in fact no import restrictions relating to apples and pears had been based on the 1934 Act before the year 1958, restrictions in force before that period having resulted from the 1946 Act. According to its terms, the 1934 Act is enabling, not mandatory in character and can for this reason not be considered as being covered by the existing legislation clause.

“As for the Common Political Programme of 1945 (Annex III) and the Government’s White Paper No. 10 (Annex IV), endorsed by the Storting on the occasion of the adoption of the National Budget in 1947, the Panel concluded from the documents and from the explanations provided by Norway that these documents and the discussions which ensued in the Storting had in fact no bearing on import restrictions as such and contained no reference to the subject matter of the present dispute, i.e. import restrictions to be imposed on apples and pears. Though political guidelines could possibly be inferred from them, they could not be considered to be legislation conforming to the criteria enumerated in paragraph 5.7 above, and therefore could not fall within the meaning of the Protocol.

“As for the various developments in the field of agricultural policy which took place after 1947, such as the ‘Basic Agricultural Agreement’ concluded in 1950 and supplemented since by periodic medium-term agreements, several White Papers presented by the Government and recommendations of a Storting Committee, which have been relied upon by Norway (see Annexes V, VI, VII and XII), the Panel noted that these could have no relevance to the application of the existing legislation clause, since they occurred after the date of the Protocol.

“For the reasons stated above, the evidence presented by Norway on the state of the legislation that existed on 30 October 1947 did not show that the Norwegian system of restrictive licensing of the import of apples and pears was based on legislation eligible under the paragraph 1(b) of the Protocol”.³⁰

The Panel on “Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes” examined whether Thailand’s Protocol of Accession exempted measures taken under Section 27 of the Tobacco Act from the application of Article XI:1. Thailand argued that the intent of the Tobacco Act was to restrict imports of cigarettes and that it was therefore mandatory. Section 27 of the Tobacco Act provided that “the importation ... of tobacco is prohibited except by licence of the Director-General”.

“The Panel noted that, while the Tobacco Act was legislation in the formal sense and predated the Protocol of Accession of Thailand, it did not, by its terms or expressed intent, impose on the Thai executive

³⁰L/6474, adopted on 22 June 1989, 36S/306, 319-322, paras. 5.6-5.7 and 5.10-5.13.

authorities a requirement to restrict imports that could not be modified by executive action. On the contrary, Section 27 of the Act explicitly gives the Thai executive authorities the power to grant import licences. The Panel therefore found that the existing legislation clause in Thailand's Protocol of Accession did not exempt the restrictions on the importation of cigarettes from Thailand's obligations under the General Agreement."³¹

The 1992 Panel on "Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies" examined, *inter alia*, the argument of Canada that the authorization of private sale of domestic beer in Ontario was covered by paragraph 1(b) of the Protocol. The Ontario Liquor Control Act, which had been in effect on 30 October 1947, restricted the sale of beer in Ontario to sales by the liquor board and sales by federally-licensed Canadian brewers "duly authorized by the dominion of Canada". In Canada's view, this legislation made mandatory a prohibition on authorizing foreign brewers to sell beer in Ontario except through the liquor board.

"The Panel noted that the Ontario Liquor Control Act in effect on 30 October 1947 had been the legal basis for authorizing the on-site brewery outlets in Ontario, of which there were now 23 The legal basis for authorizing the brewers' retail stores, of which there were now 473 ... was Section 3(e) of the Liquor Control Act introduced in 1980, which empowered the liquor board to authorize Brewers Warehousing Company Limited 'to operate stores for the sale of beer to the public'. The Panel concluded from this that Canada's arguments relating to the Protocol of Provisional Application could apply only to the on-site outlets but not to the brewers' retail stores. The Panel further noted that it had been determined by the CONTRACTING PARTIES that a measure was covered by paragraph 1(b) of the Protocol of Provisional Application only if "the legislation on which it is based is by its terms or expressed intent of a mandatory character - that is, it imposes on the executive authority requirements which cannot be modified by executive action". (II/62) The Ontario Liquor Control Act, as amended to July 1947, provided in Section 46 that

'The [Liquor Control Board of Ontario] may, with the approval of the Minister and subject to the provisions of this Act, and to the regulations made thereunder *grant a license* to any brewer duly authorized by the Dominion of Canada authorizing such brewer or any lawfully appointed agent of such brewer, ...

(c) to keep for sale and sell beer under the supervision and control of the Board and in accordance with this Act and the regulations.' (emphasis supplied).

"The Panel noted that the Liquor Control Act, by its terms, enabled the Dominion of Canada to authorize Canadian brewers to sell beer but it did not mandatorily require it to do so and that Canada had not claimed that the Act, by its terms or expressed intent, prevented the liquor board from withdrawing the authorizations granted. The Panel therefore found that the Act did not require the executive authority to accord domestic beer treatment more favourable than that accorded to imported beer and that the discriminatory restrictions on access to points of sale imposed by Canada in Ontario were consequently not covered by paragraph 1(b) of the Protocol of Provisional Application."³²

The 1992 Panel on "United States - Measures Affecting Alcoholic and Malt Beverages" examined, *inter alia*, the United States contention that the state distribution requirements of certain states, even if inconsistent with Article III, were covered by the "existing legislation" clause of the Protocol of Provisional Application. After a recital of the decisions listed above,

"The Panel then proceeded to examine the contention of the United States that existing mandatory legislation in the United States included legislation at the state level. The Panel first considered whether, in view of the fact that the United States had accepted the PPA as a federal Executive Agreement, the state distribution requirements concerned could be considered 'mandatory legislation' in the sense of the PPA. The Panel noted in this respect that both parties agreed that under United States constitutional law GATT law is part of United States federal law and, being based on the Commerce Clause of the Constitution,

³¹DS10/R, adopted on 7 November 1990, 37S/200, 226-227, paras. 82-83.

³²DS17/R, adopted on 18 February 1992, 39S/27, 76-77, para. 5.9.

overrides, as a general matter, inconsistent state law. This was also the view of two eminent writers on the law of the GATT, Professors John Jackson and Robert Hudec. ...

"The Panel considered that assuming that United States federal law, including the GATT as part of federal law, in general overrides inconsistent state legislation, it was still necessary in the present case to examine whether United States federal law, including the GATT, overrides inconsistent state liquor laws based on the Twenty-first Amendment of the United States Constitution which grants substantial regulatory powers to the states in respect of alcoholic beverages. Based on the submissions of the parties, the Panel found that there is evidence supporting the conclusion that this is the case: that is, the Twenty-First Amendment grants broad police powers to the states to regulate the distribution and sale of alcoholic beverages but does not grant the states powers to protect in-state producers of alcoholic beverages against imports of competing like products.

"The Panel noted that this conclusion is supported by various decisions of the United States Supreme Court, to which Canada and the United States referred in their submissions.³³ ...

"Judging from the evidence submitted to this Panel, and in particular that of the various cases before the United States Supreme Court, the Panel considered that the United States has not demonstrated that its state laws inconsistent with Article III impose requirements which the United States could not change, or indeed has not already overruled, by executive action, including, in this case, acceptance by the United States of the obligations under the General Agreement as part of United States federal law. The Panel thus found that the record does not support the conclusion that the inconsistent state liquor legislation at issue in this proceeding is 'mandatory existing legislation' in terms of the PPA."³⁴

During consideration of this Panel Report at the June 1992 Council meeting, the representative of the United States stated that "While the United States would not oppose adoption of the Panel report, it would enter for the record a formal reservation" regarding these paragraphs.³⁵

In this connection see also the unadopted 1993 panel report on "EEC - Member States' Import Régimes for Bananas".³⁶

(c) *Modification of "existing legislation"*

The Working Party report, adopted on 30 June 1949, on "Brazilian Internal Taxes" recognized that legislation inconsistent with Part II of the General Agreement could be modified without losing its status of "existing legislation" provided the degree of inconsistency with the General Agreement was not increased. The prevailing view was "that the Protocol of Provisional Application limited the operation of Article III only in the sense that it permitted the retention of an absolute difference in the level of taxes applied to domestic and imported products, required by existing legislation, and that no subsequent change in legislation should have the effect of increasing the absolute margin of difference".³⁷

The Panel report on "United States Manufacturing Clause" noted that

"... the central point of difference between the two parties to the dispute related to whether the Manufacturing Clause, despite the postponement by legislation of July 1982 of the expiry date of 1 July 1982 inserted in the Clause in 1976, could still qualify as 'existing legislation' under the Protocol of Provisional Application.

³³The footnotes to this paragraph provide citations to *Hostetter v. Idlewild*, 337 U.S. 324, 331 (1964); *Bachus Imports, Ltd. v. Dias, Director of Taxation of Hawaii*, 486 U.S. 263, 276 (1984); *Brown-Forman Distillers Corp v. New York State Liquor Authority*, 476 U.S. 573, 585 (1986); *Healy v. Beer Institute, Inc.*, 109 S.Ct. 2491, 2500-03 (1989).

³⁴DS23/R, adopted on 19 June 1992, 39S/206, 284-287, paras. 5.45, 5.46, 5.48.

³⁵C/M/257.

³⁶DS32/R, dated 3 June 1993, paras. 346-349.

³⁷GATT/CP.3/42, adopted on 30 June 1949, II/181, 183, para. 12. The analysis of the margins of difference applied the definition of "margin of preference" in Article I:4.

“... The Panel, noting that the Manufacturing Clause had been amended on 13 July 1982, first asked itself whether the mere fact that the Clause had been amended after 30 October 1947 meant that it had lost the cover of the ‘existing legislation’ provision of the Protocol of Provisional Application. ... The Panel ... noted that one of the basic purposes of the provisional application of Part II of the GATT had been to ensure that the value of tariff concessions was not undermined by new protective legislation. To permit changes to ‘existing legislation’ that did not increase the degree of inconsistency of such legislation with the General Agreement would thus be in accordance with this purpose of the Protocol of Provisional Application. The Panel therefore considered that changes to the Manufacturing Clause that did not alter its degree of inconsistency with the General Agreement, or which constituted a move towards a greater degree of consistency, would not cause it to cease to qualify as ‘existing legislation’ in terms of paragraph 1(b) of the Protocol of Provisional Application. In this regard, the Panel noted with satisfaction that certain of the amendments made by the United States since 1947 to the Manufacturing Clause had reduced its degree of inconsistency with the General Agreement.

“The Panel then asked itself whether or not the legislation of 13 July 1982 postponing the expiry date of the Manufacturing Clause had merely amended the Manufacturing Clause without increasing its degree of inconsistency with the General Agreement. The Panel considered that the answer to this question depended on whether the introduction by the United States in 1976 of an expiry date of 1 July 1982 for the Manufacturing Clause had constituted a move towards GATT conformity, which had been reversed by the 1982 legislation, or whether the 1976 amendment had represented only an announcement of the possibility of a future move. The Panel considered that the response to this question depended in turn on whether, in the circumstances of the particular case, the insertion of the expiry date could justifiably have been considered by trading partners as a change in United States policy (with delayed implementation) or merely as the announcement of the possibility of a future change in policy. After a careful evaluation of the evidence before it, in particular of the evidence in paragraphs 24-29, and having regard to the fact that the expiry date inserted in the Clause in 1976 was the first such provision introduced since the legislation came into force in 1891, the Panel found that the European Communities had been justified in reaching the conclusion that the expiry date inserted in 1976 had constituted a policy change. The Panel therefore found that the insertion of the expiry date of 1 July 1982 for the Manufacturing Clause by Public Law 94-553 had represented a move towards greater GATT conformity. In consequence, the Panel further found that the legislation of 13 July 1982 postponing this expiry date had, in the circumstances of this particular case, constituted a reversal of this move towards greater GATT conformity and, therefore, increased the degree of inconsistency with the General Agreement of the Manufacturing Clause.

“The Panel then considered whether this increase in the degree of inconsistency with the General Agreement of the Manufacturing Clause could be justified in terms of paragraph 1(b) of the Protocol of Provisional Application because the postponement of the expiry date had not increased the degree of inconsistency to a level in excess of that which had existed on 30 October 1947. The Panel was of the view that the basic issue in this respect was whether the ‘existing legislation’ provision of the Protocol of Provisional Application should be interpreted as opening a ‘one-way street’ permitting only movements from the situation on 30 October 1947 to the situation required by Part II of the GATT or a ‘two-way street’ permitting also movements back towards the 1947 situation.

“Since the text of the Protocol itself and previous decisions of the CONTRACTING PARTIES concerning the Protocol are not clear on this point, the Panel examined which of these two interpretations would be in accordance with the purposes of the Protocol of Provisional Application and of the General Agreement. It noted that the Protocol had been conceived of as providing a temporary dispensation to enable contracting parties to apply Part II of the General Agreement without changing existing legislation or acting inconsistently with it. Given this purpose of the Protocol, the Panel believed that, once a contracting party had reduced the degree of inconsistency of ‘existing legislation’ with the General Agreement, there could be no justification for a subsequent move to increase the degree of GATT inconsistency of such legislation, albeit to a level not exceeding that which had existed on 30 October 1947. The Panel further noted that one of the basic aims of the General Agreement was security and predictability in trade relations among contracting parties. The Panel believed that it would not be consistent with this aim if contracting parties were free to reverse steps that had brought legislation inconsistent with GATT and justified under the Protocol of Provisional Application into line with the provisions of the General Agreement. The Panel

therefore found that the Protocol of Provisional Application did not authorize contracting parties to enact legislation increasing the degree of GATT inconsistency of 'existing legislation', even if that degree of inconsistency remained not in excess of that which had obtained on 30 October 1947. The Panel therefore found that the United States legislation of 13 July 1982 postponing the expiry date of the Manufacturing Clause could not be justified under the Protocol of Provisional Application."³⁸

The Panel Report on "Norway - Restrictions on Imports of Apples and Pears" notes, regarding the "Manufacturing Clause" panel:

"... In a Panel report adopted by the CONTRACTING PARTIES on the Manufacturing Clause in the US copyright legislation, the scope of paragraph 1(b) of the Protocol was extensively considered. The basic issue before that Panel was whether the existing legislation clause should be interpreted as opening a one-way street permitting only movements from the situation on 30 October 1947 to the situation required by Part II of the General Agreement or a two-way street permitting also movements back to the 1947 situation. The Panel decided in favour of the "one-way street" principle arguing that the Protocol was designed to provide only a temporary dispensation from Part II, that the basic aim of the General Agreement was security and predictability in trade relations and that it would be inconsistent with that aim if contracting parties were free to reverse, at any time and at their discretion, the steps they had taken to bring their legislation into conformity with the General Agreement ...".³⁹

(d) *Notification of "existing legislation" and other claims*

The 1949 Report on "Notifications of Existing Measures and Procedural Questions" states that "there is no obligation on the part of a contracting party to notify a measure permitted by sub-paragraph 1(b) of the Protocol of Provisional Application", even if, in the absence of the Protocol, the measures could only be justified under a GATT provision requiring notification (such as Article XVIII).⁴⁰

In 1955, a request was made to contracting parties for information on their existing mandatory legislation which was not in conformity with Part II of the GATT. Of the thirteen that replied, seven countries indicated they had such legislation.⁴¹ At the time it was understood that this list was not exhaustive and that respondents were not bound by the list.

The Panel Report on "Norway - Restrictions on Imports of Apples and Pears" notes that "when in 1955 and 1958 the CONTRACTING PARTIES requested notification of legislation eligible under paragraph 1(b) of the Protocol, six contracting parties (Canada, Denmark, Germany, the United Kingdom, the United States and the Union of South Africa) notified legislative acts, whereas seven contracting parties (Australia, Ceylon, Finland, Japan, Pakistan, Rhodesia and Nyasaland) declared that they had no such legislation (see document L/2375/Add.1). Although the Panel recognized that there was no legal obligation to make such notification, it did note that Norway did not avail itself of the opportunity to notify on that occasion the Acts and declarations cited in the present dispute".⁴²

The Panel report, adopted on 16 November 1962, on "Uruguayan Recourse to Article XXIII" shows that out of the fifteen countries against which Uruguay had directed its complaints, six countries argued that certain measures were permitted under their respective Protocols of Accession or Provisional Application.⁴³ Also, during an examination of residual import restrictions in 1962, four countries stated that they considered that certain restrictions they applied to certain agricultural products were covered by their respective Protocols of Provisional Application or Accession.⁴⁴

³⁸L/5609, adopted on 15 May 1984, 31S/74, 88-90, paras. 35-39.

³⁹36S/306, 320, para. 5.6.

⁴⁰II/62, para. 100.

⁴¹See L/309 and Addenda, L/2375.

⁴²36S/306, 321, para. 5.9.

⁴³IIS/95, 102-148; countries included Belgium (mixing regulation on wheat), Canada (import licensing on grain items), Denmark (mixing regulation on bread grains), Federal Republic of Germany (import permits and quotas on meat and edible oils), Italy (State trading on wheat and wheat flour), and the United States (quotas on wheat and wheat flour to the extent inconsistent with XI:2(c)).

⁴⁴L/1769; Australia (prohibition on butter substitutes), Italy (restrictions on wheat and meslin, wheat flour, bananas and tobacco), Sweden (various measures in meat, dairy, grains, sugar and fish sectors) and United States (import quotas on wheat, wheat flour, and sugar).

e) *Burden of proof with respect to “existing legislation”*

The 1957 Working Party Report on “Import Restrictions of the Federal Republic of Germany” notes the following view of a number of delegations: “Should the Federal Government seek to maintain its claim that the Marketing Laws in fact require the maintenance of restrictions inconsistent with GATT provisions, the German delegation should produce the text of the Laws and particulars of the parliamentary discussions and explanatory material relating to the legislation in question to bear out its contention”.⁴⁵ See the examination of legislative provisions and intent cited above in the 1989 Panel Report on “Norway - Restrictions on Imports of Apples and Pears”.

The Panel on “United States - Measures affecting Alcoholic and Malt Beverages” examined, *inter alia*, the United States contention that certain requirements were covered by the “existing legislation” clause of the Protocol of Provisional Application. In this connection, the panel “noted that the United States, as the party invoking the PPA, has the burden of demonstrating its applicability in the instant case”.⁴⁶

In this connection see also the unadopted 1993 panel report on “EEC - Member States’ Import Régimes for Bananas”.⁴⁷

2. Paragraph 2 of the Protocol of Provisional Application: Provisional application of the General Agreement in non-metropolitan territories

Paragraph 2 provides that the governments named in paragraph 1 shall make effective provisional application of the General Agreement in respect of any of their territories other than their metropolitan territories after giving notice thereof to the Secretary-General of the United Nations.⁴⁸ Notices under paragraph 2 were received from Australia (on behalf of Papua New Guinea), Belgium (on behalf of the Belgian Congo), France (on behalf of all overseas territories of the French Union listed in Annex B except Morocco), the Netherlands (on behalf of its overseas territories), and the United Kingdom (on behalf of Newfoundland, the Mandated Territory of Palestine, all territories for the international relations of which it is responsible except Jamaica, and later on behalf of Jamaica).⁴⁹ Statements concerning provisional application to specific territories also appear in certain accession protocols e.g. of Japan⁵⁰, Portugal⁵¹ and Spain.⁵²

Lists of territories in respect of which the General Agreement has been made effective were periodically compiled.⁵³ See also the material in this Index under Articles XXIV:1 and XXVI:5.

3. Paragraphs 3 and 4 of the Protocol of Provisional Application: Acceptance by other governments signatory to the Geneva Final Act

Acceptances under paragraph 3 were received from Brazil, Burma, China, Cuba, Czechoslovakia, India, Lebanon, New Zealand, Norway, Pakistan, South Africa, Sri Lanka, Syria and Zimbabwe.⁵⁴

⁴⁵L/768, adopted on 30 November 1957, 6S/55, 61, para. 13.

⁴⁶DS23/R, adopted on 19 June 1992, 39S/206, 284, para. 5.44.

⁴⁷DS32/R, dated 3 June 1993, paras. 336-339.

⁴⁸Concerning territorial application of the General Agreement to territories for which the United States has international responsibility other than the customs territory of the United States, see discussion at GATT/CP.3/SR.5 p. 5, and note by the United States dated 13 September 1949, GATT/CP/33.

⁴⁹Status of Legal Instruments, p. 1-2.2. See also discussion at CP.3/SR.5 p. 4. Concerning the notification by the United Kingdom in 1962 that the General Agreement was to be applied provisionally in respect of Jamaica (L/1809), see also L/3485, Report of the Panel on “Jamaica - Margins of Preference”, adopted on 2 February 1971, 18S/183. See also L/3800, notice by the United Kingdom concerning its continuing representation of Hong Kong after UK accession to the EC 1 January 1973; and MTN.GNS/W/159/Corr.1 of 4 March 1993, concerning the legal régime governing relations between the European Economic Community, the Netherlands and Aruba.

⁵⁰4S/7, para. 1(d) (exception from the application of GATT under certain circumstances for islands referred to in the Treaty of Peace with Japan).

⁵¹11S/20, 24, para. 11 (acceptance “in respect of all Portugal’s separate customs territories”).

⁵²12S/27, 28 para. 3 (acceptance in respect of the customs territories listed in Annex B to the Protocol (not reproduced in the BISD); these territorial units into which the National Territory is divided are considered customs territories for the sole purpose of the General Agreement).

⁵³7S/12, 10S/7, 12S/5, 14S/1, 16S/3.

⁵⁴Status of Legal Instruments, p. 1-2.3.

On 7 September 1948 the CONTRACTING PARTIES decided that “a government signatory of the Final Act of October 30, 1947 on behalf of which the Protocol of Provisional Application was not signed by June 30, 1948 shall not be considered to be a ‘party’ within the meaning of Article XXXIII of the General Agreement in its provisional application and consequently that any such government may accede to such Agreement pursuant to the provisions of Article XXXIII”.⁵⁵ The first government to accede to the General Agreement was Chile, which applies the General Agreement under the provisions of the Protocol for the Accession of Signatories of the Final Act of 30 October 1947.⁵⁶ The provisions of this special Protocol are similar to and refer to those of the Protocol of Provisional Application.

The General Agreement does not contain provisions which specifically address the admissibility of reservations. Nevertheless, some countries accepted the 1947 Protocol of Provisional Application under paragraph 3 subject to reservations, which have in due course lapsed or been withdrawn.⁵⁷

4. Paragraph 5 of the Protocol of Provisional Application and corresponding provisions of accession protocols: withdrawal of provisional application

It was stated at the Geneva session of the Preparatory Committee that the phrase “free to withdraw such application” meant “freedom to withdraw the whole arrangement and not part of it”, so that countries could not withdraw portions of their schedules.⁵⁸ Four contracting parties have notified their withdrawal of provisional application.⁵⁹ See also above under Articles XXVII and XXXI.

B. TERMINATION OF PROVISIONAL APPLICATION OF THE GENERAL AGREEMENT

On 8 December 1994, at their Sixth Special Session, the CONTRACTING PARTIES adopted a Decision on “Transitional Co-existence of the GATT 1947 and the WTO Agreement”, which provides *inter alia*:

“The legal instruments through which the contracting parties apply the GATT 1947 are herewith terminated one year after the date of entry into force of the WTO Agreement. In the light of unforeseen circumstances, the CONTRACTING PARTIES may decide to postpone the date of termination by no more than one year.”⁶⁰

III. RELEVANT DOCUMENTS

Geneva

CONTRACTING PARTIES (1948-49)

Discussion: EPCT/TAC/PV.1, 2, 5, 6, 17, 26
 EPCT/TAC/SR.1, 2, 5, 6, 17, 26
 Documents: EPCT/100, 135, 196
 Reports: EPCT/100
 EPCT/W/301

Discussion: GATT/1/SR.1, 14
 GATT/CP.2/SR.11
 GATT/CP.3/SR.5, 40
 Reports: GATT/CP.3/60/Rev.1
 GATT/TN.2/42
 GATT/CP.2/11
 GATT/CP/22, 33
 G/5, Add.1-3, G/10

⁵⁵GATT/CP/1 p. 36.

⁵⁶Signed at Geneva and entered into force on 14 September 1948; *Status of Legal Instruments*, 3-1.1.

⁵⁷See *Status of Legal Instruments*, p. 1-2.3-1.2-4.

⁵⁸EPCT/TAC/PV/17, p. 8.

⁵⁹China, notification of withdrawal 5 May 1950 (GATT/CP/54), Lebanon, 25 February 1951 (GATT/CP/91/Corr.1), Liberia, 13 June 1953 (G/45), Syria, 6 August 1951 (GATT/CP/118).

⁶⁰PC/12, L/7583.

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I. GENERAL

The General Agreement on Tariffs and Trade was negotiated at an intermediate stage of the negotiations in 1946-1948 on the Charter of the International Trade Organization (ITO). The General Agreement has never entered into force, and has been provisionally applied by its contracting parties since 1 January 1948 under the Protocol of Provisional Application and other accession Protocols. Three principal bodies have been involved in the administration of the General Agreement: the CONTRACTING PARTIES, the Council of Representatives, and the Interim Commission for the International Trade Organization. The CONTRACTING PARTIES also established a Committee on Trade and Development, given a special role in administering Part IV of the General Agreement.

The General Agreement does not as such provide for membership in an organization, but instead provides in paragraph 1 of Article XXV that “Representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of this Agreement. Wherever reference is made in this Agreement to the contracting parties acting jointly they are designated as the CONTRACTING PARTIES.” The CONTRACTING PARTIES now meet in annual Sessions. Between sessions, business is conducted by the Council of Representatives, established in 1960 as a successor to the Inter-Sessional Committee. The Interim Commission for the International Trade Organization (“ICITO”), established in 1948 to prepare for the entry into force of the ITO Charter, has furnished secretariat services to the CONTRACTING PARTIES.

The Charter of the ITO never entered into force. The Review Session of the CONTRACTING PARTIES held in 1954-55 reached an Agreement on the Organization for Trade Cooperation (OTC) and also concluded a Protocol of Organizational Amendments to the General Agreement. Neither of these instruments entered into force.¹

In the Uruguay Round of multilateral trade negotiations, agreement was reached on the Marrakesh Agreement Establishing the World Trade Organization (“WTO Agreement”), which was opened for signature on 15 April 1994 at the Marrakesh Ministerial Meeting concluding the Uruguay Round of multilateral trade negotiations. The WTO Agreement entered into force on 1 January 1995. On 8 December 1994, the Preparatory Committee for the WTO meeting on the occasion of the Implementation Conference, and the CONTRACTING PARTIES meeting in Special Session, each decided that “The legal instruments through which the contracting parties apply the GATT 1947 are herewith terminated one year after the date of entry into force of the WTO

¹The time-limit for signature of the Protocol of Organizational Amendments to the General Agreement expired on 7 April 1966; the Agreement on the Organization for Trade Cooperation did not receive the requisite number of acceptances for entry into force.

Agreement. In the light of unforeseen circumstances, the CONTRACTING PARTIES may decide to postpone the date of termination by no more than one year.² Accordingly, the provisional application of the General Agreement on Tariffs and Trade (1947) will terminate on 31 December 1995 unless thus extended. Application of the GATT 1994 will continue, but solely within the framework of the WTO Agreement.

II. TRANSITION TO THE WTO

A. PREPARATORY COMMITTEE FOR THE WTO

The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations provided in its paragraph 3 that "... Not later than late 1994, Ministers will meet, in accordance with the final paragraph of the Punta del Este Ministerial Declaration, to decide on the international implementation of the results, including the timing of their entry into force."³ The WTO Agreement does not provide for any fixed date of entry into force other than the one set at that implementation conference.

A Decision of Ministers also taken at the Marrakesh Ministerial Meeting established a Preparatory Committee for the World Trade Organization and set out its mandate, as follows:⁴

"Ministers,

"Having regard to the Agreement Establishing the World Trade Organization ..., and

"Mindful of the desirability of ensuring an orderly transition to the WTO and the efficient operation of the WTO as of the date of entry into force,

"hereby agree as follows:

"1. A Preparatory Committee for the WTO ... is hereby established. Mr. P.D. Sutherland in his personal capacity is appointed Chairman of the Committee.

"2. The Committee shall be open for membership to all Signatories of the Final Act of the Uruguay Round of Multilateral Trade Negotiations and to any contracting party eligible to become an original member of the WTO in accordance with Article XI of the WTO Agreement.

"3. A Sub-Committee on Budget, Finance and Administration, to be chaired by the Chairman of the GATT CONTRACTING PARTIES and a Sub-Committee on Services responsible for preparatory work on GATS matters are also established. The Committee may establish additional sub-committees as appropriate. Membership of the Sub-Committees shall be open to all members of the Committee. The Committee shall establish its own procedures and those of its sub-committees.

"4. The Committee will make all its decisions by consensus.

"5. Only those members of the Committee that are GATT contracting parties eligible to become original Members of the WTO in accordance with Articles XI and XIV of the WTO Agreement may participate in the decision-making of the Committee.

"6. The Committee and its sub-committees shall be serviced by the GATT Secretariat.

²PC/12, L/7583.

³The Ministerial Declaration on the Uruguay Round, adopted in Punta del Este, Uruguay on 26 September 1986 (Min.Dec., 3S/19), was divided into Part I (Negotiations on Trade in Goods) and Part II (Negotiations on Trade in Services), and final paragraph following Part II, entitled "Implementation of Results under Parts I and II" (3S/28). This final paragraph provided as follows: "When the results of the Multilateral Trade Negotiations in all areas have been established, Ministers meeting also on the occasion of a Special Session of CONTRACTING PARTIES shall decide regarding the international implementation of the respective results".

⁴Decision on the Establishment of the Preparatory Committee for the World Trade Organization, MTN.TNC/45(MIN), Annex IV.

“7. The Committee shall cease to exist upon the entry into force of the WTO Agreement, at which time it will forward its records and recommendations to the WTO.

“8. The Committee shall perform such functions as may be necessary to ensure the efficient operation of the WTO immediately as of the date of its establishment, including the functions set out below:

“(a) *Administrative, budgetary and financial matters:*

“To prepare recommendations for the consideration of the competent body of the WTO, or, to the extent necessary, take decisions or, as appropriate, provisional decisions in advance of the establishment of the WTO, with respect to the recommendations submitted to it by the Chairman of the Sub-Committee on Budget, Finance and Administration referred to in paragraph 3 above, in cooperation with the Chairman of the GATT Committee on Budget, Finance and Administration, assisted by proposals from the Secretariat on:

- “(i) the headquarters agreement provided for in Article VIII:5 of the WTO Agreement;
- “(ii) financial regulations, including guidelines for the assessment of WTO members' budget contributions, in accordance with the criteria set out in Article VII of the WTO Agreement;
- “(iii) the budget estimates for the first year of operation of the WTO;
- “(iv) the transfer of the property, including financial assets, of the ICITO/GATT to the WTO;
- “(v) the transfer and the terms and conditions of the transfer of the GATT staff to the WTO Secretariat; and
- “(vi) the relationship between the International Trade Centre and the WTO.

“(b) *Institutional, procedural and legal matters:*

- “(i) To carry out the examination of and approve the schedules submitted to it in accordance with the ‘Decision on Acceptance of and Accession to the Agreement Establishing the World Trade Organization’ and to propose terms of accession in accordance with paragraph 2 of that Decision;
- “(ii) To make proposals concerning terms of reference for the bodies of the WTO, in particular those established in Article IV of the WTO Agreement, and the rules of procedure which they are called upon to establish for themselves, bearing in mind paragraph 1 of Article XVI;
- “(iii) To make recommendations to the General Council of the WTO concerning the appropriate arrangements with respect to relations with other organizations referred to in Article V of the WTO Agreement; and
- “(iv) To prepare and submit a report on its activities to the WTO.

“(c) *Matters related to the entry into force of the WTO Agreement and to the activities of the WTO within its scope and functions:*

- “(i) To convene and prepare the Implementation Conference;
- “(ii) To initiate the work programme arising from the Uruguay Round results as set out in the Final Act, such as overseeing, in the Sub-Committee on Services referred to in paragraph 3 above, negotiations in specific services sectors, and also to undertake work resulting from Decisions of the Marrakesh meeting;

- “(iii) To discuss suggestions for the inclusion of additional items on the agenda of the WTO's work programme;
- “(iv) To make proposals concerning the composition of the Textiles Monitoring Body in accordance with the criteria set out in Article 8 of the Agreement on Textiles and Clothing; and
- “(v) To convene the first meeting of the Ministerial Conference or the General Council of the WTO, whichever meets first, and to prepare the provisional agenda thereof.”

In carrying out its task, the Preparatory Committee held 11 meetings during the period 29 April to 21 December 1994. Its Report, the Committee minutes and the minutes of its Sub-Committees are the permanent record of the Committee's work.⁵

B. IMPLEMENTATION CONFERENCE OF 8 DECEMBER 1994

The Implementation Conference was held on 8 December 1994 in Geneva, in conjunction with a Special Session of the CONTRACTING PARTIES.⁶ The Implementation Conference agreed that the WTO Agreement would enter into force on 1 January 1995, provisionally adopted the report of the Preparatory Committee, and adopted a number of decisions drawn up by the Preparatory Committee in pursuance of its mandate. These decisions responded to issues raised during the deliberations of the Preparatory Committee and to the desire to provide a smooth transition between the GATT 1947 and the WTO, including a firm termination date for the GATT 1947; sufficient time for signatories of the Final Act to become Members of the WTO and participants in the legal arrangements therein; and arrangements facilitating stability of legal and institutional relations during the period of simultaneous provisional application of the GATT 1947 and application of the WTO Agreement. The Preparatory Committee finished its work and adopted the final draft of its report on 21 December 1994.

1. Transition to GATT 1994

The WTO Agreement incorporates the General Agreement on Tariffs and Trade 1994, defined in Annex 1A of the WTO Agreement as follows:

“The General Agreement on Tariffs and Trade 1994 (‘GATT 1994’) shall consist of:

“(a) the provisions in the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (excluding the Protocol of Provisional Application), as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement;

“(b) the provisions of the legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement:

- “(i) protocols and certifications relating to tariff concessions;
- “(ii) protocols of accession (excluding the provisions (a) concerning provisional application and withdrawal of provisional application and (b) providing that Part II of GATT 1947 shall be applied provisionally to the fullest extent not inconsistent with legislation existing on the date of the Protocol);

⁵See documents PC/M/1-11, PC/BFA/M/1-2, PC/IPL/M/1-11, PC/SCS/M/1-6 and PC/SCTE/M/1-5; the documents of the Preparatory Committee and its subsidiary bodies are listed in PC/R/Add.1.

⁶The conference was held at the level of heads of delegation, this having been decided at the Marrakesh Ministerial Meeting; see MTN.TNC/45(MIN).

- “(iii) decisions on waivers granted under Article XXV of GATT 1947 and still in force on the date of entry into force of the WTO Agreement⁷;
- “(iv) other decisions of the CONTRACTING PARTIES to GATT 1947;
- “(c) the Understandings set forth below:
 - “(i) Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994;
 - “(ii) Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994;
 - “(iii) Understanding on Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994;
 - “(iv) Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994;
 - “(v) Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994;
 - “(vi) Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994; and
- “(d) the Marrakesh Protocol to GATT 1994. ...”

Article II:4 of the WTO Agreement provides that “The General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (hereinafter referred to as ‘GATT 1994’) is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified (hereinafter referred to as ‘GATT 1947’).”

2. Decision on Transitional Co-existence of the GATT 1947 and the WTO Agreement

On 8 December 1994, the Preparatory Committee, meeting on the occasion of the Implementation Conference, adopted the following Decision on “Transitional Co-existence of the GATT 1947 and the WTO Agreement”. The CONTRACTING PARTIES meeting in Special Session on the same date also adopted this decision.

“The PREPARATORY COMMITTEE FOR THE WORLD TRADE ORGANIZATION

“*invites* the CONTRACTING PARTIES to the General Agreement on Tariffs and Trade 1947 to take the following decision:

“The CONTRACTING PARTIES to the General Agreement on Tariffs and Trade (hereinafter referred to as ‘GATT 1947’),

“*Noting* that not all contracting parties to the GATT 1947 meeting the conditions for original membership in the World Trade Organization ... will be able to accept the Marrakesh Agreement Establishing the WTO ... as of its date of entry into force, and that the stability of multilateral trade

⁷Footnote 1 to this text provides that “The waivers covered by this provision are listed in footnote 7 on pages 11 and 12 in Part II of document MTN/FA of 15 December 1993 and in MTN/FA/Corr.6 of 21 March 1994. The Ministerial Conference shall establish at its first session a revised list of waivers covered by this provision that adds any waivers granted under GATT 1947 after 15 December 1993 and before the date of entry into force of the WTO Agreement, and deletes the waivers which will have expired by that time.”

relations would therefore be furthered if the GATT 1947 and the WTO Agreement were to co-exist for a limited period of time;

“Considering that, during that period of co-existence, a contracting party which has become a Member of the WTO should not be under a legal obligation to extend the benefits accruing solely under the WTO Agreement to contracting parties that have not yet become WTO Members and should have the right to act in accordance with the WTO Agreement notwithstanding its obligations under the GATT 1947;

“Desiring to end the period of co-existence on a date agreed in advance so as to provide predictability for policy makers and facilitate an orderly termination of the institutional framework of the GATT 1947;

“Decide as follows:

“1. The contracting parties that are Members of the WTO may, notwithstanding the provisions of the GATT 1947,

“(a) accord to products originating in or destined for a Member of the WTO the benefits to be accorded to such products solely as a result of concessions, commitments or other obligations assumed under the WTO Agreement without according such benefits to products originating in or destined for a contracting party that has not yet become a Member of the WTO; and

“(b) maintain or adopt any measure consistent with the provisions of the WTO Agreement.

“2. The provisions of Article XXIII of the GATT 1947 shall not apply:

“(a) to disputes brought against a contracting party which is a Member of the WTO if the dispute concerns a measure that is identified as a specific measure at issue in a request for the establishment of a panel made in accordance with Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes in Annex 2 of the WTO Agreement and the dispute settlement proceedings following that request are being pursued or are completed; and

“(b) in respect of measures covered by paragraph 1 above.

“3. The legal instruments through which the contracting parties apply the GATT 1947 are herewith terminated one year after the date of entry into force of the WTO Agreement. In the light of unforeseen circumstances, the CONTRACTING PARTIES may decide to postpone the date of termination by no more than one year.”⁸

3. Other decisions of 8 December 1994 on institutional matters

Further concerning the institutional functioning of the GATT 1947 and the WTO during the period of coexistence of the GATT 1947 and the WTO, on 8 December 1994 the Preparatory Committee at the Implementation Conference and the CONTRACTING PARTIES adopted the following decision on “Transitional Arrangements: Avoidance of Procedural and Institutional Duplication”:

“The PREPARATORY COMMITTEE FOR THE WORLD TRADE ORGANIZATION

“Noting that the General Agreement on Tariffs and Trade (hereinafter referred to as “GATT 1947”) and the Marrakesh Agreement Establishing the World Trade Organization (hereinafter referred to as “WTO

⁸PC/12, L/7583.

Agreement") are legally distinct and that Members of the WTO may therefore remain contracting parties to the GATT 1947;

"Considering that contracting parties to the GATT 1947 and parties to the Tokyo Round Agreements that are also Members of the WTO should not be subjected to the inconvenience of having to notify and consult on their measures and policies twice;

"Desiring, therefore, that the bodies established under the GATT 1947, the Tokyo Round Agreements and the WTO Agreement coordinate their activities to the extent that their functions overlap;

"Decides to propose the following procedures for adoption by the CONTRACTING PARTIES to the GATT 1947, the Committees established under the Tokyo Round Agreements and the General Council of the WTO:

"In the period between the date of entry into force of the WTO Agreement and the date of the termination of the legal instruments through which the contracting parties apply the GATT 1947 and of the Tokyo Round Agreements the following notification and coordination procedures shall apply under the GATT 1947, the Tokyo Round Agreements and the WTO Agreement:

"1. If a measure is subject to a notification obligation both under the WTO Agreement and under the GATT 1947 or a Tokyo Round Agreement, the notification of such a measure to a WTO body shall, unless otherwise indicated in the notification, be deemed to be also a notification of that measure under the GATT 1947 or the Tokyo Round Agreement. Any such notification shall be circulated by the WTO Secretariat simultaneously to the Members of the WTO and to the contracting parties to the GATT 1947 and/or the parties to the Tokyo Round Agreement. These procedures are without prejudice to any notification procedures applicable in specific areas.

"2. The coordination procedures set out in paragraphs 3 and 4 below shall apply in the relations between the bodies referred to in sub-paragraphs (a) to (d) below:

"(a) The following Committees established under the GATT 1947 or a Tokyo Round Agreement shall coordinate their activities with the corresponding Committees established under the WTO Agreement:

Committee on Trade and Development,
Committee on Balance-of-Payments Restrictions,
Committee on Anti-Dumping Practices,
Committee on Customs Valuation,
Committee on Import Licensing,
Committee on Subsidies and Countervailing Measures,
Committee on Technical Barriers to Trade.

"(b) The Committee on Tariff Concessions and the Technical Group on Quantitative Restrictions and Other Non-Tariff Measures of the GATT 1947 shall coordinate their activities with the WTO Committee on Market Access proposed to be established.

"(c) The Working Parties established under the GATT 1947 to examine a regional agreement or arrangement shall coordinate their activities with Working Parties of the WTO that examine the same regional agreement or arrangement.⁹

"(d) The GATT 1947 Council of Representatives shall coordinate its trade policy reviews with those of the WTO Trade Policy Review Body.

⁹The Working Parties of the WTO include Working Parties originating from decisions of the CONTRACTING PARTIES to the GATT 1947 that were adopted before the entry into force of the WTO Agreement and therefore form part of the GATT 1994.

“3. The bodies established under the GATT 1947 or a Tokyo Round Agreement that are referred to in paragraph 2 above shall hold their meetings jointly or consecutively, as appropriate, with the corresponding WTO bodies. In meetings held jointly the rules of procedure to be applied by the WTO body shall be followed. The reports on joint meetings shall be submitted to the competent bodies established under the GATT 1947, the Tokyo Round Agreements and the WTO Agreement.

“4. The coordination of activities in accordance with paragraph 3 above shall be conducted in a manner which ensures that the enjoyment of the rights and the performance of the obligations under the GATT 1947, the Tokyo Round Agreements and the WTO Agreement and the exercise of the competence of the CONTRACTING PARTIES to the GATT 1947, the Committees established under the Tokyo Round Agreements and the bodies of the WTO are unaffected.

“5. The CONTRACTING PARTIES to the GATT 1947, the Committees established under the Tokyo Round Agreements and the General Council of the WTO may decide independently to terminate the application of the provisions set out in paragraphs 1 to 4 above.”¹⁰

On the same date, the Preparatory Committee and the CONTRACTING PARTIES each adopted the following decision on “Participation in Meetings of WTO Bodies by Certain Signatories of the Final Act Eligible to Become Original Members of the WTO”:

“During a period of seven months following the date of entry into force of the WTO Agreement Signatories of the Final Act Embodying the Results of the Uruguay Round that are contracting parties to the GATT 1947 as of the date of this Decision and are eligible to become original Members of the WTO

“– may be present and speak at formal or informal meetings of the bodies established under the WTO Agreement other than the Textiles Monitoring Body, and

“– shall have access to all documents made available to Members of the WTO for such meetings.

“Such Signatories shall not have the right to participate in the decision-making of the bodies established under the WTO Agreement.”¹¹

See also the material on transition to the WTO under Articles I, VI and XXIII.

In addition, on 8 and 9 December 1994 the Preparatory Committee, the CONTRACTING PARTIES and the Executive Committee of ICITO adopted an Agreement on Transfer of Assets, Liabilities, Records, Staff and Functions from ICITO and the GATT to the WTO; see further at page 1123 below.

The WTO Agreement entered into force on 1 January 1995.

III. GATT 1947 BODIES

A. CONTRACTING PARTIES

1. Establishment, membership, functions and terms of reference

As noted above, the CONTRACTING PARTIES consist of the contracting parties to the GATT “acting jointly”. Article XXXII provides that “The contracting parties to this Agreement shall be understood to mean those governments which are applying the provisions of this Agreement under Articles XXVI or XXXIII or pursuant to the Protocol of Provisional Application”. The contracting parties to the GATT have gained such status by

¹⁰PC/11, L/7582.

¹¹PC/10, L/7581.

accepting the Protocol of Provisional Application; by accepting a protocol of accession under Article XXXIII which provides for provisional application of the General Agreement; or by succession to contracting party status under Article XXVI:5(c). A list of contracting parties to the GATT appears in the appendix which follows this chapter.

Other authority for joint action by the CONTRACTING PARTIES is provided for in the following provisions of the General Agreement: II:6(a); VI:6(b) and (c); VII:1 and 4(c); VIII:2; X:3(c); XII:4(b) through (d) and 5; XIII:4; XIV:2; XV:1, 2, 3, 5, 6, 7, 8; XVI:5; XVII:4(c); XVIII:6, 7, 12, 14, 16, 19, 22; XIX:2, 3; XX:(h),(j); XXII:2; XXIII:2; XXIV:7,10; XXV:5; XXVII; XXVIII:1, 4; XXVIII *bis*:1; XXIX; XXX:2; XXXIII; XXXVII:2(b); XXXVIII:1, 2; Annex I, Interpretative notes *Ad* Articles XII:4, XVIII:15, 16, and XXVIII:1. See also the material under Article XXV in this book, including material on the drafting history of Article XXV.

At its meeting on 19 June 1992, the Council decided that the representative of the Federal Republic of Yugoslavia should refrain from participating in the business of the Council.¹² At its meeting on 16-17 June 1993, the Council agreed in the light of United Nations General Assembly Resolution 47/1 to modify this decision as follows: "The Council considers that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the contracting party status of the former Socialist Federal Republic of Yugoslavia in the GATT, and therefore decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for accession to the GATT and that it shall not participate in the work of the Council and its subsidiary bodies. The Council further invites other committees and subsidiary bodies of the GATT, including the Committees of the Tokyo Round Agreements and the Committee on Trade and Development, to take the necessary decisions in accordance with the above".¹³

2. Rules of Procedure

The CONTRACTING PARTIES have adopted Rules of Procedure for their sessions. The most recent consolidated text of the Rules of Procedure appears in the twelfth Supplement of the BISD, and reflects the most recent change to the Rules in 1964.¹⁴

3. Observer status

The Rules of Procedure for Sessions of the CONTRACTING PARTIES provide as follows:

Rule 8: "The representatives of countries signatories of the Final Act adopted at the conclusion of the United Nations Conference on Trade and Employment at Havana which have not become contracting parties may attend meetings in the capacity of observers participating in the discussions without vote."

Rule 9: "Representatives of other countries invited to the United Nations Conference on Trade and Employment and of intergovernmental organizations may attend the meetings as observers on the invitation of the CONTRACTING PARTIES, and, on the invitation of the CONTRACTING PARTIES, participate in the discussions without vote in accordance with the terms of such invitation."

A Note of 15 June 1990 by the Secretariat on "Observer Status in GATT" notes these rules and states as follows:¹⁵

¹²C/M/257 and Corr.1.

¹³C/M/264, p. 3.

¹⁴Rules of Procedure at BISD 12S/10-16, reflecting changes adopted SR.21/11 p. 182-83 on the basis of proposals at W.21/10, W.21/12. Earlier rules appear at: GATT/1/1 Ann.3 (draft), discussed at GATT/1/SR.1 p. 1-4, adopted at GATT/1/SR.3 p. 2-3 and GATT/1/SR.4 p. 1, version as adopted GATT/1/16; GATT/CP.2/3 (draft), discussed GATT/CP.2/SR.1 p. 2-11, GATT/CP.2/SR.4 p. 1-2 + Corr.1, version as adopted GATT/CP.2/Rev.2; GATT/CP.3/41 p. 4 (adoption of present Rule 1 in modified form), consolidated rules at GATT/CP/30, republished at BISD Vol.1/95-100; changes to Rules 10-12, BISD 2S/7; Spec/237/56 (draft change to Rule 2), adoption of changes to Rule 2 at SR.11 p. 185-88, adoption of changes to Rules 10-12 at SR.11 p. 64-66, consolidated text at BISD 5S/11-16; Spec/285/58 (proposed changes to Rules 1 and 10), adopted SR.13/8 p. 32, report BISD 7S/108, amendments as adopted BISD 7S/7.

¹⁵C/173, p. 1-2; see also Note by the Secretariat of 27 June 1984 on the same subject, C/129. + Suppls.

“The United Nations has observer status. Also, certain of its specialized agencies and regional commissions, and several other international organizations, have been admitted as observers. ...

“International non-governmental organizations (NGOs) do not have ‘consultative status’ in GATT: none have been admitted as observers at sessions.

“The composition of observer delegations is left to the governments or international organizations concerned.”

A Decision of 21 July 1993 on “Observer Status of Governments in the Council of Representatives” provides, *inter alia*, that “Observer governments ... may participate as observers in Sessions of the CONTRACTING PARTIES ...”.¹⁶ Consequently, countries not falling under Rule 8 are accorded observer status at sessions of the CONTRACTING PARTIES if they have observer status in the Council. See below at page 1103 concerning this decision and observer status in the Council.

In 1965, during the discussion of the request from the Republic of China (now known in the GATT as the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, or Chinese Taipei¹⁷) to be represented by observers at sessions of the CONTRACTING PARTIES, the Chairman of the CONTRACTING PARTIES stated that “Consistently ... with the practice of the United Nations, it was quite clear that for the CONTRACTING PARTIES to admit observers did not prejudice the position of the CONTRACTING PARTIES or of individual contracting parties towards recognition of the government in question. The Executive Secretary had based himself also upon the opinion of the Legal Department of the United Nations, which was that the question of representation in an international organization was distinct from the question of recognition of a government by other members of that organization”.¹⁸ In 1971, at the opening of the Twenty-seventh Session, the Chairman noted that in reaching their decision in 1965 to accede to the request of the Republic of China, the CONTRACTING PARTIES had agreed to follow decisions of the United Nations on essentially political matters, and suggested that the CONTRACTING PARTIES should follow the decision taken in United Nations Resolution 2758 (XXVI). It was agreed that for these reasons, representatives of the Republic of China should no longer attend sessions of the CONTRACTING PARTIES as observers.¹⁹ In the Council in 1992, in discussion of the establishment of a working party on accession of Chinese Taipei to the General Agreement, the Chairman of the Council noted that “as part of the understanding reached on this matter, the titles carried by [the representative of Chinese Taipei] would not have any implication on the issue of sovereignty”.²⁰

4. Election of officers

Rule 10 of the Rules of Procedure of the CONTRACTING PARTIES provides that “During the course of each regular session a Chairman, a First Vice-Chairman and two other Vice-Chairmen shall be elected from among the representatives. They shall hold office from the end of that session until the end of the next regular session”.²¹ In practice the Chairman and three Vice-Chairmen are elected at the annual Session of the CONTRACTING PARTIES.

5. Procedures

(1) *Convening of and circulation of agenda for sessions*

(a) *Regular sessions*

Rule 1 of the Rules of Procedure provides that “Sessions of the CONTRACTING PARTIES shall be held from time to time as required. The date of each session shall be fixed by the CONTRACTING PARTIES at a previous session”. Rule 2 provides that “The provisional agenda for each session shall be drawn up by the Secretary in

¹⁶L/7286, para. 5.

¹⁷See Statement by Council Chairman at September 1992 Council meeting, C/M/259, p. 2-3.

¹⁸SR.22/3, p. 22.

¹⁹SR.27/1, p. 1-4.

²⁰C/M/259, p. 3-4.

²¹When the present text of Rule 10 was adopted it was noted that “it was proposed that one of the Vice-Chairmen should be designated the First Vice-Chairman and that he should be resident either in Geneva or fairly close to the GATT headquarters and should normally preside whenever the Chairman is not available”. SR.21/11 p. 182-83.

consultation with the Chairman and shall be communicated to the contracting parties at least five weeks before the date of the meeting. It shall be open to any contracting party to propose items for inclusion in this provisional agenda up to six weeks from the date of meeting". As of the end of 1992, there had been forty-eight regular sessions of the CONTRACTING PARTIES.

The CONTRACTING PARTIES have occasionally met at Ministerial level.²²

(b) Special sessions

Rule 1 of the Rules of Procedure provides that "A session may, however, be held at another date on the initiative of the Chairman, or at the request of a contracting party concurred in by a majority of the contracting parties. Notice of the convening of any such session shall be given to contracting parties at least twenty-one days in advance of the session". As of July 1995, there had been seven special sessions of the CONTRACTING PARTIES, most recently on 24 March 1995.²³ The Procedures for Future Appointment of the Director-General approved in 1986 provide that in the event of a vacancy during the term of office of the Director-General, the new Director-General should be appointed by the CONTRACTING PARTIES within six months from the date of the vacancy, if necessary at a special session convened for this purpose.²⁴

In view of this shorter advance notice for special sessions, the time-limits mentioned in Rule 2 have not been applied to special sessions. In practice, the date and provisional agenda have been determined by the Chairman of the CONTRACTING PARTIES on the basis of consultations with the contracting parties and the Secretariat, and the Secretariat has provided as much advance notice as possible by circulating the notice convening the session and the provisional agenda simultaneously, at least twenty-one days in advance of the proposed date for the session.

(2) Conduct of sessions by Chairman

Rule 17 of the Rules of Procedure provides that "In addition to exercising the powers conferred upon him elsewhere by these rules, the Chairman shall declare the opening and closing of each meeting, shall direct the discussion, accord the right to speak, put questions to the vote, announce decisions, rule on points of order and, subject to these rules, have complete control of the proceedings. The Chairman may also call a speaker to order if his remarks are not relevant".

²²Sessions of the CONTRACTING PARTIES at Ministerial level were held in Geneva from 26-30 October 1957 during the Twelfth Session of the CONTRACTING PARTIES; from 16-18 October 1959 during the Thirteenth Session; from 27-29 October 1959 during the Fifteenth Session held in Tokyo; from 27-30 November 1961 during the Nineteenth Session (adopting the Conclusions of the Meeting of Ministers, 10S/25); from 16-21 May 1963 (adopting the Action Programme and Ministerial Conclusions, 12S/36, and establishing the Trade Negotiations Committee for the Kennedy Round); during the Twenty-fourth Session in November 1967, following the conclusion of the Kennedy Round; from 12-14 September 1973 in Tokyo (adopting the Tokyo Declaration establishing the Trade Negotiations Committee for the Tokyo Round, 20S/19); from 26-29 November 1982 during the Thirty-eighth Session (adopting the Ministerial Declaration which appears at 29S/9); and in Punta del Este on 15-16 September 1986 (adopting the Punta del Este Declaration and establishing the Trade Negotiations Committee for the Uruguay Round; 33S/19). In addition the Trade Negotiations Committee met at Ministerial level from 4-6 May 1964 to mark the formal opening of the Kennedy Round and adopted the negotiating guidelines at 13S/109. On the convening of and agenda for ministerial meetings, see further CG.18/W/62, "Preparatory Work for Ministerial Meetings in the GATT", Secretariat Note dated 12 October 1981.

²³The first Special Session was held in Torquay on 29 March - 3 April 1951; it was convened by the Chairman at the request of a number of contracting parties in order to receive and act upon a suggestion to establish an inter-sessional working party to consider proposals directed toward the reduction of disparities in European tariffs (GATT/CP/99). The Second Special Session (which approved the text of Part IV of the General Agreement) was held in Geneva on 17-26 November 1964 and 8 February 1965; its convening was agreed at the twenty-first session (SR.21, p. 150). The Third Special Session was held in Geneva on 28 April 1980 at the level of heads of delegation and was convened by the Chairman of the CONTRACTING PARTIES to consider the appointment of a new Director-General on the retirement of Director-General Long. The Fourth Special Session was held in Geneva on 30 September - 2 October 1985 and was convened by the Chairman of the CONTRACTING PARTIES at the request of the United States, this request having been concurred in by a majority of contracting parties (GATT/AIR/2180, GATT/AIR/2190). The Fifth Special Session was held in Geneva on 9 June 1993 at the level of heads of delegation and was convened by the Chairman of the CONTRACTING PARTIES to consider the appointment of a new Director-General on the retirement of Director-General Dunkel (GATT/AIR/3442). The Sixth Special Session was held in Geneva on 8 December 1994 at the level of heads of delegation to consider the implementation of the results of the Uruguay Round as provided for in the final paragraph of the Punta del Este Ministerial Declaration; see further at page above (PC/AIR/40, GATT/AIR/3652). The Seventh Special Session was held in Geneva on 24 March 1995 at the level of heads of delegation and was convened by the Chairman of the CONTRACTING PARTIES to consider the appointment of a new Director-General on the retirement of Director-General Sutherland.

²⁴L/6099, approved on 26 November 1986, 33S/55.

(3) *Chairman's rulings*

Rule 18 provides that "During the discussion of any matter, a representative may raise a point of order. In this case the Chairman shall immediately state his ruling. If his ruling is challenged, the Chairman shall immediately submit it for decision and it shall stand unless overruled". There are many examples of Chairman's rulings, particularly in the first ten years of the GATT.²⁵

(4) *Decision-making, voting and consensus*

(a) *Voting majorities*

Article XXV:3 states that "Each contracting party is entitled to have one vote at all meetings of the CONTRACTING PARTIES". Article XXV:4 states that "Except as otherwise provided for in this Agreement, decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes cast". The preparatory work of the General Agreement also notes, in connection with the CONTRACTING PARTIES' power of concurrence under Article II:6 that "the concurrence regarding adjustment which is envisaged would require a simple majority vote as indicated by Article XXV".²⁶

Rule 28 of the Rules of Procedure provides that "Except as otherwise specified in the General Agreement on Tariffs and Trade, decisions shall be taken by a majority of the representatives present and voting". The established practice of the CONTRACTING PARTIES is that a contracting party that abstains is not considered as voting.

Special majorities are called for in Articles XXIV:10, XXV:5 and XXXIII. Article XXIV:10 provides for approval by a two-thirds majority of proposals which do not fully comply with the requirements of Article XXIV:5-9. Article XXV:5 provides for waivers of obligations but requires that "any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The CONTRACTING PARTIES may also by such a vote (i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and (ii) prescribe such criteria as may be necessary for the application of this paragraph". Article XXXIII provides for accession to the General Agreement and requires that such decisions be taken by the CONTRACTING PARTIES by a two-thirds majority.

(b) *Voting procedure at Sessions*

The Rules of Procedure do not specify how votes are to be taken. According to established practice, votes are taken either by ballot, or by the show of cards or a roll-call, or on a few occasions by show of hands.²⁷ A 1961 Note by the Executive Secretary on "Voting Procedures" states that "In view of the increasing number of occasions, at Sessions of the CONTRACTING PARTIES, when representatives are called upon to participate in formal voting, and in view of the difficulty of taking an accurate count of the votes cast when representatives are asked to raise cards, it is proposed that, in future, voting on decisions, declarations, etc., should be done by ballot. On each occasion when a formal vote is required, ballot papers will be distributed and a ballot box will be placed in the conference room. The result of each vote will be announced on the same or the following day and the ballot papers as well as the Executive Secretary's report will be available for inspection in the files of the Secretariat. It will of course remain open to any representative to request a vote by the raising of cards or, in accordance with normal practice, by roll call. The existing procedure for postal and telegraphic ballots during intersessional periods will still apply".²⁸

Nothing in the Rules of Procedure prevents a contracting party from requesting a secret ballot. It is up to the Chairman to decide whether to either accept a request by one contracting party for a secret ballot, or ascertain whether a majority would be in favour of such a ballot. At the 46th Session of the CONTRACTING PARTIES, in discussion of a request for a roll call vote on a waiver, "The Chairman recalled that the European Communities had asked for a roll-call vote, and noted that it was understood that contracting parties' representatives attended sessions

²⁵See, e.g., Rulings by the Chairman of 24 August 1948 relating to Article I:1 at II/12.

²⁶EPCT/TAC/PV/24 p. 40 (statement by Chairman of Sub-Committee on Schedules explaining the text proposed in EPCT/208).

²⁷Vote by show of hands: SR.47/1 p. 7.

²⁸L/1477, dated 16 May 1961.

with the necessary authority to perform the functions indicated in Article XXV of the General Agreement. Under the authority given to the Chairman in Rule 17, he then ruled that a roll-call vote be taken on this matter”.²⁹

(c) *Postal and telegraphic voting*

The record of the preparatory work of the General Agreement states that the phrase “majority of the votes cast” was used in Article XXV:3 of the General Agreement in order to permit postal and telegraphic voting as it was foreseen that there might be a need for continuous operation between formal sessions.³⁰ Accordingly, the CONTRACTING PARTIES have adopted rules for airmail and telegraphic ballots.³¹ Rule 5 of these rules provides that “The governments entitled to participate in an airmail or telegraphic ballot are those which are contracting parties at the time of the decision to submit the matter to a vote”.³² In May 1993, in discussion of a waiver request, the Council approved the text of the draft decision and recommended its adoption by the CONTRACTING PARTIES by a vote by postal ballot. In this connection the Council Chairman noted that “the decision, when and if adopted by a vote by postal ballot, would be circulated as usual ... Furthermore, the effective date of the Waiver Decision would be the date of its adoption. As representatives were aware, when voting by postal ballot, contracting parties were customarily given 30 days in which to cast their votes. Accordingly, the effective date of this decision would be the date at which the requisite majority was obtained, but not later than the thirtieth day following the present Council meeting”.³³

At the Fortieth Session of the CONTRACTING PARTIES in November 1984, the United States requested that the vote on the US request for a waiver for the US Caribbean Basin Economic Recovery Act “be postponed until it could be taken under intersessional procedures which would allow all contracting parties to participate. The Chairman said that it was up to the United States, as the country requesting the waiver, to decide whether it wanted to put the request to a vote at the present session”.³⁴ At the Council meeting in December 1984, the “Chairman recalled that ... the United States had requested that the vote on this decision be postponed to the intersessional period when the balloting could be done by postal ballot, thereby enabling all interested contracting parties to participate. The CONTRACTING PARTIES had agreed to refer this matter to the Council for appropriate action in the light of the statements at the session”.³⁵ In reply to a question by Nicaragua whether such a remittance of the matter back to the Council was contrary to established GATT practice, “the Director-General said that there appeared to be no precedent for the procedure: nevertheless, the CONTRACTING PARTIES’ decision to refer this matter back to the Council had been taken in accordance with the applicable rules. ... the normal practice was for the Council to transmit decisions to the CONTRACTING PARTIES for adoption, but that there were also cases in which that process functioned in reverse. The passage of matters back and forth between the Council and the CONTRACTING PARTIES happened frequently. It seemed, however, that Nicaragua’s question referred to a specific type of action for which there appeared to be no precedent”.³⁶ The Council took note of the statements and recommended adoption of the draft decision by the CONTRACTING PARTIES by postal ballot.³⁷

(d) *Consensus*

The CONTRACTING PARTIES routinely take votes on decisions for waivers under Article XXV:5 and on accessions under Article XXXIII. However, regarding the practice of the CONTRACTING PARTIES in relation to other business, the Report of the Working Party on “Arrangements for Japanese Participation” notes that “... the CONTRACTING PARTIES do not usually proceed to a formal vote in reaching decisions; generally, the Chairman takes the sense of the meeting ...”.³⁸ Similarly, the decision on the participation of Switzerland in the work of the

²⁹SR.46/1 p. 21.

³⁰EPCT/TAC/PV/25 p. 11-12, reflecting a statement by the Legal and Drafting Committee that the formulation “a majority of the contracting parties present and voting” would exclude postal voting (EPCT/209, note p. 8).

³¹The rules presently in effect are the Rules for Airmail and Telegraphic Ballots, BISD 12S/16, adopted 31 March 1964 (SR.21/9 p. 143; see also L/2154, W.21/9). Earlier rules on the same subject appear at BISD Vol.I/101, BISD 1S/7, BISD 2S/13, BISD 3S/14, BISD 5S/21, BISD 7S/10-11.

³²See in this connection L/2154, W.21/9 and SR.21/9.

³³C/M/263, p. 23.

³⁴SR.40/2, p.12.

³⁵C/M/184, p.2.

³⁶C/M/184, p.2.

³⁷C/M/184, p.2.

³⁸G/55/Rev.1, adopted on 23 October 1953, 2S/117, 118 para. 4.

CONTRACTING PARTIES in connection with Swiss provisional accession was approved at the Thirteenth Session subject to an understanding which included the point that “In view of the wording of the provisions of Articles XXV and XXXII, it is not possible, from a strictly legal point of view, to give full voting rights to Switzerland. However, in the normal course of business this is not very important since the CONTRACTING PARTIES do not usually proceed to a formal vote in reaching decisions; generally the Chairman takes the sense of the meeting ...”.³⁹ The most recent recorded decision of the CONTRACTING PARTIES adopted by vote, other than decisions on waivers or accession, was in 1959.⁴⁰ Concerning the practice of consensus, see also the references below at page 1108 concerning decision-making in the Council.

(5) *Relationship between the CONTRACTING PARTIES and Committees or Councils established under the Tokyo Round Agreements*

A Decision adopted on 28 November 1979 on “Action by the CONTRACTING PARTIES on the Multilateral Trade Negotiations” provides as follows:

“1. The CONTRACTING PARTIES reaffirm their intention to ensure the unity and consistency of the GATT system, and to this end they shall oversee the operation of the system as a whole and take action as appropriate.

“2. The CONTRACTING PARTIES note that as a result of the Multilateral Trade Negotiations, a number of Agreements covering certain non-tariff measures and trade in Bovine Meat and Dairy Products have been drawn up. They further note that these Agreements will go into effect as between the parties to these Agreements as from 1 January 1980 or 1 January 1981 as may be the case and for other parties as they accede to these Agreements.

“3. The CONTRACTING PARTIES also note that existing rights and benefits under the GATT of contracting parties not being parties to these Agreements, including those derived from Article I, are not affected by these Agreements.

“4. In the context of 1 and 3 above, the CONTRACTING PARTIES would receive adequate information on developments relating to the operation of each Agreement and to this end there will be regular reports from the concerned Committees or Councils to the CONTRACTING PARTIES. The CONTRACTING PARTIES may request additional reports on any aspect of the various Committees’ or Councils’ work.

“5. Further, the CONTRACTING PARTIES understand that interested non-signatory contracting parties will be able to follow the proceedings of the Committees or Councils in an observer capacity, and that satisfactory procedures for such participation would be worked out by the Committees or Councils”.⁴¹

Each of the Committees and Councils established under these agreements annually presents a report to the CONTRACTING PARTIES, which takes note of these reports. Each of these Committees and Councils has established rules on participation by observers.

³⁹SR.13/1 (adoption of Decision which appears at 7S/18). See also provisions on participation in decision-making process in L/7155, Decision of 3 December 1992 on “Interim Application of the General Agreement” to the Czech Republic and the Slovak Republic.

⁴⁰“Freedom of Contract in Transport Insurance”, Recommendation of 27 May 1959, 8S/26; adoption by 22-7 vote with 4 abstentions, SR.14/9 p. 115.

⁴¹L/4905, 26S/201. See also discussion at SR.35/3-4 p. 14-62, W.35/2.

B. INTERSESSIONAL COMMITTEE**1. Establishment, Membership, Functions and Procedures**

In order to ensure effective operation of the General Agreement between Sessions, the CONTRACTING PARTIES instituted intersessional procedures at an early date. These procedures included the provisions for mail and telegraphic ballots discussed above, and provisions for an Intersessional Committee.⁴²

The rules of procedure in effect just before the Committee was terminated provided that the Committee consisted of seventeen members, elected at the last session in each calendar year in such a manner that its composition reflected the criteria set out on page 201 of Volume II of the BISD. Contracting parties not members of the Committee or of a working party established by it could be represented by observers. The Committee was presided over by the Chairman of the CONTRACTING PARTIES. The Committee met to deal with matters expressly referred to it by the CONTRACTING PARTIES and to deal with other matters requiring urgent action, including applications made under Article XVIII:A, C and D or XXVIII:4. The Committee was authorized to establish working parties and to make recommendations to the CONTRACTING PARTIES where a dispute had been referred to the Committee. The rules provided that the Committee would meet in Geneva on the call of the Executive Secretary, with at least ten days' advance notice.⁴³ This advance notice requirement could be seen as the forerunner of the Council's "ten-day rule" discussed at page 1105 below.

2. Termination

The Intersessional Committee was terminated by the Decision of 4 June 1960 of the CONTRACTING PARTIES, which conferred upon the Council of Representatives, created by the same Decision, the specific functions previously delegated to the Intersessional Committee and to its Chairman under the Intersessional Procedures.

C. COUNCIL**1. Establishment, functions and relationship with the CONTRACTING PARTIES**

On 4 June 1960 at their Sixteenth Session, the CONTRACTING PARTIES terminated the Intersessional Committee and established the Council of Representatives with the following terms of reference:

"The functions of the Council shall be:

- "(a) To consider matters arising between sessions of the CONTRACTING PARTIES which require urgent attention, and to report thereon to the CONTRACTING PARTIES with recommendations as to any action which might appropriately be taken by them at the next regular session, at a special session which may be called by the Council, or by a postal ballot.
- "(b) To supervise the work of committees, working parties, and other subsidiary bodies of the CONTRACTING PARTIES operating intersessionally, providing guidance for them when necessary, examining the reports of such bodies, and making recommendations thereon to the CONTRACTING PARTIES.
- "(c) To undertake preparation for sessions of the CONTRACTING PARTIES.
- "(d) To deal with such other matters with which the CONTRACTING PARTIES may deal at their sessions, and to exercise such additional functions with regard to matters referred to above, as may be expressly delegated

⁴²See discussion at Second Session (establishment of working party between sessions to administer Article XVIII); Fifth Session report on "Continuing Administration of the General Agreement" adopted on 16 December 1950, GATT/CP.5/49, BISD II/197; Sixth Session report adopted on 24 October 1951 establishing a committee for Agenda and Inter-sessional Business, GATT/CP.6/41, BISD Vol.II/205, and resulting intersessional procedures for interval between Sixth and Seventh sessions, BISD Vol.I/102; Intersessional Procedures for interval between Seventh and Eighth sessions, BISD 1S/7; procedures incorporating changes made at Eighth session, BISD 2S/8; proposals at Eleventh Session, Spec(237)56 and Spec(233)56, and procedures incorporating changes made at Eleventh Session, BISD/5S/17; procedures incorporating changes made at Thirteenth Session, BISD 7S/7.

⁴³BISD 7S/7.

to it by the CONTRACTING PARTIES, including action on behalf of the CONTRACTING PARTIES in performing functions under the provisions of the General Agreement, other than action under paragraph 5 of Article XXV, and under decisions and other formal actions taken by the CONTRACTING PARTIES".⁴⁴

From 1960 until 1968, decisions on matters under Article XXIII:2, including the adoption of panel reports, were made by the CONTRACTING PARTIES, acting on recommendations agreed by the Council.⁴⁵

The Report on Establishment of a Council of the CONTRACTING PARTIES, which was also adopted on 4 June 1960, states that "It is not contemplated that the CONTRACTING PARTIES would delegate to the Council the power to grant a waiver from the provisions of the GATT. It would nevertheless be helpful if requests for waivers were examined by the Council and were then submitted with the Council's recommendations to the CONTRACTING PARTIES".⁴⁶

At their Twenty-fifth Session in 1968, the CONTRACTING PARTIES agreed to the suggestion of the Chairman that

"there should be possibilities of shortening considerably the agenda for the CONTRACTING PARTIES in the ordinary sessions, so that they could concentrate on matters of major importance. In recent years the amount of intersessional activity had increased to such an extent that the Council should give greater assistance to the CONTRACTING PARTIES in guiding the various Committees and Working Parties and, when necessary, in taking action.... The Council, in effect, had authority to take action on all matters of concern to the CONTRACTING PARTIES other than final decisions under paragraph 5 of Article XXV".⁴⁷

Since that time, the Council has handled all business other than final decisions on waivers. Panel reports under Article XXIII:2 have been adopted by the Council (acting for the CONTRACTING PARTIES) or have been adopted at the annual Session of the CONTRACTING PARTIES when this would afford more timely action.

The Decision of 4 June 1960 also provides in paragraph 3 that:

"If a contracting party considers it is adversely affected by the exercise by the Council of any of its above functions which involve recommendations to individual contracting parties or the making of determinations or taking of decisions, it may suspend the operation of such action by the Council through the submission of a written appeal to the CONTRACTING PARTIES. The CONTRACTING PARTIES may, either generally or in particular cases or types of cases, provide that such recommendations, determinations of decisions of the Council shall become final if no appeal has been lodged within a specified reasonable period. In particular cases individual contracting parties may, either before or after action has been taken by the Council, waive their right of appeal and agree to accept the action as final".⁴⁸

2. Membership

The Decision of 4 June 1960 provides that the Council is "composed of representatives of all contracting parties willing to accept the responsibilities of membership therein". The Report on Establishment of a Council of the CONTRACTING PARTIES, which was adopted at the same time, stated that "After exploring the various possibilities, the Group decided strongly in favour of a Council composed of all contracting parties which were able to make arrangements for effective participation through representation at an appropriate level. Thus, while proposing that there should be no numerical limitation on membership, the Group considers that contracting parties should not seek membership unless they could undertake to provide suitable representation ... it need not be laid down as a condition of membership that representatives must be resident in Geneva, provided they will be

⁴⁴BISD 9S/8-9 reflecting decisions recorded at SR.16/11 p. 161 (approval of formal establishment of Council with terms of reference as set out in W.16/15 as amended in W.16/15/Corr.2; approval of proposals in W.16/15 as amended in W.16/15/Corr.1).

⁴⁵See, e.g., reference to adoption by the CONTRACTING PARTIES of Panel reports, and recommendations made by the CONTRACTING PARTIES to contracting parties, on "Exports of Potatoes to Canada", "French Import Restrictions", and "Uruguayan Recourse to Article XXIII", at IIS/55-56; each of these decisions expressly authorizes the Council to deal with certain follow-up issues.

⁴⁶L/1200, p. 3.

⁴⁷SR.25/9 p. 176-177.

⁴⁸9S/8.

able normally to attend all meetings”.⁴⁹ A statement included in the Decision of 4 June 1960 provides further that “Membership in the Council is open also to governments which have acceded provisionally to the General Agreement. Groups of contracting parties are free to propose one or more of their members to participate in the Council. A contracting party not a member of the Council, which claims an interest in a matter under consideration by the Council and desires to be represented during the consideration of that matter, is co-opted as a full member for this purpose”.⁵⁰

At its meeting on 19 June 1992, the Council decided that the representative of the Federal Republic of Yugoslavia should refrain from participating in the business of the Council; see the further decision above at page 1094 on the status of Yugoslavia as a contracting party.⁵¹

A list of members of the Council appears in the appendix which follows this chapter.

3. Observer status

At the first meeting of the Council in September 1960

“It was agreed that the following should be invited to be represented by observers at sessions of the Council:

“(a) governments, as follows: contracting parties and governments having acceded provisionally which were not members of the Council; governments associated with the work of the CONTRACTING PARTIES through special arrangements or which had been invited to participate in the work of the CONTRACTING PARTIES; and governments otherwise in the process of acceding or being associated with the work of the CONTRACTING PARTIES;

“(b) inter-governmental organizations, as follows: International Monetary Fund, Organization for European Economic Co-operation, United Nations, other inter-governmental organizations directly interested in matters before the Council, and also the secretariats of regional associations for economic integration”.⁵²

At the May 1990 meeting of the Council, in connection with the former USSR’s request for observer status, the Chairman recalled this decision and noted that “Rules concerning the rights and obligations of observers were to be found in Rules 8 and 9 of the Rules of Procedure for Sessions of the CONTRACTING PARTIES ... These rules foresaw that observers may attend meetings and participate in discussions without vote. Following these guidelines, the Council had in practice invited observers to speak after Council members had spoken on a particular point”.⁵³ The Council agreed to review the issue of the status of observers and their rights and obligations. A background note of 15 June 1990 by the Secretariat on “Observer Status in GATT” states as follows:⁵⁴

“Contracting parties are not *ipso facto* members of the Council, but can become so by simply announcing their wish to become members. Several contracting parties have not taken that step and are observers in the Council. ... A government which has acceded provisionally to the GATT can become a member of the Council without voting privileges (BISD 9S/7).

“Observers at sessions of the CONTRACTING PARTIES do not automatically have that status at meetings of the Council or its subsidiary bodies ... whenever any non-contracting party has sought observer status in the Council, the request has referred to the possibility of future accession, although as stated by the Chairman at the May 1990 Council meeting, the process relating to the accession of governments to GATT is subject to separate procedures.

⁴⁹L/1200, p. 3.

⁵⁰BISD 9S/7.

⁵¹C/M/257 and Corr.1.

⁵²C/M/1, p. 3; see C/W/7.

⁵³C/M/241 p. 2-3.

⁵⁴C/173, 15 June 1990, p. 2-3.

“A number of governments apply the substantive provisions of the General Agreement on a *de facto* basis and, as such, are among the non-contracting parties invited as observers at sessions. ... In respect of observer status for meetings of the Council, however, these governments are treated like those of other non-contracting parties”.

The Note goes on to state, concerning subsidiary bodies of the Council:

“In a few instances, non-contracting party governments without Council observer status have been invited on an *ad hoc* basis to attend meetings of subsidiary bodies because of a direct involvement in the subject matter under discussion. This practice was followed in the case of the EEC Agreements with Algeria, Jordan, Lebanon and Syria, when the Lomé Agreements were being examined, and in the case of the Caribbean Basin Economic Recovery Act. In such cases, the invitation has been made by the Council itself and not by the subsidiary body concerned.”⁵⁵

The consultations held on observer status resulted in the Decision adopted by the Council on 21 July 1993, on “Observer Status of Governments in the Council of Representatives”:

“*Considering* the desirability to provide for governments wishing to accede to the General Agreement an adequate opportunity to acquaint themselves with the GATT and its activities; and

“*Taking* into account the need to further improve channels of communication and information between such governments and contracting parties;

The Council *decides* the following:

“1. Governments wishing to request Observer status in the Council should address to the CONTRACTING PARTIES a communication in which they express the intent to initiate negotiations for accession to the General Agreement within a maximum period of five years, and provide a description of their current economic and trade policies, as well as any intended future reforms of these policies. They should further indicate their acceptance of obligations or requirements, including financial obligations, that may be determined by the CONTRACTING PARTIES to apply to Observer governments in the Council.

“2. Observer status shall be granted initially for a period of five years. The purpose of observership is to allow a government to better acquaint itself with the GATT and its activities, and to prepare and initiate negotiations for accession to the General Agreement.

“3. During this period an Observer government should provide the CONTRACTING PARTIES with any additional information it considers relevant concerning developments in its economic and trade policies. At the request of any contracting party or the Observer government itself, any matter contained in such information may be brought to the attention of the Council after governments have been allowed sufficient time to examine the information.

“4. (a) If, at the end of five years, an Observer government has not yet initiated a process of negotiation with a view to acceding to the General Agreement, it may request an extension of its status as Observer. In order to do so, it shall submit to the Council a statement of the reasons for which it has not found it possible to initiate accession negotiations, as well as an indication of future plans in this respect. This communication should be accompanied by a comprehensive, up-dated description of its current economic and trade policies.

(b) Upon receiving such a request, the Council shall review the situation, and decide upon the extension of the status of Observer and the duration of such extension.

⁵⁵C/173, 15 June 1990, p. 3-4.

“5. Observer governments shall have access to the main GATT document series⁵⁶ and may participate as observers in Sessions of the CONTRACTING PARTIES and meetings of working parties and other subsidiary bodies of the Council with the exception of the Budget Committee. They may also request technical assistance from the Secretariat in relation to the operation of the GATT system in general, as well as to negotiations on accession to the General Agreement.

“6. Upon their entry into force, the procedures contained in paragraphs 1 to 5 above shall apply as appropriate to all governments which are currently Observers to the Council, including those Observers which apply GATT on a *de facto* basis, except governments which are in the process of active negotiations on accession, or which are already contracting parties to the GATT.”⁵⁷

When this Decision was adopted, the Council Chairman noted that with regard to the observer status of international organizations in the Council, and of governments and international organizations at sessions of the CONTRACTING PARTIES, it was his understanding, on the basis of the consultations he had held, that no further action was required at this stage. He also made the following clarifications: (a) all governments that were currently observers in the Council should provide information under paragraph 1 of the decision, unless they were deemed to have done so recently to a satisfactory extent; (b) the five-year period referred to in paragraph 2 of the decision would not apply retroactively to governments that were currently observers in the Council; and (c) the decision did not affect countries which applied the General Agreement on a *de facto* basis and which were not observers in the Council.⁵⁸ At its October 1993 meeting, the Council adopted a recommendation of the Budget Committee as from 1 January 1994, observer countries be requested to contribute each year, for services provided to them, 50 per cent of the minimum contribution applying to contracting parties. Administrative measures would apply to observers which did not pay.⁵⁹

In the Council in 1992, in discussion of the establishment of a working party on accession of Chinese Taipei to the General Agreement, the Chairman of the Council invited the delegation of Chinese Taipei to attend future meetings of the Council and of other GATT bodies as an observer during the period when the Working Party was carrying out its work. He noted that as part of the understanding reached on this matter, the titles carried by the representative of Chinese Taipei would not have any implication on the issue of sovereignty.⁶⁰

A list of observers in the Council appears in the appendix tables at the end of this book.

4. Election of officers

The Chairman of the Council is elected each year at the Session of the CONTRACTING PARTIES.

5. Establishment of subsidiary bodies

The Decision establishing the Council provided that “The Council may establish such subsidiary bodies as it considers appropriate to carry out its functions in relation to the examination of questions before it, consultations with government, and the drafting of reports to the CONTRACTING PARTIES; the Council may also instruct inter-sessional bodies of the CONTRACTING PARTIES to conduct such activities for it.”⁶¹

⁵⁶A footnote to the decision refers to “L/, C/, C/W/, etc.”.

⁵⁷L/7286.

⁵⁸C/M/265, p. 29.

⁵⁹C/M/267, p. 17; recommendation at L/7310, para. 29.

⁶⁰C/M/259, p. 3-4.

⁶¹BISD 9S/7-8.

6. Procedures

(1) Rules of procedure

The Decision establishing the Council provided that pending the adoption by the CONTRACTING PARTIES of permanent rules of procedure, the Council might determine its own provisional rules of procedure.⁶² The Minutes of the Council's first meeting on 19-23 September 1960 state that

"It was agreed that in view of the undesirability of committing the Council to rules of procedure in the initial stages of its existence, the Council would follow, so far as was necessary, the procedures which were followed for sessions of the CONTRACTING PARTIES, subject to such adaptation of these rules as might be required from time to time. At some later date the Council could, if necessary, decide whether it needed its own rules of procedure".⁶³

No decision establishing formal rules of procedure for the Council has been taken to date.

At the June 1993 Council meeting, the Chairman proposed, and the Council accepted, certain supplementary practices to expedite the work of the Council:

"(a) Statements of support

"In order to expedite the conduct of Council business, the Chairman would invite delegations that wished to express their support for a given proposal -- such as the adoption of a report, support of a request for observer status, support for current activities such as technical assistance, and so on -- to show their hands, to be duly recorded by name in the Council Minutes as supporting statements; thus, only delegations with dissenting views or wishing to make explicit points or proposals would actually be invited to make a statement. This procedure would only be applied in situations of a routine nature, to avoid undue repetition of points already made, and would not preclude any delegation that so wished from taking the floor.

(b) Length of statements

"... Delegations ... should endeavour, to the extent that a situation permitted, to limit their statements to a maximum of 5 minutes. Delegations wishing to develop their position on a particular matter in fuller detail would be invited to circulate a written statement for distribution to Council members, the gist of which, at the delegation's request, could be reflected in the Council Minutes."⁶⁴

At the Fiftieth Session in 1994, the Chairman of the Council noted that "informal consultations held prior to Council meetings aimed to pave the way for achieving agreement on various issues, had ... proved a useful practice which he believed should continue and be intensified, as necessary, in future, within the WTO".⁶⁵

(2) Convening of and circulation of agenda for meetings

The Report on Establishment of a Council of the CONTRACTING PARTIES states that "The Group proposes that bi-monthly meetings of approximately one week should be envisaged. Thus, while there are two sessions of the CONTRACTING PARTIES, the Council would meet in January and March, July and September. The Council would probably meet also just before and after each session and it would meet at other times as required, on the call of the Executive Secretary, at ten days' notice".⁶⁶ A Note by the Secretariat on "Airgrams convening Council meetings" provides as follows:

⁶²9S/8-9.

⁶³C/M/1, p. 2-3.

⁶⁴C/M/264; see also below under "Other Business".

⁶⁵SR.50/1, p. 4.

⁶⁶L/1200, p. 4.

“For over thirty years, the Council has followed the practice of convening its meetings by an airgram issued at least ten calendar days prior to the date set for the meeting. In the event that the tenth day falls on a weekend or a GATT holiday, the preceding GATT working day is retained for the purpose.

“The ‘ten-day rule’ has been reaffirmed at various times by Council Chairmen and delegations.⁶⁷ While this customary rule of procedure can be amended by the CONTRACTING PARTIES, or waived in specific cases, it has nearly always been adhered to, even on occasions when one or several delegations made urgent requests for convening an additional or ‘emergency’ meeting of the Council at short notice. The notable exception occurred in 1971 when nearly all delegations wanted a meeting to be held immediately to discuss a trade measure of one contracting party, which did not oppose the shortened notice for that particular meeting (cf. C/M/71).

“Requests for items to be placed on the agenda of a forthcoming meeting should be communicated in writing to the Secretariat, together with any accompanying documentation (one or two pages) to be issued in connection with that item, at the latest on the day before the airgram is to be issued. Longer communications intended for circulation as documents should, because of translation and printing requirements, be submitted two to three or more days before the deadline, depending on the nature and length of the text. Delegations should consult with the Council Secretary on a case-by-case basis to ensure that prospective documents can be issued in time.”⁶⁸

(a) *Particular agenda items*

In a number of instances decisions provide for specific items to be on the Council’s agenda.

A Decision of 25 October 1972 provided that “Without prejudice to the legal obligations to notify in pursuance of Article XXIV, the Council decides to invite contracting parties that sign an agreement falling within the terms of Article XXIV, paragraphs 5 to 8, to inscribe the item on the agenda for the first meeting of the Council following such signature, to the extent that the advance notice of ten days prescribed for inclusion of items on the agenda can be observed. Inclusion of the item should allow the Council to determine the procedures for examination of the agreement”.⁶⁹

The Decision of 12 April 1989 concerning “Functioning of the GATT System” provides, concerning the establishment of a trade policy review mechanism, that “Trade policy reviews will be carried out by the Council at periodic special meetings ... The Council will establish a basic plan for the conduct of the reviews ... The Council will establish a programme of reviews for each year in consultation with the contracting parties directly concerned”.⁷⁰

Also, the Decision of 12 April 1989 on “Improvements to the GATT Dispute Settlement Rules and Procedures” includes the following provisions relating to Council business.

- “Mutually agreed solutions to matters formally raised under GATT Articles XXII and XXIII, as well as arbitration awards within GATT, must be notified to the Council where any contracting party may raise any point relating thereto.”⁷¹

⁶⁷[Footnote to this text] “An early reference to this practice in GATT can be found in the rules of procedure of the Intersessional Committee, which preceded the Council (BISD 7S/7)”. See also discussion at page 1100 above; see also, e.g., SR.26/7 p. 70 (statement by Council Chairman that “Under normal circumstances the Council should not accept the inclusion of an item on its agenda unless it was clear that the necessary documentation would be ready a reasonable time in advance of the meeting so as to allow delegations time for serious preparation. Obviously there would be some cases from time to time when urgent action would be needed”).

⁶⁸Spec(91)73, reprinted at 38S/76-77.

⁶⁹C/M/81 p. 16; 19S/13-14.

⁷⁰L/6490, 36S/403, 405, section D.

⁷¹L/6489, 36S/61, 62 para. B.

- “If the complaining party so requests, a decision to establish a panel or working party shall be taken at the latest at the Council meeting following that at which the request first appeared as an item on the Council’s regular agenda, unless at that meeting the Council decides otherwise.”⁷²
- “In establishing a panel, the Council may authorize its Chairman to draw up the terms of reference of the panel ... If other than standard terms of reference are agreed upon, any contracting party may raise any point relating thereto in the Council.”⁷³
- “In order to provide sufficient time for the members of the Council to consider panel reports, the reports shall not be considered for adoption by the Council until thirty days after they have been issued to the contracting parties.”⁷⁴
- “Contracting parties having objections to panel reports shall give written reasons to explain their objections for circulation at least ten days prior to the Council meeting at which the panel report will be considered.”⁷⁵
- “The Council shall monitor the implementation of recommendations or rulings adopted under Article XXIII:2. The issue of implementation of the recommendations or rulings may be raised at the Council by any contracting party at any time following their adoption. Unless the Council decides otherwise, the issue of implementation of the recommendations or rulings shall be on the agenda of the Council meeting after six months following their adoption and shall remain on the Council’s agenda until the issue is resolved. At least ten days prior to each such Council meeting, the contracting party concerned shall provide the Council with a status report in writing of its progress in the implementation of the panel recommendations or rulings.”⁷⁶

(b) “Other business”

The Council agenda customarily includes an item for “Other business”; matters raised under this item do not appear in the advance airgram convening the meeting sent to delegations and to capitals. On a number of occasions, including the Council meeting on 11 July 1991, the Chairman has strongly encouraged representatives wishing to have a substantive discussion in the Council on any issues to bring them to the attention of the Secretariat in sufficient time so that they could be placed on the agenda in the airgram, rather than to raise them under “Other Business”.⁷⁷ At the June 1993 Council meeting, the Chairman made a statement containing certain proposals designed to expedite Council business, including the conduct of discussions under “Other Business”. He proposed, and the Council accepted, that:

“the Chairman would remind delegations at each Council meeting that discussions on substantive issues under ‘Other Business’ should be avoided, and that the Council should limit itself to taking note of the announcement by the sponsoring delegation, as well as any reactions to such an announcement by other delegations directly concerned;

“the Council Minutes, unless explicitly requested by the delegations concerned, would not reproduce at length the statements made under ‘Other Business’, but would be limited to an enunciation of the issues raised and a summary of the comments made;

“delegations should provide the Chairman or the Secretary of the Council and other delegations directly concerned, whenever possible, advance notice of ‘Other Business’ items.”⁷⁸

At the November 1994 Council meeting the Council accepted the Chairman’s further proposal as follows:

⁷²*Ibid.*, 36S/63, para. F(a). A footnote to this paragraph provides: “References to the Council, made in this paragraph as well as in the following paragraphs, are without prejudice to the competence of the CONTRACTING PARTIES, for which the Council is empowered to act in accordance with normal GATT practice (BISD 26S/215)”.

⁷³*Ibid.* 36S/64, para. F(b)2.

⁷⁴*Ibid.* 36S/66, para. G.1.

⁷⁵*Ibid.* para. G.2.

⁷⁶*Ibid.*, 36S/67, para. I.3.

⁷⁷38S/76; C/M/251 p. 46-47, C/M/187.

⁷⁸C/M/264.

“the first item of business at a Council meeting would be statements by the Chairman which currently are made under ‘Other Business’;

“statements by delegations under ‘Other Business’ should be limited to very short announcements;

“exceptionally, when a delegation considers it must raise an extremely urgent matter of importance, the Chairman will allow a substantive statement to be made on the matter, which should nevertheless be limited to no more than five minutes; the delegation raising the matter, if it so wishes, may circulate for the record a longer statement in document form;

“all efforts should be made to avoid an extensive debate on any question under ‘Other Business’;

“if the regular Agenda of the Council is exceptionally long and the meeting runs out of time before ‘Other Business’ items have been taken up, the Chairman may defer consideration of these items to the next meeting of the Council, unless a delegation requests otherwise”.⁷⁹

On a very few occasions, discussions have been held in the Council before adoption of the agenda.⁸⁰

(3) *Decision-making, voting and consensus*

Consensus decision-making: The Decision of 4 June 1960 establishing the Council provided that “Pending further consideration by the CONTRACTING PARTIES of the question of voting, no action by the Council, other than action relating to its own procedures, may be taken by an affirmative vote of less than the absolute number of affirmative votes by which such action could have been taken by the CONTRACTING PARTIES under the relevant provisions of the General Agreement and the rules of procedure for sessions of the CONTRACTING PARTIES”.⁸¹ However, the practice in the Council has been to proceed on the basis of consensus.

At the March 1981 Council meeting, in concluding the debate on adoption of the Director-General’s report on working party discussions between the CONTRACTING PARTIES and the European Communities under Article XVI:1 of the possibility of limiting EEC subsidization of sugar exports, and on a draft decision proposed by Australia, the Council Chairman noted

“that in matters of this kind the Council normally proceeded on the basis of consensus. In his view, consensus was understood in GATT to mean that no delegation maintained its objections to a text or attempted to prevent its adoption. He felt that such a consensus did not presently exist in the Council on this matter: he noted that the ten contracting parties in the European Communities were not in agreement with the draft decision as presented by Australia. At the same time, however, he was also very conscious of the weight of opinion expressed by the delegations which had supported either the Australian text as such or its general sense; and he concluded that there was a general desire to arrive at a decision at the present meeting ...”.⁸²

A compromise text was adopted providing for a later review by the Council upon further notification of the EEC sugar regulations.⁸³

During the discussion noted below of the request by the United States for authorization of a panel on “European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins”,⁸⁴ the representative of Australia suggested a solution to the particular problem “in that consensus was not unanimity. His delegation believed that the Chairman could conclude that a consensus

⁷⁹C/COM/5, 16 November 1994, “Council Working Practices - Treatment of ‘Other Business’ Items”.

⁸⁰See C/M/228, p. 2 (Council meeting of February 1989); the discussion that was held (on unilateral measures) is reflected in C/163 of 16 March 1989. See also discussions at May 1988 Council, C/M/220, p. 1, and October 1990 Council, C/M/245, p. 2-3.

⁸¹19S/8; concerning sessions of the CONTRACTING PARTIES see page 1097 above.

⁸²C/M/146, p. 20; discussion of L/5113, Director General’s report to the Council on Article XVI:1 discussions on “EEC - Refunds on Exports of Sugar”, adopted on 10 March 1981, 28S/80.

⁸³*Ibid.*, p. 20-21.

⁸⁴L/6328 (panel request).

existed". The representative of India, supported by Brazil, Mexico, Jamaica and Peru stated that "his delegation had listened with interest to Australia's statement which did appropriately recognize the rights of a contracting party wishing to assert its rights as such. However he could not accept the Australian view that consensus could be determined by the Chairman even if there was no unanimity. If a contracting party chose to contest a consensus and to state as its position that a consensus did not exist, it was then not possible for the Chairman of any GATT body to conclude that a consensus did exist. As long as his assessment was not contested, any chairman could conclude that there was a consensus; but once that consensus was formally disputed, contested or objected to by a contracting party, the consensus could not be said to exist".⁸⁵

The Decision of 12 April 1989 on "Improvements to the GATT Dispute Settlement Rules and Procedures" provides as follows regarding Council decisions on adoption of panel reports:

"The parties to a dispute shall have the right to participate fully in the consideration of a panel report by the Council, and their views shall be fully recorded. The practice of adopting panel reports by consensus shall be continued, without prejudice to the GATT provisions on decision-making which remain applicable. However, the delaying of the process of dispute settlement shall be avoided."⁸⁶

During discussion at the April 1992 Council meeting of a request by Egypt for Council approval of a waiver for renegotiation of Egypt's Schedule, Egypt suggested that "if no consensus were possible, the Council should vote to approve the text of the draft waiver decision and to submit it for adoption by the CONTRACTING PARTIES by postal ballot". Many developed and developing contracting parties, including some which supported the waiver request, urged Egypt to reconsider its request so that a decision by consensus could be taken later. The representative of Switzerland stated that "In his view, a vote in the Council was a final recourse, to be taken when all other possibilities for reaching a consensus had been exhausted. That stage had not been reached on the matter at hand. No delegation had stated that it would firmly oppose the granting of the waiver without any reconsideration of its position. One had only heard requests for further information and for further time to consider the matter, and it could not be deduced therefrom that there was no possibility of a consensus. He hoped that all would continue to seek a consensus and not to force the situation by turning immediately to a vote". The representative of Mexico said "it was his understanding that a vote had never been taken in the Council as far back as one could recall. While contracting parties undoubtedly had the right to request a vote, one had to regard this more like an atomic weapon -- to be stored but not used. ... Mexico would be deeply concerned by any recourse to a vote; it would prefer by far that every effort be made in the GATT to reach decisions by consensus first". The representative of Colombia said that "no one would be happy in the end if this matter were put to a vote. While Colombia fully supported Egypt's waiver request, it believed that consensus should remain the way of decision-making in the Council".

The Chairman stated that "While the waiver decision itself would be taken by the CONTRACTING PARTIES in a vote by postal ballot, what was being proposed was that the Council vote on whether or not to approve and to send the draft decision to the CONTRACTING PARTIES for a vote thereon. That would be an extraordinary move, and he called on all to reflect on this". Following consultations with delegations, the Chairman reported that "there was a strong desire amongst Council members, including Egypt, to take a decision on the waiver request on the basis of a consensus".⁸⁷ The decision was so taken.

Representation of the EC: At the June 1988 Council meeting, in discussion of the request by the United States for authorization of a panel on "European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins",⁸⁸ France stated its opposition to panel establishment, stating that "there was no consensus among the CONTRACTING PARTIES at this stage with regard to the US request". The representative of the EC then agreed to establishment of the panel on behalf of the Community, and stated that "it was fair to commit to the records of the meeting the statement made by France, but, on behalf of the Community, he had said that he accepted a panel. As far as the Community was concerned, a panel would be legally established if the Council followed this consensus. He supported such a decision on behalf of the Community". He further stated that "The Community was present because competence with regard

⁸⁵C/M/222, p. 12.

⁸⁶L/6489, 36S/61, 66, para. G.3.

⁸⁷C/M/256, p. 5-13.

⁸⁸L/6328 (panel request).

to trade policy had in fact been transferred to it by treaties. A contracting party could not raise an objection concerning something which no longer belonged to it as a government. The Community had assumed responsibility for trade policy on behalf of the member States; that was the guarantee and the security for other contracting parties. To take the French views into consideration would put into question all the current Community's obligations and rights. For these reasons, even when France spoke as a contracting party, its views as to trade policies were null and void and could not be taken into account".⁸⁹

The Council took note of the statements, agreed to establish a panel 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. The representative of France then said that "while the Chairman had concluded that a panel had been established as requested by the United States, there was no consensus for its establishment. France, as a contracting party, had to oppose its establishment". The Director-General said that "according to practices established a number of years earlier, and not just in the Council, the representative of the Community had the authority to commit the Community to a Council decision". The representative of France noted that "the Director-General had spoken of practices, not of contractual right".⁹⁰

D. COMMITTEE ON TRADE AND DEVELOPMENT

Establishment

The Committee was established on 26 November 1964 during the Second Special Session of the CONTRACTING PARTIES, with the following terms of reference:

Terms of Reference

1. To keep under continuous review the application of the provisions of Part IV of the General Agreement;
2. To carry out, or arrange for, any consultations which may be required in the application of the provisions of Part IV;
3. To formulate proposals for consideration by the CONTRACTING PARTIES in connexion with any matter relating to the furtherance of the provisions of Part IV;
4. To consider any questions which may arise as to the eligibility of a contracting party to be considered as a less-developed contracting party in the sense of Part IV and to report to the CONTRACTING PARTIES;
5. To consider, on the basis of proposals referred to it by the CONTRACTING PARTIES for examination, whether modification of or additions to Part IV are required to further the work of the CONTRACTING PARTIES in the field of trade and development and to make appropriate recommendations; and
6. To carry out such additional functions as may be assigned to the Committee by the CONTRACTING PARTIES.

The Committee took over the functions of Committee III, of the Action Committee, and its subsidiary bodies and of the Working Party on Preferences.⁹¹

At their Thirty-fifth Session (November 1979), the CONTRACTING PARTIES decided that the rôle of the Committee on Trade and Development should be strengthened and should cover, *inter alia*:

1. Work on trade policy and development policies including trade liberalization in areas of special interest to developing countries;

⁸⁹C/M/222, discussion at p. 7-14.

⁹⁰*Ibid.*, p. 15-16.

⁹¹BISD 13S p. 75-76.

2. Primary responsibility for supervision of the implementation of points 1 and 4 of the “Framework” texts;
 3. Examination of protective action by developed countries against imports from developing countries;
 4. Work on structural adjustment and trade of developing countries;
- and
5. Special attention to the special problems of least developed countries.⁹²

It was also agreed that the CONTRACTING PARTIES, through the Committee on Trade and Development, should continue to follow developments with regard to a new round of trade negotiations among developing countries. The Committee has established a Sub-Committee on Trade of Least-Developed Countries and a Sub-Committee on Protective Measures.

The Chairman of the Committee is elected each year at the annual Session of the CONTRACTING PARTIES. The Committee reports annually to the CONTRACTING PARTIES, which adopts its report. The responsibilities and activities of the Committee are further discussed in the chapter on Part IV.

The WTO Agreement provides for a Committee on Trade and Development, which was duly established by the WTO General Council at its first meeting on 31 January 1995, with terms of reference as agreed by the Preparatory Committee for the WTO the previous December.⁹³ See the chapter on Part IV. The Committee is also one of the bodies named in the Decision of 8 December 1994 on “Avoidance of Procedural and Institutional Duplication”; see page 1091 above.

E. WORKING PARTIES

1. Establishment, terms of reference and operation

Working parties may be convened either by the CONTRACTING PARTIES or by the Council. Paragraph 6 of the Annex to the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, adopted on 28 November 1979, provides:

“Concerning the customary elements of the procedures regarding working parties ... the following elements have to be noted:

“... working parties are instituted by the Council upon the request of one or several contracting parties. The terms of reference of working parties are generally “to examine the matter in the light of the relevant provisions of the General Agreement and to report to the Council”. Working parties set up their own working procedures. The practice for working parties has been to hold one or two meetings to examine the matter and a final meeting to discuss conclusions. Working parties are open to participation of any contracting party which has an interest in the matter. Generally, working parties consist of a number of delegations varying from about five to twenty according to the importance of the question and the interests involved. The countries who are parties to the dispute are always members of the Working Party and have the same status as other delegations. The report of the Working Party represents the views of all its members and therefore records different views if necessary. Since the tendency is to strive for consensus, there is generally some measure of negotiation and compromise in the formulation of the Working Party’s report. The Council adopts the report. The reports of working parties are advisory opinions on the basis of which the CONTRACTING PARTIES may take a final decision”.⁹⁴

⁹²L/4884/Add.1/Annex VI, “GATT Work Programme”, proposal by the Director-General adopted on 29 November 1979, 26S/219, 221, para. 5.

⁹³WT/L/46.

⁹⁴L/4907, adopted on 28 November 1979, 26S/210, 216-217, para. 6(i).

As noted above at page 1108, in March 1981 the Council adopted the Director-General's report on a working party which had discussed with the EC the possibility of limiting subsidization of sugar. At the July 1981 Council meeting, a number of delegations sought to have this review conducted by reconvening the working party. The representative of the United States "sought clarification on the following points: (1) In dealing with matters of a highly technical nature, had it been the practice of the Council to establish working parties? (2) If one or several contracting parties asked for the establishment of a working party, was it in the tradition of GATT to grant such a request? The Chairman replied that it had been the practice of the Council to establish working parties when dealing with matters of a highly technical nature, as well as in some cases with matters of a more general nature. As for the establishment of a working party, he stated that this was closely linked to the issue of the terms of reference for that working party".⁹⁵

In the same Council meeting the representative of Australia, referring to paragraph 10 of the 1979 Understanding, "noted that ... the principle was clear: The CONTRACTING PARTIES would decide to establish a working party if this were requested by a contracting party. This view was supported by past GATT practice".⁹⁶ "The representative of India endorsed the Australian view and said that it would set a very bad precedent if the Council decided not to set up a working party when a serious request for doing so had been made. He stressed that this would have a particularly adverse impact for contracting parties not possessing retaliatory power". At its September 1981 meeting, the Council decided to establish a Working Party.⁹⁷

See also the discussion at the May 1988 Council meeting on the "right to a working party" in connection with the United States request for a working party on the relationship of internationally-recognized labour standards to international trade.⁹⁸

Paragraph 2(c) of the Decision of 8 December 1994 on "Avoidance of Procedural and Institutional Duplication" provides that "The Working Parties established under the GATT 1947 to examine a regional agreement or arrangement shall coordinate their activities with Working Parties of the WTO that examine the same regional agreement or arrangement." Footnote 1 to that paragraph provides that "The Working Parties of the WTO include Working Parties originating from decisions of the CONTRACTING PARTIES to the GATT 1947 that were adopted before the entry into force of the WTO Agreement and therefore form part of the GATT 1994."⁹⁹ See page 1091 above.

2. Termination and reconvening of working parties

In the July 1981 Council discussion of the possibility of reconvening the working party under Article XVI on the possibility of limiting subsidization of sugar, in response to questions,

"The Chairman said that the existence of a working party was related to its terms of reference. In normal GATT practice, when a working party fulfilled its mandate, it ceased to exist when the Council adopted its report. However, when adopting a report, the Council could nevertheless decide to continue the existence of a working party with new or modified terms of reference. He recalled that, in the instance under discussion, the Director General had been invited to organize discussions in a working party and to submit a report to the Council within a stated time period, which had been accomplished. He said that while the Council might not be able to revive a defunct working party in the strictly legal sense, clearly it could decide to establish a new working party with similar or identical terms of reference. ...

"The Chairman said that it was up to the Council to decide what it meant by an earlier decision. Whereas nothing would prevent the Council from establishing a new working party to perform the same work, the Council could also interpret its earlier decision so as to continue the mandate of the old Working Party".¹⁰⁰

⁹⁵C/M/149, p. 6.

⁹⁶C/M/149, p. 8.

⁹⁷C/M/150, p. 22.

⁹⁸L/6196, L/6243, C/M/220.

⁹⁹PC/II, L/7582.

¹⁰⁰C/M/149, p. 5-6.

In November 1971 the Council agreed to the establishment of a Group on Environmental Measures and International Trade, “as standby machinery which would be ready to act only when and if the need arose ... whose main functions would be: 1. to examine upon request any specific matters relevant to the trade policy aspects of measures to control pollution and protect human environment especially with regard to the application of the provisions of the General Agreement taking into account the particular problems of developing countries; 2. to report to the Council”.¹⁰¹ In December 1990 it was proposed that the Group, which had not met hitherto, be convened during 1991.¹⁰² After debate in the Council and informal consultations, the Group was convened on the basis of a specific agenda to be adopted by it, and with a membership open to any contracting party which wished to participate.¹⁰³

F. PRINCIPAL STANDING BODIES ESTABLISHED IN THE GATT

At the Forty-fourth Session of the CONTRACTING PARTIES, the Chairman of the Council made the following suggestion regarding the appointment of presiding officers of standing bodies, in the form of a statement for the record.

“I suggest that in future, at the first Council meeting each year, on the basis of a consensus which would have emerged from consultations, the Council Chairman should propose the names of the presiding officers of the Committee on Balance-of-Payments Restrictions, the Committee on Budget, Finance and Administration and the Committee on Tariff Concessions for the current year. This would not preclude the re-appointment of an incumbent.

“The Council Chairman would have formally announced beforehand, at a Council meeting or by means of a document, his intention to carry out consultations, open to all delegations, and he would have conducted them so as to ensure the transparency of the process.”

The CONTRACTING PARTIES took note of this suggestion.¹⁰⁴

Paragraph 2 of the Decision of 8 December 1994 on “Avoidance of Procedural and Institutional Duplication” provides that:

“(a) The following Committees established under the GATT 1947 or a Tokyo Round Agreement shall coordinate their activities with the corresponding Committees established under the WTO Agreement:

Committee on Trade and Development,
Committee on Balance-of-Payments Restrictions,
Committee on Anti-Dumping Practices,
Committee on Customs Valuation,
Committee on Import Licensing,
Committee on Subsidies and Countervailing Measures,
Committee on Technical Barriers to Trade.

“(b) The Committee on Tariff Concessions and the Technical Group on Quantitative Restrictions and Other Non-Tariff Measures of the GATT 1947 shall coordinate their activities with the WTO Committee on Market Access proposed to be established. ...”¹⁰⁵

¹⁰¹C/M/74 p. 3-4 (decision); L/3622/Rev.1 (terms of reference, chairman and membership).

¹⁰²MTN.TNC/W/47; see also documents L/6809, L/6859, Spec(91)13, 20 and 21 and Spec(91) documents listed on page 2 of C/M/250; and discussion in SR.46/2 p. 5-9, C/M/247 p. 19-30, C/M/248 p. 17-26, C/M/249 p. 28-30, C/M/250 p. 2-22, C/M/251 p. 3-11.

¹⁰³C/M/252, p. 24-31; see also statements at Spec(91) 21, 39, 45, 46, 48, 50, 54, 55, 56.

¹⁰⁴SR.44/2, p. 15-16.

¹⁰⁵PC/11, L/7582; see further at p. 1091 above.

1. Committee on Balance-of-Payments Restrictions

Establishment and terms of reference: Prior to 1958, consultations under the balance-of-payments articles of the General Agreement were conducted in a series of working parties established by the CONTRACTING PARTIES for that purpose. In 1958 the CONTRACTING PARTIES established the Committee, on the recommendation of the then Working Party on Balance-of-Payments Restrictions, with the following terms of reference:

“To conduct the consultations under Article XII:4(b) and Article XVIII:12(b) and any such consultations as may be initiated during the year under Article XII:4(a) or Article XVIII:12(a).”¹⁰⁶

Paragraph 4 of the 1979 Declaration on Trade Measures Taken for Balance-of-Payments Purposes provides that “all restrictive import measures taken for balance-of-payments purposes shall be subject to consultation in the GATT Committee on Balance-of-Payments Restrictions”. Concerning the activities of the Committee, see the discussion of balance-of-payments consultations under Article XII. The Committee reports to the Council on each balance of payments consultation and each meeting.

On 31 January 1995, the WTO General Council established the WTO Committee on Balance-of-Payments Restrictions and agreed on its terms of reference.¹⁰⁷

2. Committee on Budget, Finance and Administration

Prior to 1962, the GATT budget was examined by an *ad hoc* working party appointed each year by the CONTRACTING PARTIES for that purpose. In May 1962, this earlier practice was discontinued when the Council appointed a Committee on Budget, Finance and Administration, the terms of reference and operations of which are discussed below at page 1125.¹⁰⁸ The Committee and earlier working parties have examined the budget, the accounts and administration issues.¹⁰⁹

The members of the Committee are appointed by the Council. At the July 1991 meeting of the Council, in a discussion concerning the membership of the Budget Committee, one representative stated that “... while there were no formal arrangements for membership on the Committee, the tradition had been to keep it small and efficient. There had also been a tradition of rotation, such as between Belgium and the Netherlands; he was also aware that two other contracting parties were also consulting with a view to rotation. One should also perhaps recall that observers were welcome in the Committee, had access to its documents and were allowed full participation in its meetings”.¹¹⁰

The Committee reports to the Council on a periodic basis. On 31 January 1995 the WTO General Council established the WTO Committee on Budget, Finance and Administration and agreed on its terms of reference.¹¹¹ Concerning financial and budget procedures, and the operation of the Committee and the corresponding WTO Committee during the period of transitional co-existence of the GATT 1947 and the WTO, see at page 1125 and following.

3. Committee on Tariff Concessions

Pursuant to the GATT Work Program adopted by the CONTRACTING PARTIES at their Thirty-Fifth Session in November 1979, the Committee was established by the Council on 29 January 1980 with a mandate to “supervise the task of keeping the GATT schedules up to date; supervise the staging of tariff reductions; provide a forum for discussion of questions relating to tariffs; and to report periodically to the Council”.¹¹² The Committee reports annually to the Council. Further concerning the activities of the Committee, see the discussion

¹⁰⁶L/931; BISD 7S/94. The terms of reference of the Committee and its membership appear in L/6526/Rev.2.

¹⁰⁷WT/L/45.

¹⁰⁸C/M/10, p.15.

¹⁰⁹See, e.g., Decision on “Quality of Air on GATT Premises”, in L/7198/Rev.1, Report of the Committee, dated 30 April 1993, adopted by the Council on 12 May 1993.

¹¹⁰C/M/251 p. 21.

¹¹¹WT/L/44.

¹¹²C/M/138, item no. 11(a); BISD 26S/220.

of Schedules under Article II. On 31 January 1995, the WTO General Council established the WTO Committee on Market Access and agreed on its terms of reference.¹¹³

4. Consultative Group of Eighteen

The Consultative Group of Eighteen (CG-18) was established by Decision of the Council of 11 July 1975, initially as a temporary body.¹¹⁴ In the Group's report to the Council in 1979 it recommended that it should be established as a permanent body. Its mandate, as agreed by the Council on 22 November 1979, is as follows:

"The task of the Group is to facilitate the carrying out, by the CONTRACTING PARTIES, of their responsibilities, particularly with respect to:

- "(a) following international trade developments with a view to the pursuit and maintenance of trade policies consistent with the objectives and principles of the General Agreement;
- "(b) the forestalling, whenever possible, of sudden disturbances that could represent a threat to the multilateral trading system and to international trade relations generally; and action to deal with such disturbances if they in fact occur;
- "(c) the international adjustment process and the co-ordination, in this context, between the GATT and the IMF.

"In the pursuit of its task, the Group shall take into account the special characteristics and requirements of the economies of the developing countries and their problems.

"The Group shall not impinge upon the competence or authority of the CONTRACTING PARTIES or of the Council and shall not assume, or detract from, any of the decision-making responsibilities of these two bodies or of the permanent GATT Committees.

"The Group's membership shall be balanced and broadly representative, due regard being had to rotation of membership as appropriate. ... The Group shall submit once a year a comprehensive account of its activities to the Council".¹¹⁵

The 1979 Report of the CG-18 states that "It is strongly believed in the Group that the GATT should have at its disposal a small but representative group which would permit existing and emerging trade policy issues to be discussed in confidence among responsible officials from capitals and thus facilitate a concertation of policies in the trade field".¹¹⁶ The Director-General, as Chairman of the Group, has presented its reports, prepared on his own responsibility, to the Council. These reports have been reproduced in the BISD series. At the Forty-fifth Session in December 1989, the CONTRACTING PARTIES agreed to the Director-General's suggestion to the Council that the Group remain in suspense for 1990, with the understanding that if for any reason a meeting appeared to be desirable, he would convene it. Before doing so, he would request the Council to take the necessary decision on behalf of the CONTRACTING PARTIES on the composition of the Group.¹¹⁷ The Group did not meet in 1991 and 1992.

See also the Secretariat Note of 1987 on "The History of the Consultative Group of Eighteen".¹¹⁸

¹¹³WT/L/47.

¹¹⁴C/M/107, L/4204; see also earlier documents submitted by the Director-General, L/4048, L/4189.

¹¹⁵C/M/107, BISD 22S/15-16 (Decision establishing CG-18); BISD 26S/289-90 (revised mandate). Reports of the CG.18 appear at BISD 25S/37; BISD 26S/284 OTHERS

¹¹⁶L/4869, 26S/284, 285, para. 12.

¹¹⁷C/M/246.

¹¹⁸MTN.GNG/NG14/W/5, dated 9 June 1987.

G. DOCUMENTATION

1. Document issuance and circulation

All GATT documents, with a few exceptions, are issued as “Restricted” documents. Documents issued as unrestricted documents include Decisions of the CONTRACTING PARTIES, documents in the INF/ series and a few others. Restricted documents are issued by the Secretariat only to representatives of contracting parties and of those governments and international organizations which are invited to send observers to meetings of various GATT bodies.

In 1955, the Executive Secretary noted that a representative of a contracting party had called his attention to the necessity for using the reports of Review Session Working Parties in connection with legislative consideration of amendments to the General Agreement, and observed that “The classification ‘RESTRICTED’ should not, however, prevent a government from revealing to its appropriate legislative authorities any portion of a working party report which it considers necessary for the adequate understanding of the amendments. It is recognized that, where it is the practice to publish legislative hearings, this may result in the publication of certain parts of the Working Party reports before the normal date on which the complete document would be derestricted and become available for general public use. The Executive Secretary has so informed the contracting party concerned and invites other contracting parties to be guided by the same interpretation”.¹¹⁹

The Decision of 21 July 1993 on “Observer Status of Governments in the Council of Representatives” provides that “Observer governments shall have access to the main GATT document series”.¹²⁰

2. Derestriction procedures

Early Sessions of the CONTRACTING PARTIES provided, as a routine item of closing business, for derestriction after the end of the Session, of all session documents, including any other issued since the close of the previous Session, with a few exceptions such as the summary records of the current Session.¹²¹ Procedures for the derestriction of documents were adopted at the Fourth, Sixth, Fourteenth and Twenty-third Sessions of the CONTRACTING PARTIES.¹²² In 1967, a consolidation of the procedures in force was set out in L/2737, as follows:

- “1. Documents in the L/, COM.II/, COT/, BOP/ and C/ series (respectively: Limited Distribution, Committee II, Cotton and Textiles Committee, Committee on Balance-of-Payments Restrictions and Council) are derestricted sixty days after the close of each session of the CONTRACTING PARTIES, and sixty days after any half-year in which no session is held. Decisions adopted by the CONTRACTING PARTIES during sessions or by postal ballots, are published in the L/ series as unrestricted documents.”¹²³
- “2. Documents in the COM.TD/ series (Committee on Trade and Development) are derestricted after each meeting of the Committee on Trade and Development, subject to a fifteen-day period after circulation of the list of documents proposed for derestriction.
- “3. Documents in the SR.../ series (summary records of sessions) are derestricted at the end of the second following session.
- “4. Documents in the C/M/ series (Minutes of the Council of Representatives) and selected documents in the SECRET/ series are derestricted at the end of each session of the CONTRACTING PARTIES, with a delay of two years.

¹¹⁹Spec/203/55, dated 21 March 1955.

¹²⁰L/7286, para. 5; a footnote to this paragraph refers to “L/, C/, C/W/, etc.”.

¹²¹GATT/CP.3/SR.42; derestriction agreed with the exception of documents originally classified as “secret”, documents of working parties (except those issued as numbered GATT documents), and documents for which any contracting party has requested that restricted status be continued; see also CP.3/76, CP.3/SR.41 p. 4.

¹²²GATT/CP.45; GATT/CP.47 + Add.1-4; GATT/CP.4/4, GATT/CP.4/SR.4 p. 6; GATT/CP.6/11, GATT/CP.6/SR.25, p. 2; W.14/3, SR.14/8 p. 107, INF/73, L/2238; INT(65)695, C/M/10, C/W/41, L/2564 +/Rev.1 +/Add.1, SR.23/11 p. 171.

¹²³At the Second Session of the CONTRACTING PARTIES in 1948, “the Chairman proposed that the Secretariat should be authorized to issue the Decisions taken by the CONTRACTING PARTIES as unrestricted documents. The proposal was approved”. GATT/CP.2/SR.25 p. 5.

"The secretariat gives advance notice to contracting parties and intergovernmental organizations of the documents due for derestriction and fixes the date for the derestriction to take place. Any document, or any item in a summary record or Council minute, remains restricted at the request of a contracting party or an intergovernmental organization. A list of newly-derestricted documents is issued by the secretariat shortly after each date fixed for derestriction.

"All documents in series other than those mentioned in paragraphs 1 to 4 remain restricted, with the following exceptions:

"COM.I/, COM.III/, and AC/ series, now discontinued, have been derestricted. INF/ series and GATT press releases are not subject to restriction".

Document series which have come into existence since 1967 have been submitted to the CONTRACTING PARTIES for periodic derestriction, with some exceptions. The procedure in recent years has been for the Secretariat to propose a list of documents for derestriction twice a year, allowing governments and intergovernmental organizations sixty days to request that a document or portion thereof remain restricted. Occasionally documents have been derestricted outside of these twice-yearly exercises at a contracting party's request, subject to the same 60-day requirement,¹²⁴ or immediately upon decision at a Council meeting.¹²⁵ Decisions on derestriction or derestriction practices have also been made with respect to types of documents, document series or a specific document.¹²⁶ A list of documents recently derestricted and those remaining restricted is issued twice a year in the INF/ series.

A series of consultations on document derestriction were conducted in the GATT Council in 1993-94. At the Fiftieth Session in December 1994, the Chairman noted that delegations had been unable to reach consensus before the last meeting of the Council in 1994, as some were interested primarily in the treatment of documents to be issued in the future under the auspices of the WTO, while others thought that any change in procedures should not apply to past GATT documents, given expectations of confidentiality when those documents were issued. A number of delegations had therefore proposed that informal consultations be held to establish procedures for issuance and derestriction of WTO documents; in the light of such consultations procedures for issuance and derestriction of GATT 1947 documentation could then be reviewed.¹²⁷

3. Panel reports and the roster of non-governmental panelists

At its meeting on 4 May 1988, "the Council agreed that in future, panel reports would be derestricted upon their adoption by the Council or the CONTRACTING PARTIES unless, prior to adoption, a party to the dispute had informed the Council Chairman or CONTRACTING PARTIES' Chairman that it opposed derestriction in that particular case. The Secretariat would check with the parties to a dispute prior to the Council meeting or CONTRACTING PARTIES' Session in this connection".¹²⁸ At its meeting on 21 June 1994, the Council agreed that the roster of non-governmental panelists would be issued henceforth as an unrestricted document in the L/ series.¹²⁹

4. Documents associated with negotiating rounds

Eight negotiating rounds have been conducted in the GATT: 1947 (Geneva), 1949 (Annecy), 1950 (Torquay), 1956 (Geneva), 1960-61 (Dillon Round), 1962-67 (Kennedy Round), 1974-79 (Tokyo Round) and the Uruguay Round. Essentially all documents relating to these rounds remain restricted. Uruguay Round

¹²⁴See, e.g., INF/234 (derestriction of L/6175, Panel report on United States - Taxes on Petroleum and Certain Imported Substances).

¹²⁵See, e.g., Council derestriction (C/M/245 p. 17-18) of "United States - Countervailing duties on fresh, chilled and frozen pork from Canada", DS7/R, 38S/30, at the request of Canada; Council derestriction (C/M/275, p. 10-12) of document C/189, proposal on derestriction, at request of United States.

¹²⁶See 30 March 1994 decision of the Uruguay Round Trade Negotiations Committee on "Derestriction of Certain Uruguay Round Documents", MTN.TNC/42; decision of 30 November 1994 by the Preparatory Committee for the WTO on "Derestriction of Documents of the Preparatory Committee and its Subsidiary Bodies", PC/4; decision to immediately derestrict the Report by the Chairman of the Group on Environmental Measures and International Trade (L/7402) "in view of the public misperception about the role of the GATT in the field of the environment", SR.49/3 p. 6.

¹²⁷SR.50/2 p. 2-3; see also C/M/275, p. 10-12.

¹²⁸C/M/220, 35S/331.

¹²⁹C/M/273, p. 16.

documentation, too, has been issued in restricted document series; on 30 March 1994, the Uruguay Round Trade Negotiations Committee decided on derestriction procedures for Uruguay Round documents.¹³⁰

5. Documents of bodies established under separate agreements

When the Committees administering the Tokyo Round Agreements were first convened in early 1980 and 1981, each of those bodies decided that working documents and minutes would never be derestricted and that the secretariat should make a proposal annually regarding other documents to be derestricted at the end of the year and that these documents would be derestricted if no delegation objected to the proposal.¹³¹ Under these procedures, the bodies mentioned thereunder propose a list of documents for derestriction annually. On occasion a document has also been derestricted by a decision of the body issuing it.¹³² Certain other bodies of limited membership have also established their own document derestriction policies.¹³³

IV. INSTITUTIONAL ISSUES IN TRADE NEGOTIATIONS

Trade negotiations in the GATT have generally been conducted under the supervision of a Trade Negotiations Committee (earlier, a Tariff Negotiations Committee). The General Agreement does not require individual contracting parties to participate in GATT-sponsored negotiations. The CONTRACTING PARTIES may invite non-contracting parties to participate. Almost all past rounds of negotiations have also provided the opportunity for negotiations on accession by one or more governments. See under Article XXVIII *bis* above; see also the 1985 Secretariat Note on the "Launching and Organization of Trade Negotiations in the GATT"¹³⁴ and Secretariat Notes on negotiating procedures in the Dillon, Kennedy and Tokyo Rounds.¹³⁵

The Uruguay Round was launched by a conference of Ministers meeting on the occasion of the Special Session of the CONTRACTING PARTIES at Punta del Este, Uruguay. The Ministerial Declaration of 20 September 1986 on the Uruguay Round established a Trade Negotiations Committee to carry out the negotiations, and provided in two parts for the launching of negotiations on trade in goods and in services, respectively, conducted within a Group for Negotiations on Goods and a Group for Negotiations on Services each reporting to the Trade Negotiations Committee.

As for participation, the Ministerial Declaration provided that the negotiations would be open to: (i) all contracting parties; (ii) countries having acceded provisionally; (iii) countries applying the GATT on a *de facto* basis having announced, not later than 30 April 1987, their intention to accede to the GATT and to participate in the negotiations; (iv) countries that had already informed the CONTRACTING PARTIES, at a regular meeting of the Council of Representatives, of their intention to negotiate the terms of their membership as a contracting party; and (v) developing countries that had, by 30 April 1987, initiated procedures for accession to the GATT with the intention of negotiating the terms of their accession during the course of the negotiations. Participation in negotiations relating to the amendment or application of GATT provisions or the negotiation of new provisions would be open only to contracting parties.¹³⁶ On 5 July 1993, the TNC agreed that by analogy, and *mutatis mutandis*, the Decision referred to above on page 1094 regarding the contracting party status of Yugoslavia would apply to the Uruguay Round and to the Trade Negotiations Committee.¹³⁷ As of the 15 April 1994 Marrakesh Ministerial Meeting concluding the Uruguay Round, there were 125 countries and territories

¹³⁰See 30 March 1994 decision of the Uruguay Round Trade Negotiations Committee on "Derestriction of Certain Uruguay Round Documents", MTN.TNC/42. The PREP.COM(86)/ document series which preceded the Round was derestricted in March 1987 through the regular document derestriction process. L/6122, INF/230.

¹³¹ADP/M/2 p. 10; AIR/W/16; GPR/M/1; LIC/M/2; SCM/M/3 p. 3; TBT/M/2.

¹³²Decision of Committee on Subsidies and Countervailing Measures to derestrict adopted panel report on "Canadian countervailing duties on grain corn from the United States" in SCM/140 and Corr.1, SCM/M/59 p. 34.

¹³³See COM.TEX/W/26 (Textiles Committee); see also CPC/46, CPC/W/60 Annex II (Committee of Participating Countries).

¹³⁴Spec(85)46, dated 26 September 1985.

¹³⁵Notes on "Rules and Procedures for the Dillon and Kennedy Rounds", MTN/W/8; "Use of Computer Facilities in the Multilateral Trade Negotiations", MTN/W/12; "Accreditation of Delegations to the Multilateral Trade Negotiations", MTN/W/26; Notes on "Tariff Negotiations in the Kennedy and Tokyo Rounds", MTN.GNG/NG1/W/1; and "Data Base and Relevant Work Undertaken on Negotiating Techniques", MTN.GNG/NG2/W/1.

¹³⁶Min.Dec, agreed on 20 September 1986, 33S/19, 26-27.

¹³⁷MTN.TNC/30, p. 3-4, paras. 15-16.

participants in the Round.¹³⁸ On 28 July 1993, the TNC further agreed that the countries and territories which are negotiating accession to GATT but are not presently participating in the Uruguay Round, may, upon request, be associated with the activities of the Uruguay Round; these countries and territories would be invited to be present, without participating in the deliberations, at formal meetings of Uruguay Round bodies, would have access to minutes of meetings where they were present, but would not be entitled to table offers or other documentation for circulation to participants. As of 15 April 1994 there were 19 such countries or territories.¹³⁹

V. THE INTERIM COMMISSION FOR THE INTERNATIONAL TRADE ORGANIZATION (ICITO)

1. Establishment and membership

The Interim Commission for the International Trade Organization (ICITO) was established by a Resolution of the United Nations Conference on Trade and Employment (the Havana Conference) "considering that pending the establishment of the Organization certain interim functions should be performed".¹⁴⁰ The Annex to this Resolution provides for the membership and functions of ICITO and provides in paragraph 9 that "The Commission shall cease to exist upon the appointment of the Director-General of the Organization, at which time the property and records of the Commission shall be transferred to the Organization".

The Havana Conference Resolution Establishing an Interim Commission for the International Trade Organization provides that the Commission shall consist of "the governments the representatives of which have approved this resolution and which are entitled to original membership of the Organization under Article 71 of the [ITO] Charter". The fifty-two delegations which approved the resolution are listed in the note below.¹⁴¹ Under Article 71 of the Charter the governments which were entitled to original membership were those States and customs territories invited to the United Nations Conference for Trade and Employment in Havana.

The Interim Commission itself has met only once, on 20 March 1948 during the Havana Conference. The Annex to the Havana Conference Resolution provides that "the Commission shall elect an Executive Committee of eighteen members to exercise any or all of its functions as the Commission may determine on electing the Committee". At its first meeting, the Commission elected its Executive Committee consisting of: Australia, Benelux Union, Brazil, Canada, China, Colombia, Czechoslovakia, Egypt, El Salvador, France, Greece, India, Italy, Mexico, Norway, Philippines, United Kingdom and United States.¹⁴² The Executive Committee membership has not changed since that election except for the deletion of the Czech and Slovak Federal Republic when it ceased to exist on 31 December 1992; seventeen members remain.

¹³⁸ MTN.TNC/MIN(94)/INF/1 (list of participants). Participants as of 15 April 1994 were: Algeria, Angola, Antigua and Barbuda, Argentina, Australia, Austria, Bahrain, Bangladesh, Barbados, Belgium, Belize, Benin, Bolivia, Botswana, Brazil, Brunei Darussalam, Burkina Faso, Burundi, Cameroon, Canada, Central African Rep, Chad, Chile, China, Colombia, Congo, Costa Rica, Côte d'Ivoire, Cuba, Cyprus, Czech Republic, Denmark, Dominica, Dominican Republic, Egypt, El Salvador, European , Communities, Fiji, Finland, France, Gabon, Gambia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea Bissau, Guyana, Haiti, Honduras, Hong Kong, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Kenya, Republic of Korea, Kuwait, Lesotho, Liechtenstein, Luxembourg, Macau, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Morocco, Mozambique, Myanmar, Namibia, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Pakistan, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Romania, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Sierra Leone, Singapore, Slovak Republic, South Africa, Spain, Sri Lanka, Suriname, Swaziland, Sweden, Switzerland, Tanzania, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkey, Uganda, United Arab Emirates, United Kingdom, United States, Uruguay, Venezuela, Zaire, Zambia, Zimbabwe.

¹³⁹ MTN.TNC/32, p. 13, para. 40-41 (decision); MTN.TNC/MIN(94)/INF/1 (list of associated countries and territories). The 19 associated countries or territories were: Albania, Armenia, Belarus, Bulgaria, Croatia, Ecuador, Estonia, Jordan, Latvia, Lithuania, Moldova, Mongolia, Nepal, Panama, Russian Federation, Saudi Arabia, Slovenia, Ukraine, Chinese Taipei.

¹⁴⁰ Resolution Establishing an Interim Commission for the International Trade Organization, adopted upon signing of Havana Conference Final Act 24 March 1948, in *Havana Conference Final Act and Related Documents*, E/CONF.2/78 or ICITO/I/4. The Resolution was drafted by a Working Party of the Sixth Committee of the Havana Conference; see Havana Reports p. 158-159.

¹⁴¹ Afghanistan, Argentina, Australia, Austria, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, France, Greece, Guatemala, Haiti, India, Republic of Indonesia, Iran, Iraq, Italy, Lebanon, Liberia, Luxembourg, Mexico, the Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Peru, Philippines, Poland, Southern Rhodesia, Sweden, Syria, Transjordan, Turkey, South Africa, United Kingdom, United States, Uruguay, Venezuela. E/CONF.2/78 or ICITO/I/4, p. 69.

¹⁴² "It was agreed that the election of the Executive Committee should proceed along the lines of Article [78 of the Charter] and the Annex thereto". ICITO/1/SR.1 p. 1.

The Executive Committee met on 20 March 1948 at the Havana Conference, then at Geneva from 25 August to 15 September 1948 during the Second Session of the CONTRACTING PARTIES, and in the summer of 1949 during the Third Session of the CONTRACTING PARTIES. A third session was scheduled for September 1949, on which date the Charter provided that (if the Charter had not entered into force) the Secretary-General of the United Nations would invite those governments which had deposited instruments of acceptance of the Charter to enter into consultation to determine whether and on what conditions they desired to bring the Charter into force.¹⁴³ In view of the delay in receiving acceptances of the Havana Charter¹⁴⁴, in August 1949 the Executive Committee agreed to postpone this meeting until a date when the entry into force of the Charter and the holding of the first ITO Conference were more imminent.¹⁴⁵ On 6 December 1950 the United States Department of State issued a statement of policy indicating that the Havana Charter would not be submitted again to the United States Congress. It subsequently became evident that the establishment of the ITO would be indefinitely postponed.¹⁴⁶

Since 1950, the Executive Committee of ICITO has met only four times. The meetings on 29 March 1968, 4 August 1980, and 10 June 1993 were held to replace the Executive Secretary and confirm the appointment of the GATT Director-General designate as his successor.¹⁴⁷ For instance, at the June 1993 meeting it was agreed that the appointment of Mr. Peter Sutherland as Executive Secretary of ICITO would be coterminous with his tenure as Director-General to the CONTRACTING PARTIES to the GATT. The final meeting of the Executive Committee, held on 9 December 1995, adopted the Transfer Agreement reprinted *in extenso* at page 1123.

2. Functions

Paragraph 2 of the Annex to the Havana Conference Resolution provided that the Commission was to have the following functions, which bore on preparation for the first Conference of the ITO:

- “(a) to convoke the first regular session of the Conference of the Organization (hereinafter referred to as “the Conference”) not less than four months and, as far as practicable, not more than six months after the receipt of the last acceptance needed to bring the Charter into force;
- “(b) to submit the provisional agenda for the first regular session of the Conference, together with documents and recommendations relating to all matters upon this agenda, including (i) proposals as to the programme and budget for the first year of the Organization;¹⁴⁸ (ii) studies regarding selection of headquarters of the Organization;¹⁴⁹ (iii) draft financial and staff regulations.¹⁵⁰
- “(c) to prepare, in consultation with the United Nations, a draft agreement of relationship as contemplated in paragraph 1 of Article 86 of the Charter¹⁵¹ for consideration by the first regular session of the Conference;

¹⁴³Havana Charter, Article 103:2(b). This date is also referred to in Article XXIX:3 of the General Agreement: see the chapter on Article XXIX.

¹⁴⁴A Secretariat Note on “Interim Arrangements and Postponement of ITO” (Sec/36/53 (mid-1953)) states that “By the end of 1950 the Havana Charter had been accepted by Liberia and - conditional upon acceptance by the United Kingdom and the United States - by Australia. The Swedish Riksdag authorized Sweden’s adherence at the discretion of the Foreign Minister. No acceptances had been deposited with the Secretary-General of the United Nations”.

¹⁴⁵ICITO/1/21. The CONTRACTING PARTIES decided on 21 March 1950 that the meeting referred to in Article XXIX:3 “shall be held at such time as may subsequently be decided by the CONTRACTING PARTIES”. Decision at GATT/CP.4/29, GATT/CP/61 p. 8; adoption at GATT/CP.4/SR.17 p. 7. The Decision of 24 October 1953 by the CONTRACTING PARTIES to convene the Review Session in October 1954 provided that “the review referred to in this Decision shall be deemed to fulfil the requirements of paragraph 3 of Article XXIX”. 2S/28, 30.

¹⁴⁶Sec/36/53. The US announcement of its decision not to resubmit ITO to Congress appears in GATT/CP/86 dated 7 December 1950.

¹⁴⁷ICITO/1/36, ICITO/1/37, ICITO/1/38.

¹⁴⁸See ICITO/EC.1/5, ICITO/EC.2/14 and Annex B thereto.

¹⁴⁹See ICITO/EC.2/SR.10 p. 13-15 (discussion of site).

¹⁵⁰See ICITO/EC.2/10 (draft regulations), ICITO/EC.2/14 Annex C p. 75 (revision), ICITO/EC.2/SR.13 p. 7 (approval).

¹⁵¹This paragraph requires the conclusion of a specialized agency agreement with the United Nations. See below at page 1131.

- “(d) to prepare, in consultation with inter-governmental organizations other than the United Nations, for presentation to the first regular session of the Conference, documents and recommendations regarding the implementation of the provisions of paragraphs 1 and 3 of Article 87 of the Charter¹⁵²;
- “(e) to prepare, in consultation with non-governmental organizations, for presentation to the first regular session of the Conference, recommendations regarding the implementation of the provisions of paragraph 2 of Article 87 of the Charter¹⁵³;
- “(f) to prepare, with a view to recommendation by the Economic and Social Council to the first regular session of the Conference, the Annex referred to in paragraph 3 of Article 90 of the Charter¹⁵⁴;
- “(g) to carry out the functions and responsibilities referred to in the following documents of the United Nations Conference on Trade and Employment: 1. Paragraph 2 of the Final Act of the United Nations Conference on Trade and Employment. ...¹⁵⁵ 2. The Resolution of the Conference regarding the relation of the International Trade Organization and the International Court of Justice. ...¹⁵⁶ 3. The Resolution of the Conference relating to Economic Development and Reconstruction. ...¹⁵⁷ 4. The Report of Sub-Committee G of the Third Committee on the Proposal made by the Delegation of Switzerland ... together with the sections relating to that matter in the Report of the Third Committee ...¹⁵⁸;
- “(h) to enter into consultations with the Secretary-General of the United Nations regarding the expenses incurred by the Preparatory Committee of the [Havana Conference] and by that Conference, and, in the light of such consultations, to present a report to the first regular session of the Conference;¹⁵⁹
- “(i) generally to perform such other functions as may be ancillary and necessary to the effective carrying out of the provisions of this annex.”

¹⁵²See references on page 1132 below.

¹⁵³See references on page 1133 below.

¹⁵⁴The reference is to an ITO Annex to the United Nations General Convention on the Privileges and Immunities of the Specialized Agencies (33 UNTS 261); see page 1129 below.

¹⁵⁵This paragraph provides that “The authentic text of the Charter in the Chinese, Russian and Spanish languages will be established by the Interim Commission of the International Trade Organization, in accordance with the procedure established by the Conference”. See ICITO/EC.2/5, ICITO/EC.2/15. Texts of the Charter in these languages are on deposit in the GATT Library. An authentic Spanish language text of the Charter was finalized by the ICITO Executive Committee; see the material on authentic texts under Article XXVI in this book.

¹⁵⁶In this Resolution, the Conference “Resolves that the Interim Commission on the International Trade Organization, through such means as may be appropriate, shall consult with appropriate officials of the International Court or with the Court itself, and after such consultation report to the first regular session of the Conference of the [ITO] upon the questions of: (a) whether [the procedures in Chapter VIII of the Charter for review of legal questions arising out of decisions and recommendations of the Organization] need to be changed to ensure that decisions of the Court on matters referred to it by the Organization should, with respect to the Organization, have the nature of a judgment; and (b) whether an amendment should be presented to the Conference pursuant to and in accordance with the provisions of [Annex N of the Charter]”. E/CONF.2/78 or ICITO/I/4, p. 71. On ICITO implementation of this mandate see ICITO/EC.2/3, ICITO/EC.2/15, ICITO/EC.2/SR.3 p. 3-6, ICITO/EC.2/SR.11 p. 1-9, ICITO/EC.2/SR.12 p. 1-2.

¹⁵⁷This Resolution directed the ICITO “to examine (i) the powers, responsibilities and activities in the field of industrial and general economic development and reconstruction of the United Nations, of the specialized agencies and of other inter-governmental organizations, including regional organizations; (ii) the availability of facilities for technical surveys or studies of: the natural resources of under-developed countries; or the possibilities of their industrial development, whether general or in relation to the processing of locally produced raw materials or other particular industries; or for the improvement of their systems of transportation and communications; or with respect to the manner in which investment of foreign capital may contribute to their economic development; and in the light of this examination to report to the Organization upon (a) the structure and administrative methods, (b) the working relations with the United Nations, the specialized agencies and other inter-governmental organizations including regional organizations[,] which will enable the [ITO] most effectively to carry out its positive functions for the promotion of the economic development and reconstruction of Members”. E/CONF.2/78 or ICITO/I/4 p. 74. On implementation see ICITO/EC.2/7 and annexes, ICITO/EC.2/20, ICITO/EC.2/SR.3 p. 6-11, ICITO/EC.2/SR.15 p. 7, ICITO/EC.2/SR.16.

¹⁵⁸The Sub-Committee in question was unable to accept a Swiss proposal (E/CONF.2/C.3/11, Havana Reports p. 102) but recommended that ICITO “invite the Swiss Government to participate in a study of the problems facing the Swiss economy with a view to submitting to the first Conference of the Organization a report as to the measures for dealing with the Swiss problem which could be taken in accordance with the procedures established in the Charter”. Havana Reports, p. 44-45; see also *ibid.* p. 102-105. On implementation see ICITO/EC.2/9, ICITO/EC.2/18, ICITO/EC.2/SR.4 p. 1-5, ICITO/EC.2/SR.15 p. 1-2.

¹⁵⁹Concerning the consultations see ICITO/EC.1/SR.2 p. 2, ICITO/EC.2/4, ICITO/EC.2/14/Add.1, ICITO/EC.2/SR.9 p. 1-11, ICITO/EC.2/SR.14 p. 1-4.

The Sixth Committee of the Havana Conference “agreed that the performance of the functions specified in subparagraphs 2(c), (d) and (e) of the Annex to the Havana Conference Resolution could not result in the increase of the obligations or the decrease of the rights of Members under the Charter”.¹⁶⁰

At the first and only meeting of the Interim Commission itself, it was agreed that the Commission should delegate all its powers to the Executive Committee including the power to replace the Executive Secretary if this should become necessary.¹⁶¹ No later meetings of the Interim Commission were held.

A 1953 Secretariat Note states: “The main task of the Interim Commission was to prepare the ground for the first session of ITO, including a plan of work for the first year of the Organization, the budget, the site for ITO headquarters, relations with the United Nations, the specialized agencies and other inter- and non-governmental organizations. The bulk of this task - so far as events could be foreseen - was completed in 1949, and since that time the secretariat of the ICITO has been almost entirely occupied with the performance of duties for the Contracting Parties to the General Agreement on Tariffs and Trade”.¹⁶²

3. Procedures

Rules of Procedure were adopted at the Interim Commission’s first meeting and revised at the second session of the Executive Committee.¹⁶³ The Chairman of the Executive Committee was elected at each meeting thereof.

4. Budget

In the course of arrangements for certain administrative services to be performed on a reimbursement basis by the Secretariat of the United Nations during the early years of the GATT, the Executive Secretary of ICITO agreed “that the administration, financial and personnel regulations of the United Nations shall, where appropriate, apply to the Secretariat of the Interim Commission”.¹⁶⁴

The ICITO budget in 1948-50 was financed by contributions from the CONTRACTING PARTIES and by advances from the Working Capital Fund of the United Nations. In 1953 ICITO was paid by the CONTRACTING PARTIES for services rendered prior to 1951 and repaid the same amount to the United Nations, liquidating its outstanding balance. A Note to this effect from the Executive Secretary of 5 October 1954 also stated that “As all current expenditure of ICITO is automatically repaid by the CONTRACTING PARTIES to the General Agreement on Tariffs and Trade, all financial operations of ICITO are now self-liquidating and it therefore appears unnecessary to issue any further statement on the accounts or the financial position of the ICITO”.¹⁶⁵

5. Secretariat

The Havana Conference Resolution provides that “the Commission shall elect an Executive Secretary who shall be its chief administrative officer. The Executive Secretary shall appoint the staff of the Commission observing, as far as possible, the principles of paragraph 2 of Article 85 of the Charter ... The Executive Secretary shall also perform such other functions and duties as the Commission shall determine”. Paragraph 2 of Article 85 of the Charter provides: “The selection of the members of the staff, including the appointment of the Deputy Directors-General, shall as far as possible be made on a wide geographical basis and with due regard to the various types of economy represented by Member countries. The paramount consideration in the selection of candidates and in determining the conditions of service of the staff shall be the necessity of securing the highest standards of efficiency, competence, impartiality and integrity”.

¹⁶⁰Havana Reports p. 158.

¹⁶¹ICITO/1/SR.1 p. 3.

¹⁶²Sec/36/53, p. 2.

¹⁶³ICITO/EC.1/3, based on the final Rules of Procedure for the Havana Conference (E/CONF.2/2/Rev.4) with necessary modifications, adopted on 20 March 1948 (ICITO/1/SR.1 p. 1), revisions ICITO/EC.2/6 and Rev.1, adopted ICITO/EC.2/SR.1 p. 3-11.

¹⁶⁴ICITO/EC.2/5 p. 3.

¹⁶⁵ICITO/1/35.

The preparatory work of the Charter states that “It was agreed that under the second sentence of paragraph 3 of the annex to the resolution the Executive Secretary of the Commission might ... be authorized to make available to the Contracting Parties to the General Agreement on Tariffs and Trade acting jointly in accordance with Article XXV thereof, at their request, the services of the staff upon terms to be agreed”.¹⁶⁶ The CONTRACTING PARTIES adopted at their Second Session in September 1948 a Resolution requesting ICITO to furnish secretariat services to them. The Executive Committee of ICITO met at that time and approved financial arrangements which conferred authority on the Executive Secretary of ICITO to provide secretariat services to the CONTRACTING PARTIES. It was also agreed that the CONTRACTING PARTIES would reimburse ICITO for the services so rendered.¹⁶⁷ The second Report on Continuing Administration of the General Agreement adopted 24 October 1951 recommended “that the CONTRACTING PARTIES decide that the usual functions of a secretariat continue to be carried out, pending further consideration at a later session, by the Executive Secretary of the Interim Commission for an International Trade Organization”.¹⁶⁸

This arrangement between ICITO and the CONTRACTING PARTIES has continued to the present day. As from 1 January 1951, the ICITO Secretariat has worked exclusively for the CONTRACTING PARTIES and the CONTRACTING PARTIES have borne the entire cost of the ICITO Secretariat.¹⁶⁹ The Chairman of the Executive Committee of ICITO stated at its most recent meeting that “From a legal point of view, it was therefore the Executive Secretary of ICITO who provided secretariat services to the CONTRACTING PARTIES. Although in the course of over forty years of practical developments this subtle legal distinction had virtually been ignored, it was imperative that the function of Director-General to the CONTRACTING PARTIES to the GATT and that of Executive Secretary of ICITO be exercised by the same person, so as to enable the secretariat to engage in contractual transactions, and to participate in the United Nations Joint Staff Pension Fund”.¹⁷⁰

In 1955 the CONTRACTING PARTIES adopted a decision enabling ICITO staff to participate in the United Nations Joint Staff Pension Fund.¹⁷¹ The regulations of the Pension Fund were amended by a United Nations General Assembly Resolution to permit the admission of ICITO staff,¹⁷² an agreement was concluded between the Secretary-General of the United Nations and the Executive Secretary of ICITO on 20 May 1957, and the staff of ICITO were admitted to the UNJSPF as from 1 July 1957. ICITO staff disputes regarding non-pension fund matters are submitted to the IBO Administrative Tribunal and disputes regarding pension matters are submitted to the UN Administrative Tribunal.

6. Termination of ICITO and transfer of ICITO and GATT assets, liabilities, records, staff and functions to the WTO

The CONTRACTING PARTIES at their Sixth Special Session on 8 December 1994 and the Executive Committee of ICITO at its final meeting on 9 December 1994 each approved a Decision on “Transitional Arrangements: Transfer Agreement between GATT 1947, ICITO and the WTO”.¹⁷³ The Decision was also agreed to by the Preparatory Committee for the WTO, and was endorsed by the General Council of the WTO at its first meeting on 31 January 1995.¹⁷⁴ The “Agreement on the Transfer of Assets, Liabilities, Records, Staff and Functions from the Interim Commission of the International Trade Organization and the GATT to the World Trade Organization”, attached to this Decision, provides as follows:

“The CONTRACTING PARTIES to the General Agreement on Tariffs and Trade (hereinafter referred to as the ‘GATT 1947’), the Executive Committee of the Interim Commission of the International Trade Organization ... and the Preparatory Committee for the World Trade Organization ...

¹⁶⁶Havana Reports p. 158-159.

¹⁶⁷GATT/CP.2/41, GATT/CP.2/SR.24 p. 8-9, ICITO/EC.2/16.

¹⁶⁸GATT/CP.6/41, II/205, 208.

¹⁶⁹ICITO/1/29, ICITO/1/30.

¹⁷⁰ICITO/1/38 p. 2, repeating similar statement in ICITO/1/37.

¹⁷¹SR.10/18 p. 202; see also documents on the question of affiliation of the staff to the United Nations Joint Pension Fund, at L/452/Add.1, L/509, L/527, L/576.

¹⁷²General Assembly Resolution 874(IX); L/694. See also discussions in the Fifth Committee of the General Assembly, A/C.5/SR.536. GATT is represented in the United Nations Joint Staff Pension Board (UNJSPB).

¹⁷³PC/9, L/7580; Agreement, duly signed and executed, also issued as ICITO/1/39.

¹⁷⁴WT/L/36, WT/GC/M/1.

“Noting that:

“Articles VI:1 and XVI:2 of the Marrakesh Agreement Establishing the World Trade Organization ... provide that there shall be a Secretariat of the WTO and that, to the extent practicable, the Secretariat of the GATT 1947 shall become the Secretariat of the WTO;

“the duties of the Secretariat of the GATT 1947 are presently being performed by the staff of the ICITO;

“the Director-General of the WTO, according to Article VI:3 of the WTO Agreement, will be able to appoint the members of the staff of the WTO Secretariat only after the Ministerial Conference or General Council of the WTO has adopted regulations governing the duties and conditions of service of the staff;

“Recalling that paragraph 8 (a) of the Ministerial Decision on the Establishment of the Preparatory Committee adopted on 14 April 1994 authorizes the Preparatory Committee to take, as appropriate, decisions in advance of the establishment of the WTO, *inter alia*, on financial regulations, the budget estimates for the first year of operation of the WTO, the transfer of the property of the ICITO and the GATT 1947 to the WTO, and the terms and conditions of the transfer of ICITO staff to the Secretariat of the WTO;

“Agree as follows:

“1. As from the date of entry into force of the WTO Agreement, all assets and liabilities of the GATT 1947 and the ICITO shall be assets and liabilities of the WTO. The assets and liabilities of the GATT 1947 and the ICITO shall include the assets held and the liabilities incurred in the name of ICITO/GATT.

“2. The Director-General of the WTO, acting in accordance with the provisions of Articles VI:3 and XVI:2 of the WTO Agreement, shall appoint the members of the staff of the Secretariat of the WTO on or before 30 June 1995, provided that the General Council of the WTO has adopted prior to that date regulations governing the duties and conditions of service of the members of the staff of the WTO Secretariat, including regulations on contract of employment policy, salaries and pensions.

“3. The staff of the ICITO shall perform the duties of the Secretariat of the WTO until the appointment of the staff of the Secretariat of the WTO. The staff of the ICITO shall continue to perform the duties of the GATT 1947 Secretariat and those of the Secretariat of the bodies established under the Tokyo Round Agreements until the appointment of the staff of the Secretariat of the WTO; thereafter these duties shall be performed by the Secretariat of the WTO.

“4. The ICITO is herewith dissolved as of the date on which the members of the Secretariat of the WTO are appointed. On that date the records of the ICITO shall be transferred to the WTO.

“5. The Director-General of the WTO shall perform the depositary functions of the Director-General of the GATT 1947 after the date on which the legal instruments through which the contracting parties apply the GATT 1947 are terminated. On that date the records of the GATT 1947 shall be transferred to the WTO.

“6. There shall be a common budget for the GATT 1947 and the WTO from the date of entry into force of the WTO Agreement until the date as of which the legal instruments through which the contracting parties apply the GATT 1947 are terminated. During that period the basis for assessment of the contracting parties to the GATT 1947, of the Members of the WTO and of contracting parties that are also Members of the WTO shall be the same, and a single payment to the WTO shall be due by all contracting parties to the GATT 1947 and Members of the WTO.

“7. The Director-General of the GATT 1947 and, after the date of the entry into force of the WTO Agreement, the Director-General of the WTO are herewith authorized to take, in consultation with the Committees on Budget, Finance and Administration of the GATT 1947 and the WTO, the necessary actions to adjust the contractual arrangements of the ICITO and of the GATT 1947, including the arrangements on financial and personnel matters, to the changes provided for under paragraphs 1 to 6 above.

“8. This Agreement shall initially apply until the date of the first meeting of the General Council of the WTO. It shall remain in force beyond that date provided that it is approved by the General Council of the WTO.

“9. The text of this Agreement, done in a single copy, in the English, French and Spanish languages, each text being authentic, shall be deposited with the Director-General of the GATT 1947.”

VI. BUDGET

A. FINANCIAL AND BUDGET PROCEDURES

Rule 15 of the Rules of Procedure of the CONTRACTING PARTIES provides that “The usual duties of a secretariat shall, by agreement with the Interim Commission for the International Trade Organization, be performed by the Executive Secretary of the Interim Commission on a reimbursable basis”. The services performed by the Secretariat of the ICITO have been therefore reimbursed from the budget of the CONTRACTING PARTIES. See the material directly above on the budget, financial procedures and Secretariat of ICITO.

Prior to 1962, the GATT budget was examined by an *ad hoc* working party appointed each year by the CONTRACTING PARTIES for that purpose. In May 1962, this earlier practice was discontinued when the Council appointed a Committee on Budget, Finance and Administration of fourteen members.¹⁷⁵ The current terms of reference of the Budget Committee are as follows:

- (i) “To examine any questions arising in connection with the audited accounts, proposals for the budgets of the GATT and of the International Trade Centre UNCTAD/GATT, and the financing thereof.
- (ii) “To study any financial and administrative questions which may be referred to it by the Council or submitted to it by the Director-General, and undertake such other studies as may be assigned to it by the Council”.¹⁷⁶

The Budget Committee makes recommendations to the CONTRACTING PARTIES through the Council regarding adoption of the draft budget, and the CONTRACTING PARTIES then take a decision on the budget according to the usual procedures. With regard to the accounts of the GATT, the Committee examines reports submitted to it by the Director-General and the External Auditor. The Committee submits annually to the CONTRACTING PARTIES, through the Council, its recommendation regarding approval of the audited accounts for the past fiscal year. The Council has exceptionally and for emergency reasons taken decisions on recommendations of the Budget Committee.¹⁷⁷ The Committee has on occasion made recommendations on administrative matters.

Paragraph 6 of the Agreement on the Transfer of Assets, Liabilities, Records, Staff and Functions from ICITO and GATT to the WTO, cited *in extenso* in the preceding section, provides that “There shall be a common budget for the GATT 1947 and the WTO from the date of entry into force of the WTO Agreement until the date as of which the legal instruments through which the contracting parties apply the GATT 1947 are terminated. During that period the basis for assessment of the contracting parties to the GATT 1947, of the Members of the WTO and of contracting parties that are also Members of the WTO shall be the same, and a single payment to the WTO shall be due by all contracting parties to the GATT 1947 and Members of the WTO.” At their Fiftieth Session on 9 December 1994, the Contracting Parties decided as following concerning the future treatment of the budget of the GATT 1947:

“... given that:

“– the WTO Secretariat will service all agreements, through a single budget;

¹⁷⁵C/M/10, p.15. In 1963 and 1964, the Council appointed a Budget Committee based on a proposal by the Council Chairman, and in 1965 through 1967 the Council agreed on composition, chairmanship and terms of reference of the Budget Committee.

¹⁷⁶L/5964/Rev.5.

¹⁷⁷C/M/251 p. 17-19, July 1991, adopting Budget Committee report in L/6870.

- “– there is to be a common assessment system with a single payment from each Member or GATT 1947 contracting party;
- “– there are practical problems for some participants in achieving ratification of the WTO by 1 January 1995;
- “– the Final Act will remain open for acceptance for a period of two years following its entry into force;
- “– that at different times during this period of two years some participants will change their status in respect of the WTO and GATT 1947;
- “... during the period in which the Final Act is open for acceptance:
- “– the WTO Committee on Budget, Finance and Administration and the GATT 1947 Committee on Budget, Finance and Administration will meet in joint session with the same Chairman and a common agenda;
- “– members of both the GATT 1947 Committee and the WTO Committee may participate fully on all agenda items;
- “– until agreed otherwise, it shall be understood that matters relating to the ITC are dealt with on the understanding that they do not preempt the final position of the WTO in respect of the ITC;
- “– this arrangement shall be reconsidered before the end of the period during which the Final Act is open for acceptance.”¹⁷⁸

B. RESOURCES

Since the adoption of the first contribution scale at the Second Session in September 1948, contributions of the contracting parties to the GATT budget for the year to come have been allocated on the basis of the volume of foreign trade in that year, estimated on the basis of a representative period.¹⁷⁹ A Working Party at the Third Session stated the view that “the best practical method would be to assess the contributions on the basis of the volume of the foreign trade of the Contracting Parties. This criterion was a simple one and was considered to be appropriate in the case of a group which is concerned with foreign trade”.¹⁸⁰

A footnote to the scale of contributions included in the 1992 report of the Committee on Budget, Finance and Administration states that “The contribution of each contracting party and associated government is calculated on the basis of its share in the total trade of the contracting parties and associated governments. The shares of the contracting parties in the total trade are computed on the basis of foreign trade figures for the last three available years. The scale of contributions also includes a minimum percentage contribution of 0.03 per cent for countries whose trade value is 0.03 per cent or less of the total trade of the contracting parties and associated governments”.¹⁸¹ The present minimum budget contribution percentage was decided in 1988.¹⁸² The level of the minimum contribution has been set at 31,320 Swiss francs for 1994.¹⁸³

¹⁷⁸PC/6, L/7577, Annex I, para. 6, adopted on 8 December 1994 by the Preparatory Committee for the WTO and on 9 December 1994 by the CONTRACTING PARTIES.

¹⁷⁹GATT/CP.2/41, adopted CP.2/SR.24 p. 8-9; shares at that time were based on the figures in Annex H of GATT, which reflected total external trade based on the average of 1938 and the latest twelve months for which figures were available (see I/67).

¹⁸⁰GATT/CP.3/WP.9 Budget/4/Rev.1, 3 August 1949.

¹⁸¹L/7105, adopted on 3 December 1992, BISD 39S/8. Closely similar statements appear in every budget report since L/596 (1957). Budget shares have been adjusted when the territory of a contracting party has diminished or enlarged. See GATT/CP.4/9/Add.2 (adjustment to contribution of Netherlands following accession of Indonesia under Article XXVI), L/3793 (adjustment to contribution of Pakistan following independence of Bangladesh), L/5986 (adjustment to contribution of United Kingdom following accession of Hong Kong as a contracting party), L/7455 (prospective adjustment to contribution of Switzerland after 1994 succession of Liechtenstein to separate contracting party status, since former Swiss had been based on statistics including those of Liechtenstein). However, see reservation of Germany regarding calculation of its budget share after reunification, C/M/251 p. 18, L/7105.

¹⁸²See recommendations in the 12 September 1988 Report of the Committee on Budget, Finance and Administration, L/6384.

¹⁸³Report of the Committee on Budget, Finance and Administration, PC/6, L/7577, adopted by the CONTRACTING PARTIES on 9 December 1994.

During discussion of the budget at the October 1988 Council meeting, the representative of the United Kingdom stated that "GATT was unusual among international institutions in that its subject matter, trade, could be used as a basis for providing a formula for its own funding. Adoption of this new budgetary package reconfirmed contracting parties' commitment to the principle of payment according to trade share ... The maintenance of a minimum contribution in no way undermined the principle in GATT of payment according to trade share. Any contracting party, by its very membership of and participation in the organization, entailed certain basic financial costs. Having a minimum contribution merely reflected that fact".¹⁸⁴

Since 1956 the GATT has maintained a Working Capital Fund, constituted of advances made by contracting parties, which are carried to the credit of the contracting parties which have made them; and other sums as decided by the CONTRACTING PARTIES, which are credited to the organization.¹⁸⁵ A government acceding to the General Agreement is required to make an advance to the Working Capital Fund in accordance with the scale of contributions applicable to the budget in the year of its accession. The minimum advance to the Working Capital Fund amounts to 0.5 per cent of the principal of the Fund for countries whose share of the total trade of the contracting parties and associated governments is 0.5 per cent or less.¹⁸⁶

At their Second Special Session in 1964, the CONTRACTING PARTIES adopted a recommendation of the Council "that in all cases where governments are in arrears for two years, the Executive Secretary, on behalf of the CONTRACTING PARTIES, should inform such governments of the CONTRACTING PARTIES' concern that such a situation exists and invited them to inform the CONTRACTING PARTIES through him of the steps they intend to take to fulfil their financial obligations. The Executive Secretary should communicate to the Council and/or the CONTRACTING PARTIES the replies received".¹⁸⁷ See also the discussion of arrears at the Council meetings of October 1987¹⁸⁸, October 1988¹⁸⁹ and June 1994.¹⁹⁰ At the Fiftieth Session in December 1994 the CONTRACTING PARTIES approved administrative measures to be applied to contracting parties which since 1989 had accumulated more than three years arrears in the payment of their contributions.¹⁹¹

In October 1993 the Council adopted a Budget Committee recommendation that as from 1 January 1994 observer governments be invited to contribute, for services provided to them, 50 per cent of the minimum contribution applying to contracting parties. Administrative measures would be applied to observers which do not pay.¹⁹² In December 1994 at the Fiftieth Session the CONTRACTING PARTIES approved a Decision on "Financial obligations of states or separate customs territories that are observers to the WTO", under which the specified contribution is not voluntary but mandatory; however, the preface to that Decision provides that "These financial obligations will not apply to the States or separate customs territories which are GATT 1947 contracting parties, in the process of ratification of the WTO Agreement, but have not yet become Members."¹⁹³ See also at page 1104 above.

VII. SECRETARIAT

Rule 15 of the Rules of Procedure of the CONTRACTING PARTIES provides that "The usual duties of a secretariat shall, by agreement with the Interim Commission for the International Trade Organization, be performed by the Executive Secretary of the Interim Commission on a reimbursable basis". As from 1 January

¹⁸⁴C/M/226.

¹⁸⁵The Working Capital Fund was created by the Resolution on the Budget for 1956 (L/596) and replaced a Cash Reserve set up on 27 November 1950 (GATT/CP.5/10, GATT/CP.5/13, GATT/CP/84, discussion at GATT/CP.5/SR.3). The rules governing the use of the Fund were modified by Decisions in 1958, 1960, 1965, and 1967; see Spec(65)82, and L/5009, Secretariat Note on "Working Capital Fund" dated 30 July 1980 (including text of rules governing the Fund).

¹⁸⁶See, e.g., L/7091, "Assessment on Namibia of Additional Contribution to the 1992 Budget and Advance to the Working Capital Fund", 28 September 1992.

¹⁸⁷Recommendation at C/M/23, adopted 18 November 1964, 2SS/SR.2 p. 9; see also L/2269 and L/2305.

¹⁸⁸Council meeting convened on 29 October 1987 to discuss request by Director-General for authorization to make bank overdrafts if expected contributions were not received by 28 October 1987; see GATT/AIR/2497, draft decision (not adopted) in C/151, Spec(87)52, C/M/214.

¹⁸⁹See discussion of proposals regarding budgetary arrears in connection with the 1988 Reports of the Committee on Budget, Finance and Administration (L/6384 and L/6408), at C/M/226.

¹⁹⁰Report of Working Group on Arrears, Spec(94)21; L/7483; C/M/273 p. 16-17.

¹⁹¹Recommendation in paragraphs 7(a), (b), (d), (e) of PC/7, L/7578, approved 9 Dec 1994, SR.50/2 p. 2.

¹⁹²C/M/267, p. 17; recommendation of Committee on Budget, Finance and Administration in L/7310, para. 29.

¹⁹³Para. 4 of PC/9, L/7579, approved on 9 Dec 1994, SR.50/2 p. 2.

1951, the ICITO Secretariat has worked exclusively for the CONTRACTING PARTIES and the CONTRACTING PARTIES have borne the entire cost of the ICITO Secretariat.¹⁹⁴

The multilateral trade agreements reached in the Tokyo Round generally provide that they will be serviced by the GATT Secretariat.¹⁹⁵

Article XVI:1 of the WTO Agreement provides that "To the extent practicable, the Secretariat of GATT 1947 shall become the Secretariat of the WTO ...". See also above at page 1123 concerning the transfer agreement between the CONTRACTING PARTIES to GATT 1947, ICITO and the WTO.

A. DIRECTOR-GENERAL (EXECUTIVE SECRETARY)

The Director-General to the CONTRACTING PARTIES to the General Agreement on Tariffs and Trade serves simultaneously as the Executive Secretary of the Interim Commission. Before 1965, the Director-General was referred to as the "Executive Secretary". The CONTRACTING PARTIES decided on 23 March 1965 that

"... whenever the words "Executive Secretary" have been heretofore used in any decision, document or action taken or issued by virtue of the authority of the CONTRACTING PARTIES, such words shall hereafter be deemed to read "Director-General" and shall mean Director-General to the CONTRACTING PARTIES. ... The Director-General shall have all the duties, powers, privileges and responsibilities heretofore granted the Executive Secretary by the CONTRACTING PARTIES or by virtue of the authority of the CONTRACTING PARTIES, including but not limited to the functions of the Executive Secretary as Depositary Agent under all protocols and other instruments of the CONTRACTING PARTIES".¹⁹⁶

The same decision provided that where this change would have required a protocol of amendment or action other than a decision of the CONTRACTING PARTIES, such duties or powers, including but not limited to those conferred upon the Executive Secretary by the General Agreement, shall be exercised by the person holding the position of Director-General, who shall for this purpose also hold the position of Executive Secretary.

The CONTRACTING PARTIES on 26 November 1986 approved a report by their Chairman to the effect that consultations with contracting parties had resulted in consensus on the following statement:

"The Director-General should be appointed by the CONTRACTING PARTIES at a regular Session for a term of office of four years. The CONTRACTING PARTIES may reappoint the Director-General for a further term not exceeding four years. The decision to appoint the Director-General for a first term should be taken after a process of consultation to be conducted by the Chairman of the CONTRACTING PARTIES and to be started by an announcement at the Council of Representatives not less than six months before the Session of the CONTRACTING PARTIES where the appointment is made.

"Consultations about the reappointment of the Director-General should be conducted by the Chairman of the CONTRACTING PARTIES after an announcement has been made at a meeting of the Council of Representatives, not less than six months before the termination of the first term of office of the Director-General.

"In the event of a vacancy during the term of office of the Director-General, the Chairman of the CONTRACTING PARTIES should conduct as rapidly as possible consultations on the appointment of a new Director-General. The new Director-General should be appointed by the CONTRACTING PARTIES within six months from the date of the vacancy, if necessary at a special Session convened for the purpose. The Council of Representatives will designate one of the Deputy Directors-General as Acting Director-General until the appointment of a new Director-General".¹⁹⁷

¹⁹⁴ICITO/1/29, ICITO/1/30.

¹⁹⁵A provision to this effect appears in the final provisions or institutional provisions of each of these agreements.

¹⁹⁶13S/19.

¹⁹⁷L/6099, approved on 26 November 1986, 33S/55-56.

The report also notes that "I wish to underline that I am reporting on the results of my consultations in the form of a statement. This means that there will be a reasonable amount of flexibility in the future application of the procedures forming part of this statement".¹⁹⁸ At the Fifth Special Session of the CONTRACTING PARTIES, convened on 9 June 1993 to appoint the new Director-General, the Chairman noted that in view of the particular circumstances it had not been possible to follow this statement in every detail; that the deviations were in the nature of the "flexible application" cited in the 1986 report; and that the 1986 procedures would remain unchanged for future use, until they were modified. The appointment of Mr. Peter Sutherland as Director-General was then approved by acclamation.¹⁹⁹

Article XVI:2 of the WTO Agreement provides that "... the Director-General to the CONTRACTING PARTIES to GATT 1947, until such time as the Ministerial Conference has appointed a Director-General in accordance with paragraph 2 of Article VI of the Agreement, shall serve as Director-General of the WTO". Accordingly, Mr. Sutherland served as the first Director-General of the WTO. On 24 March 1995, the WTO General Council agreed to formally appoint Mr. Renato Ruggiero as Director-General of the WTO for one four-year term effective 1 May 1995. The General Council also took note of certain other understandings reached during the consultations leading to this appointment, and authorized the Chairman to undertake consultations at the appropriate time on the development of procedures for the appointment in future of a Director-General.²⁰⁰ On 24 March 1995, Mr. Ruggiero was also appointed by consensus at a Seventh Special Session of the CONTRACTING PARTIES.

B. DEPUTY DIRECTORS-GENERAL

On 15 April 1987 the Council approved the following Procedures for Future Appointment of the Deputy Directors-General:

"The Deputy Directors-General are to be appointed by the Director-General for renewable terms of three years. The Director-General is to announce at a meeting of the Council that he will hold consultations on the appointment or reappointment of a Deputy Director-General. Such consultations will start not less than three months before the expiration of the term of office of the Deputy Director-General. After the termination of the consultations, the Director-General will inform the Council of his decision concerning the appointment".²⁰¹

At the Fifth Special Session in 1993 it was agreed to establish a third Deputy Director-General post.²⁰² On 15 July 1993 the Director-General informed the Council that he had decided to appoint Mr. Anwarul Hoda, Mr. Warren Lavorel and Mr. Jesús Seade as Deputy Directors-General in accordance with these procedures.²⁰³

VIII. PRIVILEGES AND IMMUNITIES

Article 90 of the Havana Charter provided, concerning the status of the International Trade Organization in the territory of Members of the ITO:

- "1. The Organization shall enjoy in the territory of each of its Members such legal capacity, privileges and immunities as may be necessary for the exercise of its functions.
- "2. The representatives of Members and the officials of the Organization shall similarly enjoy such privileges and immunities as may be necessary for the independent exercise of their functions in connection with the Organization".

In addition, it provided for the legal capacity of the Organization, as well as these privileges and immunities, to be defined by the General Convention on Privileges and Immunities of the Specialized Agencies,

¹⁹⁸*Ibid.*

¹⁹⁹5SS/SR/1, p. 1.

²⁰⁰WT/GC/M/2.

²⁰¹L/6161, approved on 15 April 1987, 34S/173.

²⁰²5SS/SR/1, p. 3.

²⁰³C/185; C/M/265, p. 35.

as supplemented by an annex relating to the International Trade Organization.²⁰⁴ The Convention on Privileges and Immunities of the Specialized Agencies²⁰⁵ contains provisions regarding juridical personality; property, funds and assets; communications facilities; privileges and immunities for the representatives of members; privileges and immunities of officials; limitations of rights of residence; the United Nations *laissez-passer*; settlement of disputes; and final provisions. As noted above, the Resolution of the Havana Conference Establishing an Interim Commission for the International Trade Organization mandated the Interim Commission, *inter alia*, “to prepare, with a view to recommendation by the Economic and Social Council to the first regular session of the Conference, the Annex referred to in paragraph 3 of Article 90 of the Charter”.

During the negotiation of the Agreement on the Organization for Trade Cooperation in the Review Session of 1954-1955, complete integration of the OTC and the GATT into the United Nations Organization was considered and rejected (see below). In consequence, Article 10(d) of the OTC Agreement provided that privileges and immunities to be accorded to the OTC, its officials and the representatives of OTC members would be “similar to” those accorded by each OTC member to specialized agencies of the United Nations, to their officials and to the representatives of their members under the Convention on Privileges and Immunities of the Specialized Agencies or under similar arrangements.²⁰⁶

The Agreement on the Privileges and Immunities of the United Nations Organization concluded 11 June 1946 between the Swiss Federal Council and the Secretary-General of the United Nations²⁰⁷, was applied by analogy to the ICITO and its personnel by decision of the Federal Council 20 May 1948.²⁰⁸ This Agreement contains provisions regarding juridical personality of the United Nations Organization; property, funds and assets of the Organization; communications facilities of the Organization; privileges and immunities for the representatives of Members of the Organization; privileges and immunities of officials of the Organization and experts on mission for the Organization; the United Nations *laissez-passer*; settlement of disputes; and final provisions.

The Swiss authorities decided in 1956 to continue to accord to the ICITO the same status as that from which the European Office of the United Nations benefits under this Agreement. This special juridical status was continued taking into account the assumption that whenever the ITO would be created it would become a specialized agency of the United Nations and would, if it decided to have its headquarters in Switzerland, conclude an agreement with the Federal Council definitively establishing its legal status in Switzerland.²⁰⁹

The federal authorities of Switzerland and the Director-General of GATT, acting in the name of and on behalf of the CONTRACTING PARTIES, agreed on 18 August 1977 to apply to GATT, by analogy, the Agreement on the Privileges and Immunities of the United Nations Organization concluded 19 April 1946 between the Swiss Federal Council and the Secretary-General of the United Nations. This agreement had been approved by the Council of Representatives at its meeting on 26 July 1977.²¹⁰

By virtue of the relationship between ICITO and the United Nations, ICITO personnel on mission outside the territory of Switzerland have been accorded the privileges and immunities of personnel of the United Nations, and travel under United Nations *laissez-passer*.

²⁰⁴This provision originated in a suggestion by the Secretariat to the Havana Conference based on a Resolution of the United Nations General Assembly. E.CONF.2/C.6/12 p. 15-16; see also text of letter from United Nations Secretary-General and text of General Convention in E/CONF.2.C.6/16.

²⁰⁵33 UNTS 261; approved by the General Assembly 21 November 1947, Resolution 179(II); *Official Records of the Second Session of the General Assembly*, Resolutions (A/519) p. 112. As of 31 December 1991 there were seventeen annexes to this Convention relating to various specialized agencies of the United Nations, and the Convention had entered into force for 94 Members of the United Nations with respect to one or more of these specialized agencies. (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1991*, UN Doc. ST/LEG/SER.E/10 p. 43-53 (1992)).

²⁰⁶Agreement on the Organization for Trade Cooperation, BISD Vol.I (Revised).

²⁰⁷1 UNTS 163; subsequently modified by exchange of letters of 5/11 April 1963. The name of this agreement before its amendment in 1963 was the Interim Arrangement on the Privileges and Immunities of the United Nations Organization.

²⁰⁸Letter dated 31 May 1948 from Département politique fédéral, Berne, to E. Wyndham White, Executive Secretary of ICITO. See also GATT/CP.6/17, Note dated 12 September 1951 on “Geneva as a Permanent Site for the GATT”.

²⁰⁹Exchange of letters of 7/10 August 1956 between Minister P. Micheli, Département politique fédéral, Berne, and Mr. E. Wyndham White, Executive Secretary, ICITO.

²¹⁰Approval C/M/122; see also C/100. Text of agreement is reprinted in L/4551, 24S/8-9.

IX. RELATIONSHIP WITH OTHER ORGANIZATIONS

A. UNITED NATIONS

Paragraph 1 of Article 86 of the ITO Charter would have required that the ITO be brought into relationship with the United Nations through a specialized agency agreement with the Economic and Social Council under Article 63 of the United Nations Charter. The Executive Committee of ICITO prepared and approved a specialized agency agreement for the ITO, but the ITO never entered into force.²¹¹

In their Fifth and Sixth Sessions in 1950 and 1951, when it had become apparent that ratification of the ITO Charter would be indefinitely postponed, the CONTRACTING PARTIES discussed the arrangements for continuing administration of the General Agreement. It was proposed that secretariat and conference services be provided by the United Nations and that the Secretariat staff be administratively under the control of the Secretary-General of the United Nations. Contracting parties which were not UN members would make separate contributions to the United Nations. In discussions of this proposal, the concerns were expressed that financial contributions to the work of the CONTRACTING PARTIES would be made by non-contracting parties; that the CONTRACTING PARTIES would lose their independence; and that an dissatisfied individual contracting party could appeal to the Economic and Social Council, with the result that discussions in the CONTRACTING PARTIES would be duplicated in ECOSOC. The Chairman noted that all representatives that had spoken, other than that of its sponsor, had expressed doubts about the proposal.²¹²

As a result of the discussion, the CONTRACTING PARTIES instructed the Executive Secretary to consult with the Secretary-General of the United Nations in 1952 concerning arrangements with the UN. These consultations resulted in an exchange of letters in August 1952 in which the Secretary-General was notified of the nature of the arrangement between ICITO and the CONTRACTING PARTIES, and confirmed therein that “the existence of this arrangement, coupled with the close working arrangements which exist between the United Nations Secretariat and the Secretariat of the Interim Commission renders it unnecessary to make separate or formal agreements relating to the work of the General Agreement”.²¹³ This exchange has defined the relationship between the CONTRACTING PARTIES and the United Nations, in which the GATT is treated as a specialized agency on a *de facto* basis. The GATT has not concluded a specialized agency agreement with the United Nations, nor has it been brought into any other formal relationship with the United Nations. It has however been the policy of the CONTRACTING PARTIES “to avoid passing judgment in any way on essentially political matters and to follow decisions of the United Nations on such questions”.²¹⁴

The issue of relations with the United Nations was considered during the drafting of the Agreement on the Organization for Trade Cooperation in the Review Session of 1954-55. The Secretary-General of the United Nations had informally put forward the view that a closer relationship than specialized agency status was desirable; “he hoped that the possibility of complete integration into the United Nations as a subordinate body would be carefully considered by the CONTRACTING PARTIES”.²¹⁵ The Executive Secretary of the CONTRACTING PARTIES stated concerning specialized agency status that “The Agreement is a treaty embodying specific rights and obligations on the parties to it in the field of commercial policy. In this respect it differs from those specialized agencies, which operate under Charters providing for general co-operation and co-ordination in various fields but without creating treaty rights and obligations such as those provided for in GATT. If it could be argued that the effect of specialized agency status would in any way subject the decisions of the CONTRACTING PARTIES to appeal, or even to the influence of an external body, then it would be necessary carefully to consider entering into such status”.²¹⁶ The report of the group which considered this issue indicates that it “felt unable to

²¹¹See ICITO/EC.2/2/Add.1 (draft), ICITO/EC.2/14 and Annex A, ICITO/EC.2/21 (revision), ICITO/EC.2/SR.4 p. 5-8, ICITO/EC.2/SR.5 p. 1-5, ICITO/SR.13 p. 3 (approval of draft).

²¹²GATT/CP.6/13 (Secretariat Note concerning proposal by the United States); GATT/CP.6/SR.3 (discussion of proposal and summing-up by Chairman).

²¹³CP.6/41 (mandate for consultations), G/16 (note reporting on consultations); Exchange of letters 11/25 August 1952 between Trygve Lie and Eric Wyndham White.

²¹⁴SR.22/3, p. 21-22 (discussion in 1965 of request from Government of the Republic of China (now referred to as “Chinese Taipei”) to be represented by observers at sessions of the CONTRACTING PARTIES). See also the material on territorial claims, under Article XXVI; also, the reference to a United Nations General Assembly resolution on the status of Yugoslavia, above at page 1094.

²¹⁵W.9/100, “Report by the Chairman of Sub-Group A on Organizational Questions”, p. 2-3.

²¹⁶W.9/65, “Statement by the Executive Secretary regarding Specialized Agency Status”.

share these views of the Secretary-General, and in the light of them felt, indeed, that the CONTRACTING PARTIES might wish to adopt a somewhat more cautious attitude to the suggestion that the Organization aim at a specialized agency relationship".²¹⁷ Accordingly, the Agreement on the OTC permitted, but did not require, conclusion of a specialized agency agreement with the United Nations.²¹⁸ This Agreement never entered into effect.

As a result, arrangements of a practical nature have developed over the years covering exchange of information and documents, resolutions of the United Nations, reciprocal representation and coordination. The Secretary-General of the United Nations or his representative is invited to attend sessions of the CONTRACTING PARTIES, the Council and regular GATT committees and working parties; the Director-General of GATT or his representative is invited to attend plenary meetings of the General Assembly, its committees, and meetings of the Economic and Social Council and, as appropriate, its subsidiary bodies. As regards the Economic and Social Council the question of GATT participation under the new rules of procedure of the Council was discussed during the fifty-ninth session of the Council in July 1975. It was agreed that GATT should continue to participate on the same footing as before.²¹⁹ The same arrangements also apply to the Regional Economic Commissions. The GATT participates in the work of the Administrative Committee on Coordination, and in bodies established by it such as the Consultative Committee on Administrative Questions (CCAQ). It also participates in the work and shares in the costs of the International Civil Service Commission (ICSC). The GATT statistical service cooperates with the United Nations Statistical Services and shares in the costs of the International Computing Centre.

The 1976 Report of the Consultative Group of Eighteen notes that the Group had "discussed developments in, and secretariat action with respect to, various United Nations bodies, such as the Task Force on the Implementation of General Assembly Resolution 3362 and the *Ad Hoc* Committee on Restructuring of the Economic and Social Sectors of the United Nations System ... In the light of these discussions, the Group confirmed the general approach adopted by the Director-General in relation to the activities of these various bodies, and also endorsed his comprehensive statement to the *Ad Hoc* Committee which stressed the distinctive contractual nature of the GATT and the important implications this had both for relations between contracting parties and between the GATT and other international institutions".²²⁰

B. INTERGOVERNMENTAL ORGANIZATIONS

Paragraph 1 of Article 87 of the Havana Charter mandated the ITO to make arrangements for effective co-operation and the avoidance of unnecessary duplication in the activities of intergovernmental organizations; paragraph 3 of that Article authorized the Director-General of the ITO to make an agreement to bring such an organization under the ITO whenever deemed desirable by the Conference and the competent authorities of any such organization whose purposes and functions lay within the scope of the Charter.²²¹

Although Article XV of the General Agreement provides for a special role for the International Monetary Fund in the administration of the balance-of-payments provisions of the General Agreement, the CONTRACTING PARTIES have never entered into a formal agreement with the Fund. Concerning institutional relations with the IMF, see Article XV.

²¹⁷W.9/100, "Report by the Chairman of Sub-Group A on Organizational Questions", p. 2-3.

²¹⁸Agreement on the Organization for Trade Cooperation, Article 11(b), BISD Vol.I (Revised); Report on Organizational and Functional Questions, L/327, BISD 3S/231, 237; see also discussion at SR.9/38 p. 3-5.

²¹⁹E/SR.1973, 23 July 1975; see also papers submitted to the Ad Hoc Committee on Restructuring of the Economic and Social Sectors of the United Nations System, L/4306 and Add.1.

²²⁰L/4429, 23S/38, 40, para. 10.

²²¹The Executive Committee of ICITO in 1948 drafted such an agreement with the International Monetary Fund; see ICITO/EC.2/2/Add.2 (draft), ICITO/EC.2/14 Annex A (revision), discussion at ICITO/EC.2/SR.5 p. 5-8, approved with amendments at ICITO/EC.2/SR.14 p. 2. Concerning relations and agreements with other inter-governmental organizations see drafts at ICITO/EC.2/2 and ICITO/EC.2/21, discussion at ICITO/EC.2/SR.5 p. 8-10, ICITO/EC.2/SR.6 p. 1-9, ICITO/EC.2/SR.7 p. 1-12, ICITO/EC.2/SR.13 p. 3-5.

C. NON-GOVERNMENTAL ORGANIZATIONS

Paragraph 2 of Article 87 of the Havana Charter authorized the ITO to make suitable arrangements for consultation and co-operation with non-governmental organizations concerned with matters within the scope of the Charter.²²²

The Rules of Procedure for Sessions of the CONTRACTING PARTIES have not provided for observer status for non-governmental organizations.²²³ In connection with the Working Party set up in the sixth session to examine resolutions of the International Chamber of Commerce on certain customs facilitation matters, it was decided that if no action were taken in the absence of rules pertaining thereto, the Working Party could ask the International Chamber of Commerce to give evidence if they should consider this desirable. The Report of the ensuing Working Party notes that "The working party decided to invite the International Chamber of Commerce to send representatives to one meeting of the working party to make a statement regarding the contents of these three resolutions and to answer questions on points which, after a preliminary examination by the working party, might require clarification".²²⁴ A Note of 15 June 1990 by the Secretariat on "Observer Status in GATT" states as follows: "International non-governmental organizations (NGOs) do not have 'consultative status' in GATT: none have been admitted as observers at sessions".²²⁵ See also the discussion of observer status above at page 1095.

X. OTHER RELEVANT DOCUMENTS

A. PREPARATORY WORK AND INTERNATIONAL TRADE ORGANIZATION

Concerning the institutional aspects of the International Trade Organization, the relevant articles in the U.S. Suggested Charter are Articles 50 through 77: in the London Draft Charter Articles 61 to 85 and 87, in the New York Draft Charter Articles 61 to 84 and 87, in the Geneva Draft Charter Articles 68 to 88, and in the Havana Charter Articles 71 to 91. See also discussions in the Second, Third, Fifth and Sixth Sessions of the CONTRACTING PARTIES on continuing administration of the General Agreement.

B. REVIEW SESSION AND ORGANIZATION FOR TRADE COOPERATION

The Review Session of 1954-55 gave extensive consideration to the organizational aspects of the GATT and proposed a Protocol of Organizational Amendments to the GATT, including an Agreement on the Organization for Trade Cooperation. Further information can be found in the report of the Review Working Party on Organizational and Functional Questions and associated documents.²²⁶

²²²Concerning ICITO implementation of this paragraph see ICITO/EC.2/II, ICITO/EC.2/SR.2, ICITO/EC.2/SR.8 p. 1-8, ICITO/EC.2/SR.13 p. 5-6. Concerning consultation with non-governmental organizations during the Havana Conference process see, *inter alia*, EPCT/45/Rev.1, EPCT/II.3.

²²³See GATT/CP.2/SR.4 p. 1-2 (discussion of non-governmental organizations in the context of draft rules corresponding to the present Rules 8 and 9); see also Note by the Executive Secretary, "Relations between the Contracting Parties and Non-governmental Organizations", MGT/68/51.

²²⁴GATT/CP.6/SR.5, p. 8 (decision); Report of the Working Party on "Customs Treatment of Samples and Advertising Material, Documentary Requirements for the Importation of Goods, and Consular Formalities - Resolutions of the International Chamber of Commerce", GATT/CP.6/36, adopted on 24 October 1951, II/210; see also later report at IS/100, para. 1.

²²⁵C/173, p. 2; see also Note by the Secretariat of 27 June 1984 on the same subject, C/129 and supplements.

²²⁶Discussions: SR.9/18, 19, 23, 38, 39, 41, 44, 46, 47; Reports: W.9/123, 158, 197, 198+Add.1, 215+Corr.1; L/327 (3S/231). Other: GATT/183, 179; L/261/Add.1, 270, 272, 276, 283, 290, 292, 276, 299, 314; W.9/27, 38, 65, 93, 135; Spec/107/55; Draft texts: L/189+Add.1, 276, 290, 292; W.9/100, 123, 215+Corr.1; Sec/151/54, 164/54; Spec/12/55, 48/55, 63/55, 86/55.

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Notes to the Appendix:

1. All tables in this Appendix have been updated to 1 January 1995 unless otherwise indicated.
2. In table I, the date referred to indicates the date of acquisition of contracting party status, whether by acceptance of Protocol of Provisional Application, by accession under Article XXIII, or by succession to contracting party status under Article XXVI:5(c).
3. Table II lists governments applying the General Agreement *de facto*. Concerning *de facto* application of the GATT, see the discussion at pages 855-856. Any such government may succeed to contracting party status under Article XXVI:5(c) upon certification by the Director-General that the conditions required by this Article have been met: see the discussion at pages 853-854. Governments having succeeded to contracting party status under Article XXVI:5(c) are listed in table VI(C).
4. Tables III, IV and V list members of and observers in the Council, and observers to sessions of the CONTRACTING PARTIES. See the discussion of observer status at pages 1009-1010 and 1017-1019. Each contracting party is listed here as an observer in the Council until the Council meeting following a request by it for membership in the Council.

I. CONTRACTING PARTIES TO THE GENERAL AGREEMENT (1947) AS OF 1 JANUARY 1995 (128)

Angola	8 April 1994	Malaysia	24 October 1957
Antigua and Barbuda*	30 March 1987	Maldives	19 April 1983
Argentina	11 October 1967	Mali	11 January 1993
Australia	1 January 1948	Malta	17 November 1964
Austria	19 October 1951	Mauritania	30 September 1963
Bahrain	13 December 1993	Mauritius	2 September 1970
Bangladesh	16 December 1972	Mexico	24 August 1986
Barbados	15 February 1967	Morocco	17 June 1987
Belgium	1 January 1948	Mozambique	27 July 1992
Belize	7 October 1983	Myanmar	29 July 1948
Benin	12 September 1963	Namibia	15 September 1992
Bolivia	8 September 1990	Netherlands	1 January 1948
Botswana	28 August 1987	New Zealand	30 July 1948
Brazil	30 July 1948	Nicaragua	28 May 1950
Brunei Darussalam	9 December 1993	Niger	31 December 1963
Burkina Faso	3 May 1963	Nigeria	18 November 1960
Burundi	13 March 1965	Norway	10 July 1948
Cameroon	3 May 1963	Pakistan	30 July 1948
Canada	1 January 1948	Papua New Guinea	16 December 1994
Central African Republic	3 May 1963	Paraguay	6 January 1994
Chad	12 July 1963	Peru	7 October 1951
Chile	16 March 1949	Philippines	27 December 1979
Colombia	3 October 1981	Poland	18 October 1967
Congo	3 May 1963	Portugal	6 May 1962
Costa Rica	24 November 1990	Romania	14 November 1971
Côte d'Ivoire	31 December 1963	Rwanda	1 January 1966
Cuba	1 January 1948	Qatar	7 April 1994
Cyprus	15 July 1963	Saint Kitts and Nevis	24 March 1994
Czech Republic	15 April 1993	Saint Lucia	13 April 1993
Denmark	28 May 1950	Saint Vincent & the Grenadines	18 May 1993
Djibouti	16 December 1994	Senegal	27 September 1963
Dominica	20 April 1993	Sierra Leone	19 May 1961
Dominican Republic	19 May 1950	Singapore	20 August 1973
Egypt	9 May 1970	Slovak Republic	15 April 1993
El Salvador	22 May 1991	Slovenia	30 October 1994
Fiji	16 November 1993	Solomon Islands	28 December 1994
Finland	25 May 1950	South Africa	13 June 1948
France	1 January 1948	Spain	29 August 1963
Gabon	3 May 1963	Sri Lanka	29 July 1948
Gambia	22 February 1965	Suriname	22 March 1978
Germany	1 October 1951	Swaziland	8 February 1993
Ghana	17 October 1957	Sweden	30 April 1950
Greece	1 March 1950	Switzerland	1 August 1966
Grenada	9 February 1994	Tanzania	9 December 1961
Guatemala	10 October 1991	Thailand	20 November 1982
Guinea, Rep. of	8 December 1994	Togo	20 March 1964
Guinea-Bissau	17 March 1994	Trinidad and Tobago	23 October 1962
Guyana	5 July 1966	Tunisia	19 August 1990
Haiti	1 January 1950	Turkey	17 October 1951
Honduras	10 April 1994	Uganda	23 October 1962
Hong Kong	23 April 1986	United Arab Emirates	8 March 1994
Hungary	9 September 1973	United Kingdom	1 January 1948
Iceland	21 April 1968	United States of America	1 January 1948
India	8 July 1948	Uruguay	6 December 1953
Indonesia	24 February 1950	Venezuela	31 August 1990
Ireland	22 December 1967	Yugoslavia	25 August 1966
Israel	5 July 1962	Zaire	11 September 1971
Italy	30 May 1950	Zambia	10 February 1982
Jamaica	31 December 1963	Zimbabwe	11 July 1948
Japan	10 September 1955		
Kenya	5 February 1964		
Korea, Republic of	14 April 1967		
Kuwait	3 May 1963		
Lesotho	8 January 1988		
Liechtenstein	29 March 1994		
Luxembourg	1 January 1948		
Macau	11 January 1991		
Madagascar	30 September 1963		
Malawi	28 August 1964		

II. GOVERNMENTS APPLYING THE GENERAL AGREEMENT *DE FACTO*

Countries to whose territories the General Agreement has been applied and which now, as independent States, maintain a *de facto* application of the General Agreement pending final decisions as to their future commercial policy: updated to 1 January 1995.

	Date of independence
Algeria	3 July 1962
Bahamas	10 July 1973
Cambodia	9 November 1953
Cape Verde	5 July 1975
Comoros	6 July 1975
Equatorial Guinea	12 October 1968
Kiribati	12 July 1979
Sao Tomé and Príncipe	12 July 1975
Seychelles	29 June 1976
Tonga	5 June 1970
Tuvalu	1 October 1978
Yemen	30 November 1967

III. MEMBERSHIP OF THE COUNCIL OF REPRESENTATIVES

(as of 1 January 1995; 97 members)

Antigua and Barbuda	Egypt	Macau	Singapore
Argentina	El Salvador	Madagascar	Slovak Republic
Australia	Fiji	Malaysia	Slovenia
Austria	Finland	Malta	South Africa
Bahrain	France	Mauritania	Spain
Bangladesh	Gabon	Mexico	Sri Lanka
Barbados	Germany	Morocco	Suriname
Belgium	Ghana	Myanmar	Sweden
Belize	Greece	Netherlands	Switzerland
Bolivia	Grenada	New Zealand	Tanzania
Brazil	Guatemala	Nicaragua	Thailand
Brunei Darussalam	Guyana	Nigeria	Trinidad and Tobago
Cameroon	Honduras	Norway	Tunisia
Canada	Hong Kong	Pakistan	Turkey
Central African Rep.	Hungary	Paraguay	United Kingdom
Chile	Iceland	Peru	United States
Colombia	India	Philippines	Uruguay
Congo	Indonesia	Poland	Venezuela
Costa Rica	Ireland	Portugal	Zaire
Côte d'Ivoire	Israel	Romania	Zambia
Cuba	Italy	Saint Kitts and Nevis	Zimbabwe
Czech Republic	Jamaica	Saint Lucia	Commission of the European Communities
Denmark	Japan	Saint Vincent & the Grenadines	
Dominica	Korea, Republic of	Senegal	
Dominican Republic	Kuwait		
	Luxembourg		

IV. OBSERVERS TO SESSIONS OF THE CONTRACTING PARTIES as of 1 January 1995

1. Governments

Countries applying the General Agreement on a <i>de facto</i> basis*	Countries signatories of the Havana Final Act which have not become contracting parties (Rule 8)	Countries not falling into the first two categories and which have been granted observer status	
Algeria**	Afghanistan	Albania**	Latvia**
Bahamas	Ecuador**	Armenia**	Lithuania**
Cambodia	Iran	Azerbaijan	Libyan Arab
Cape Verde	Iraq	Belarus**	Jamahiriyah
Comoros	Jordan**	Bulgaria**	Moldova**
Equatorial Guinea	Lebanon	China**	Mongolia**
Kiribati	Liberia	Croatia**	Nepal**
Sao Tomé and Príncipe	Panama**	Estonia**	Russian
Seychelles	Syrian Arab Republic	Ethiopia	Federation**
Tonga		Former	Saudi Arabia**
Tuvalu		Yugoslav	Somalia
Yemen		Republic of	Sudan
		Macedonia	Chinese Taipei**
		Guinea	Turkmenistan
		Kazakhstan	Ukraine**
		Kyrgyzstan	Viet Nam
		Laos	

*See discussion of *de facto* status under Article XXVI.

**Currently negotiating for accession or for resumption of contracting party status.

2. International organizations

United Nations (UN)

UN bodies and specialized agencies:

Economic and Social Commission for Asia and the Pacific (ESCAP)
Economic Commission for Africa (ECA)
Economic Commission for Europe (ECE)
Economic Commission for Latin America and the Caribbean (ECLAC)
Economic and Social Commission for Western Asia (ESCWA)
Food and Agriculture Organization (FAO)
International Labour Organization (ILO)
International Monetary Fund (IMF)
United Nations Conference on Trade and Development (UNCTAD)
United Nations Educational, Scientific and Cultural Organization (UNESCO)
United Nations Industrial Development Organization (UNIDO)
World Bank
World Intellectual Property Organization (WIPO)

Other organizations:

African, Caribbean and Pacific Group of States (ACP Group)
Andean Group Secretariat
Arab Monetary Fund
Caribbean Community Secretariat
Central African Customs and Economic Union (UDEAC)
Commonwealth Secretariat
Council of Europe
Customs Co-operation Council (CCC)
European Free Trade Association (EFTA)
Gulf Cooperation Council (GCC)
Inter-American Development Bank (IDB)
Latin American Integration Association (ALADI)
Latin American Economic System (SELA)
League of Arab States
Organization for Economic Co-operation and Development (OECD)
Organization of American States (OAS)
Organization of the Islamic Conference
Secretariat of the General Treaty on Central American Economic Integration (SIECA)
West African Economic Community (CEAO)

V. OBSERVERS IN THE COUNCIL OF REPRESENTATIVES AS OF 1 JANUARY 1995

1. Governments:

Contracting parties		Non-contracting parties	
Angola	Malawi	Albania*	Kazakhstan
Benin	Maldives	Algeria*	Kyrgyzstan
Botswana	Mali	Armenia*	Latvia*
Burkina Faso	Mauritius	Azerbaijan	Lithuania*
Burundi	Mozambique	Belarus*	Moldova*
Chad	Namibia	Bulgaria*	Mongolia*
Cyprus	Niger	China*	Nepal*
Gambia	Qatar	Croatia*	Panama*
Grenada	Rwanda	Ecuador*	Russian Federation*
Guinea-Bissau	Sierra Leone	Estonia*	Saudi Arabia*
Haiti	Swaziland	Former Yugoslav Republic of Macedonia	Sudan
Kenya	Togo	Georgia	Chinese Taipei*
Lesotho	Uganda	Iran	Turkmenistan
Liechtenstein	United Arab Emirates	Jordan*	Ukraine*
			Uzbekistan
			Viet Nam

*Currently negotiating for accession or for resumption of contracting party status.

2. International organizations:

United Nations (UN)

UN bodies and specialized agencies:

Economic Commission for Africa (ECA)
 Economic Commission for Europe (ECE)
 Economic Commission for Latin America and
 the Caribbean (ECLAC)
 Economic and Social Commission for Asia and
 the Pacific (ESCAP)
 Food and Agriculture Organization (FAO)
 International Monetary Fund (IMF)
 United Nations Conference on Trade and
 Development (UNCTAD)
 World Bank
 World Intellectual Property Organization (WIPO)

Other organizations:

African, Caribbean and Pacific Group of
 States (ACP Group)
 Andean Group Secretariat
 Arab Monetary Fund
 Caribbean Community Secretariat
 European Bank for Reconstruction and
 Development (EBRD)
 European Free Trade Association (EFTA)
 Gulf Cooperation Council (GCC)
 Inter-American Development Bank (IDB)
 Latin American Integration Association (ALADI)
 Latin American Economic System (SELA)
 Organization for Economic Co-operation
 and Development (OECD)
 Organization of American States (OAS)
 Secretariat of the General Treaty on Central American
 Economic Integration (SIECA)

VI. ACCESSION AND SUCCESSION TO CONTRACTING PARTY STATUS UNDER THE GENERAL AGREEMENT

A. ACCESSIONS UNDER ARTICLE XXXIII

(The PA column indicates those contracting parties that have gone through a process of "provisional accession;" the next table contains names of such countries with document references).

Contracting party	Decision	Ref.	PA	Protocol	Ref.
Chile	Decision of 14 September 1948	I/130		Geneva Protocol	I/130
Denmark	Decisions of 30 November 1949	II/33		Annecy Protocol	I/79
Dominican Republic	Decisions of 30 November 1949	II/33		Annecy Protocol	I/79
Finland	Decisions of 30 November 1949	II/33		Annecy Protocol	I/79
Greece	Decisions of 30 November 1949	II/33		Annecy Protocol	I/79
Haiti	Decisions of 30 November 1949	II/33		Annecy Protocol	I/79
Italy	Decisions of 30 November 1949	II/33		Annecy Protocol	I/79
Liberia	Decisions of 30 November 1949	II/33		Annecy Protocol	I/79
Nicaragua	Decisions of 30 November 1949	II/33		Annecy Protocol	I/79
Sweden	Decisions of 30 November 1949	II/33		Annecy Protocol	I/79
Uruguay	Decisions of 30 November 1949	II/33		Annecy Protocol	I/79
Austria	Decisions of 21 June 1951	II/33-35		Torquay Protocol	I/86
Germany	Decisions of 21 June 1951	II/33-35		Torquay Protocol	I/86
Peru	Decisions of 21 June 1951	II/33-35		Torquay Protocol	I/86
Turkey	Decisions of 21 June 1951	II/33-35		Torquay Protocol	I/86
Uruguay	Decisions of 21 June 1951	II/33-35		Torquay Protocol	I/86
Japan	Declaration of 24 October 1953	2S/31			
	Decision of 11 August 1955	4S/33		Protocol	4S/11
Israel	Decision of 9 December 1961	10S/11	PA	Protocol	11S/17
Portugal	Decision of 9 December 1961	10S/11		Protocol	11S/20
Cambodia	Decision of 5 June 1962	11S/44		Protocol (not accepted by Cambodia)	11S/12
Spain	Decision of 30 June 1963	12S/27		Protocol	12S/27
Switzerland	Decision of 1 April 1966	14S/13	PA	Protocol	14S/6
Yugoslavia	Decision of 20 July 1966	15S/63	PA	Protocol	15S/53
Korea	Decision of 2 March 1967	15S/60		Protocol	15S/44
Argentina	Decision of 4 September 1967	15S/59	PA	Protocol	15S/36
Iceland	Decision of 4 September 1967	15S/59	PA	Protocol	15S/38
Ireland	Decision of 4 September 1967	15S/60		Protocol	15S/41
Poland	Declaration of 9 November 1959	8S/12		Protocol	15S/46
	Decision of 4 September 1967	15S/60			
United Arab Republic (Egypt)	Decision of 4 March 1970	17S/17	PA	Protocol	17S/2
Democratic Republic of the Congo (Zaire)	Decision of 11 August 1971	18S/22		Protocol	18S/3
Romania	Decision of 15 October 1971	18S/23		Protocol	18S/5
Bangladesh	Decision of 10 November 1972	19S/6		Protocol	19S/3
Hungary	Decision of 8 August 1973	20S/17		Protocol	20S/3
Philippines	Decision of 26 November 1979	26S/223	PA	Protocol	26S/192
Colombia	Decision of 28 November 1979	26S/222	PA	Protocol	26S/194

Contracting party	Decision	Ref.	PA	Protocol	Ref.
Mexico				Draft Protocol (not accepted by Mexico)	26S/256
Thailand	Decision of 21 October 1982	29S/7		Protocol	29S/3
Mexico	Decision of 17 July 1986	33S/56		Protocol	33S/3
Morocco	Decision of 19 February 1987	34S/28		Protocol	34S/3
Bolivia	Decision of 3 August 1989	36S/25		Protocol	37S/5
Costa Rica	Decision of 20 November 1989	36S/43		Protocol	37S/7
El Salvador	Decision of 13 December 1990	37S/27		Protocol	37S/27
Tunisia	Decision of 12 March 1990	37S/41		Protocol	37S/41
Venezuela	Decision of 26 July 1990	37S/71		Protocol	37S/72
Guatemala	Decision of 28 February 1991	38S/16		Protocol	38S/17
Czech Republic	Decision of 19 February 1993	L/7181		Protocol	L/7181
Slovak Republic	Decision of 19 February 1993	L/7182		Protocol	L/7182
Paraguay	Decision of 30 June 1993	L/7252		Protocol	L/7260
Honduras	Decision of 2 March 1994	L/7419		Protocol	L/7424
Slovenia	Decision of 12 September 1994	L/7530		Protocol	L/7492

B. PROVISIONAL ACCESSIONS

(Chronologically by date of initial Declaration)

Switzerland	Declaration of 22 November 1958	7S/19
	Procès-Verbal of 8 December 1961	10S/12
	Second Procès-Verbal of 30 October 1964	13S/14
	Terminated on 1 August 1966 - date of accession	
Yugoslavia	Declaration of 25 May 1959	8S/18
	Declaration of 13 November 1962	11S/50
	Procès-Verbal of 14 December 1965	14S/16
	Expired on 30 June 1966; date of accession 25 August 1966	
Israel	Declaration of 29 May 1959	8S/10
	Expired on 31 December 1961; date of accession 5 July 1962	
Tunisia	Declaration of 12 November 1959	8S/15
	Procès-Verbal of 9 December 1961	10S/15
	Second Procès-Verbal of 12 December 1963	12S/32
	Third Procès-Verbal of 14 December 1965	14S/14
	Fourth Procès-Verbal of 14 November 1967	15S/61
	Fifth Procès-Verbal of 19 November 1968	16S/9
	Sixth Procès-Verbal of 16 December 1969	17S/14
	Seventh Procès-Verbal of 2 December 1970	18S/19
	Eighth Procès-Verbal of 9 November 1971	18S/20
	Ninth Procès-Verbal of 7 November 1973	20S/10
	Tenth Procès-Verbal of 21 November 1975	22S/6
	Eleventh Procès-Verbal of 11 November 1977	24S/4
	Twelfth Procès-Verbal of 27 November 1979	26S/197
	Thirteenth Procès-Verbal of 24 November 1981	28S/9
	Fourteenth Procès-Verbal of 2 November 1982	29S/5
	Fifteenth Procès-Verbal of 1 November 1983	30S/3
	Sixteenth Procès-Verbal of 8 November 1984	31S/3
	Seventeenth Procès-Verbal of 6 November 1985	32S/3
	Eighteenth Procès-Verbal of 5 November 1986	33S/6
	Nineteenth Procès-Verbal of 10 November 1987	34S/7
	Twentieth Procès-Verbal of 7 November 1988	35S/15
	Expired 31 December 1989; date of accession 12 March 1990	

Argentina	Declaration of 18 November 1960	9S/11
	Procès-Verbal of 7 November 1962	11S/42
	Second Procès-Verbal of 30 October 1964	13S/13
	Third Procès-Verbal of 17 November 1966	(590 UNTS 246)
	Terminated on 10 October 1967 - date of accession	
Egypt (United Arab Republic)	Declaration of 13 November 1962	11S/46
	Procès-Verbal of 30 October 1964	13S/16
	Second Procès-Verbal of 17 November 1966	L/2714
	Third Procès-Verbal of 14 November 1967	15S/62
	Fourth Procès-Verbal of 19 November 1968	16S/10
	Fifth Procès-Verbal of 16 December 1969	17S/16
	Terminated on 8 May 1970 - date of accession	
Iceland	Declaration of 5 March 1964	12S/24
	Procès-Verbal of 14 December 1965	14S/12
	Expired on 31 December 1967; date of accession 21 April 1968	
Philippines	Declaration of 9 August 1973	20S/8
	Procès-Verbal of 21 November 1975	22S/5
	Second Procès-Verbal of 11 November 1977	24S/3
	Terminated on 27 December 1979 - date of accession	
Colombia	Declaration of 23 July 1975	22S/3
	Procès-Verbal of 12 November 1976	23S/3
	Second Procès-Verbal of 14 November 1978	25S/3
	Third Procès-Verbal of 10 November 1980	27S/6
	Terminated on 3 October 1981 - date of accession	

C. SUCCESSION TO CONTRACTING PARTY STATUS UNDER ARTICLE XXVI:5(c)

The simplified procedures for the acquisition of contracting party status under Article XXVI:5(c) adopted in 1963 provide for a certification by the Director-General to the effect that the conditions of Article XXVI:5(c) have been fulfilled and advising that the government concerned has become a contracting party. The rights and obligations of contracting parties acceding under Article XXVI:5(c) date from the date of independence of the newly-independent State or the date of a territory's autonomy in the conduct of its external commercial relations as certified by the "responsible contracting party" under Article XXVI:5(c). See further at pages 853-856.

Contracting party	Date of independence or autonomy in commercial relations	Date of admission as contracting party	Certification by Director-General
Angola	11.11.1975	8.4.1994	L/7442
Antigua and Barbuda	1.11.1981	30.3.1987	34S/25
Bahrain	15.8.1971	13.12.1993	L/7359
Barbados	30.11.1966	15.2.1967	15S/59
Belize	21.9.1981	7.10.1983	30S/7
Benin	1.8.1960	12.9.1963	12S/33
Botswana	30.9.1966	28.8.1987	34S/26
Brunei Darussalam	9.12.1993	31.12.1983	L/7358
Burkina Faso	5.8.1960	3.5.1963	12S/34
Burundi	1.7.1962	13.3.1965	13S/12
Cameroon	1.1.1960	3.5.1963	12S/33
Central African Republic	14.8.1960	3.5.1963	12S/33

Contracting party	Date of independence or autonomy in commercial relations	Date of admission as contracting party	Certification by Director-General
Chad	11.8.1960	12.7.1963	12S/33
Congo	15.8.1960	3.5.1963	12S/33
Côte d'Ivoire	7.8.1960	31.12.1963	12S/33
Cyprus	16.8.1960	15.7.1963	12S/33
Djibouti	27.7.1977	16.12.1994	L/7609
Dominica	3.11.1978	20.4.1993	L/7203
Fiji	9.10.1970	16.11.1993	L/7325
Gabon	17.8.1960	3.5.1963	12S/33
Gambia	18.2.1965	22.2.1965	13S/12
Ghana	6.3.1957	17.10.1957	6S/9
Grenada	7.2.1974	9.2.1994	L/7412
Guinea	2.10.1958	8.12.1994	L/7606
Guinea-Bissau	10.9.1974	17.3.1994	L/7432
Guyana	26.5.1966	5.7.1966	14S/13
Hong Kong	23.4.1986	23.4.1986	34S/27
Indonesia	27.12.1949	24.2.1950	1S/6
Jamaica	6.8.1962	31.12.1963	12S/34
Kenya	12.12.1963	5.2.1964	12S/34
Kuwait	19.6.1961	3.5.1963	12S/34
Lesotho	4.10.1966	8.1.1988	L/2701, 35S/25
Liechtenstein	29.3.1994	29.3.1994	L/7440
Macau	11.1.1991	11.1.1991	L/6806, L/6807
Madagascar	25.6.1960	30.9.1963	12S/34
Malawi	6.7.1964	28.8.1964	13S/12
Malaysia	31.8.1957	24.10.1957	6S/9
Maldives	26.7.1965	19.4.1983	30S/7
Mali	20.6.1960	11.1.1993	L/7166
Malta	21.9.1964	17.11.1964	13S/12
Mauritania	28.11.1960	30.9.1963	12S/34
Mauritius	12.3.1968	2.9.1970	18S/23
Mozambique	25.6.1975	27.7.1992	L/7069
Namibia	21.3.1990	15.9.1992	L/7081 + Add.1
Niger	3.8.1960	31.12.1963	12S/34
Nigeria	1.10.1960	18.12.1960	9S/13
Papua New Guinea	16.9.1975	16.12.1994	L/7610
Qatar	3.9.1971	7.4.1994	L/7441
Rwanda	1.7.1962	1.1.1966	14S/13
Saint Kitts and Nevis	19.9.1983	24.3.1994	L/7434
Saint Lucia	22.1.1979	13.4.1993	L/7200
Saint Vincent & the Grenadines	27.10.1979	18.4.1993	L/7203
Senegal	20.6.1960	27.9.1963	12S/34
Sierra Leone	27.4.1961	19.5.1961	10S/11

Contracting party	Date of independence or autonomy in commercial relations	Date of admission as contracting party	Certification by Director-General
Singapore	9.8.1965	20.8.1973	20S/19
Solomon Islands	7.7.1978	28.12.1994	L/7607
Suriname	25.11.1975	22.3.1978	25S/6
Swaziland	6.9.1968	8.2.1993	L/7179
Tanzania	9.12.1961	9.12.1961	10S/14
Togo	27.4.1960	20.3.1964	12S/34
Trinidad and Tobago	31.8.1962	23.10.1962	11S/44
Uganda	9.10.1962	23.10.1962	11S/45
United Arab Emirates	1.12.1971	8.3.1994	L/7422
Zambia	24.10.1964	10.2.1982	29S/7

D. OVERVIEW

Note: names in (parentheses) indicate governments which later withdrew provisional application of the General Agreement or ceased to exist. "N°" columns indicate the number of present contracting parties (not including those which later withdrew provisional application) which became contracting parties in the time period referred to; for exact dates see page 1137. Status is as of 1 January 1995.

Year	Govts. accepting Protocol of Provisional Application or acceding under Article XXXIII	N°	Govts. succeeding to contracting party status under Article XXVI:5(c)	N°	Total	Cumulative total
1947: Original contracting parties	Australia, Belgium, Canada, France, Luxembourg, Netherlands, United Kingdom, United States	8	--	0	8	8
1948: Governments signatory to para. 3 of Protocol of Provisional Application	Brazil, (Republic of China), Cuba, (Czechoslovakia), India, (Lebanon), Myanmar, New Zealand, Norway, Pakistan, South Africa, Sri Lanka, (Syria), Zimbabwe	10	--		10	18
1948: Protocol for Accession of Signatories to Geneva Final Act	Chile	1	--	0	1	19
1949 (Annecy Round)	Denmark, Dominican Republic, Finland, Greece, Haiti, Italy, (Liberia), Nicaragua, Sweden	8	--	0	8	27
1950	--	0	Indonesia	1	1	28
1951 (Torquay Round)	Austria, Germany, Peru, Turkey	4	--	0	4	32
1953	Uruguay	1	--	0	1	33
1955	Japan	1	--	0	1	34
1957	--	0	Ghana, Malaysia	2	2	36
1960	--	0	Nigeria	1	1	37
1961	--		Sierra Leone, Tanzania	2	2	39
1962 (Dillon Round)	Israel, Portugal	2	Trinidad and Tobago, Uganda	2	4	43
1963	Spain	1	Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Côte d'Ivoire, Cyprus, Gabon, Jamaica, Kuwait, Madagascar, Mauritania, Niger, Senegal	15	16	59
1964	--	0	Kenya, Malawi, Malta, Togo	4	4	63

Year	Govts. accepting Protocol of Provisional Application or acceding under Article XXXIII	N°	Govts. succeeding to contracting party status under Article XXVI:5(c)	N°	Total	Cumulative total
1965	--	0	Burundi, Gambia	2	2	65
1966	Switzerland, Yugoslavia	2	Guyana, Rwanda	2	4	69
1967 (Kennedy Round)	Korea, Argentina, Ireland, Poland	4	Barbados	1	5	74
1968	Iceland	1	--	0	1	75
1970	Egypt	1	Mauritius	1	2	77
1971	Zaire, Romania	2	--	0	2	79
1972	Bangladesh	1	--	0	1	80
1973	Hungary	1	Singapore	1	2	82
1978	--	0	Suriname	1	1	83
1979 (Tokyo Round)	Philippines	1	--	0	1	84
1981	Colombia	1	--	0	1	85
1982	Thailand	1	Zambia	1	2	87
1983	--	0	Belize, Maldives	2	2	89
1986	Mexico	1	Hong Kong	1	2	91
1987	Morocco	1	Antigua and Barbuda, Botswana	2	3	94
1988	--	0	Lesotho	1	1	95
1990	Bolivia, Costa Rica, El Salvador, Tunisia, Venezuela	5	--	0	5	100
1991	Guatemala	1	Macau	1	2	102
1992	--	0	Mozambique, Namibia	2	2	104
1993	Czech Republic, Slovak Republic	2	Dominica, Mali, Swaziland, Saint Lucia, Saint Vincent & the Grenadines, Fiji, Brunei Darussalam, Bahrain	8	10	114
1994 (Uruguay Round)	Paraguay, Honduras, Slovenia	3	Angola, Djibouti, Grenada, Guinea-Bissau, Republic of Guinea, Liechtenstein, Papua New Guinea, Qatar, St. Kitts and Nevis, Solomon Islands, United Arab Emirates	11	14	128
TOTAL		64		64	128	128

VII. ACCEPTANCES OF TOKYO ROUND AGREEMENTS

Status as of 1 June 1995. The table below refers to the following agreements, all done at Geneva on 12 April 1979 unless otherwise specified, which are open for acceptance by governments contracting parties to the GATT and by the European Economic Community.¹

1. *Agreements which entered into force on 1 January 1980:*

- (ADP)** Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 26S/171, 1186 UNTS 2. Acceptance of this Agreement carries denunciation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade done in 1967 (all parties to the 1967 Agreement have accepted the 1979 Agreement except Portugal and Malta).
- (SCM)** Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, 26S/56, 1186 UNTS 204.
- (LIC)** Agreement on Import Licensing Procedures, 26S/154, 1186 UNTS 372.
- (AIR)** Agreement on Trade in Civil Aircraft, 26S/162, 1186 UNTS 170; the Annex to this Agreement was amended by the Protocol (1986) Amending the Annex to the Agreement on Trade in Civil Aircraft, 34S/22, ... UNTS ..., which entered into force on 1 January 1988.
- (TBT)** Agreement on Technical Barriers to Trade, 26S/8, 1186 UNTS 276.

2. *Agreements which entered into force on 1 January 1981:*

- (VAL)** Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, 26S/116, 1235 UNTS 126, and Protocol to the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, 26S/151, 1235 UNTS 238, done at Geneva on 1 November 1979; upon entry into force of the Agreement on 1 January 1981, the provisions of the Protocol were deemed to be an integral part of the Agreement.
- (GPR)** Agreement on Government Procurement, 26S/33, 1235 UNTS 258; this agreement was amended by the Protocol Amending the Agreement on Government Procurement, 34S/12, ... UNTS ..., which entered into force on 14 February 1988 upon its acceptance by all Parties to the Agreement.

In addition, the following two agreements, done in 1979, were open for acceptance by governments members of the United Nations, or of one of its specialized agencies, and by the European Economic Community. These agreements have now terminated. Information on acceptances of these agreements can be found in previous editions of this book or in the *GATT Status of Legal Instruments*.

Arrangement Regarding Bovine Meat, 26S/84, 1186 UNTS 344. On 15 April at Marrakesh, Morocco, the International Bovine Meat Agreement was opened for acceptance; Article VI:1(c) of this Agreement provides that acceptance thereof carries denunciation of the Arrangement Regarding Bovine Meat effective on the date of entry into force of the Agreement Establishing the WTO. On 17 June 1994, the International Meat Council composed of the signatories to the Arrangement decided to extend the Arrangement only until the date of entry into force of the Agreement Establishing the WTO and the International Bovine Meat Agreement, and decided that the Arrangement Regarding Bovine Meat would terminate as of that date. The Arrangement duly terminated on 1 January 1995.

International Dairy Arrangement, 26S/91, 1186 UNTS 54. Acceptance of the International Dairy Arrangement carried denunciation of the Arrangement Concerning Certain Dairy Products done in 1970, and the Protocol Relating to Milk Fat, done in 1973. All parties to the 1970 Arrangement and the 1973 Protocol had accepted the 1979 Arrangement or otherwise withdrawn. On 15 April at Marrakesh, Morocco, the International Dairy Agreement was opened for acceptance; Article VIII:1(c) of this Agreement provides that acceptance thereof carries denunciation of the International Dairy Arrangement effective on the date of entry into force of the Agreement Establishing the WTO. In September 1994 the International Dairy Products Council composed of the signatories to the Arrangement decided to extend the Arrangement only until the date of entry into force of the Agreement Establishing the WTO and the International Dairy Agreement, and decided that the International Dairy Arrangement would terminate as of that date. The Arrangement duly terminated on 1 January 1995.

¹Also open for acceptance by governments having provisionally acceded to the GATT, and open to accession by any other government on terms to be agreed between that government and the parties to the agreement in question.

KEY:

A : Accepted (includes acceptance subject to ratification)

S : Signed (acceptance pending)

W: Accepted and later withdrew

O : Observer

*Subject to reservation, condition and/or declaration

	ADP	SCM	LIC	AIR	TBT	VAL + Prot.	GPR
CONTRACTING PARTIES TO GATT AND THE EUROPEAN ECONOMIC COMMUNITY							
Antigua and Barbuda							
Argentina	S	S	S	O	S	A*	O
Australia	A	A*	A	O	A	A	O
Austria	A	A	A	A	A	A	A
Bahrain							
Bangladesh	O	O	O	O	O	O	O
Barbados							
Belgium				A	A		
Belize							
Benin							
Bolivia			A			A*	
Botswana						A	
Brazil	A	A	O	O	A	A*	O
Brunei Darussalam							
Burkina Faso							
Burundi							
Cameroon				O		O	O
Canada	A	A	A	A	A	A*	A
Central African Republic							
Chad							
Chile	O	A	A		A	O	O
Colombia	A	A*	O		O	A*	
Congo							
Costa Rica							
Côte d'Ivoire	O	O	O		O	O	O
Cuba	O	O	O		O	O	O
Cyprus						A	
Czech Republic	A		A		A	A	
Denmark				A*	A*		
Dominica							
Dominican Rep.			O				O
Egypt	A	A	A	A	A	O	O
El Salvador							
European Economic Community	A	A	A	A	A	A	A
Fiji							
Finland	A	A	A	O	A	A	A
France				A	A		
Gabon		O	O	O	O		O
Gambia							
Germany				A*	A*		

	ADP	SCM	LIC	AIR	TBT	VAL + Prot.	GPR
Ghana	O	O	O	O	O		
Greece				S	A		
Grenada							
Guatemala							
Guinea-Bissau							
Guyana							
Haiti							
Honduras							
Hong Kong	A	A	A		A	A	A
Hungary	A	O	A		A*	A	O
Iceland							
India	A	A	A	O	A	A*	O
Indonesia	O	A*	O	O	A	O	O
Ireland				A	A		
Israel	O	A*	O	O	A	O	A
Italy				A	A		
Jamaica		O	O				O
Japan	A	A	A	A	A	A	A
Kenya							O
Korea, Republic of	A	A	O		A	A	O**
Kuwait							
Lesotho						A	
Luxembourg				A	A		
Macau							
Madagascar							
Malawi						A*	
Malaysia	O	O	O		A	O	O
Maldives							
Mali							
Malta	O	O	O	O	O		O
Mauritania							
Mauritius				O			
Mexico	A	O	A		A	A*	
Morocco					A	A*	
Mozambique							
Myanmar							
Namibia							
Netherlands				A	A		
Netherlands with respect to Aruba							A
New Zealand	A	A	A		A	A*	O
Nicaragua	O	O	O		O	O	O
Niger							
Nigeria	O	O	A	O	O	O	O
Norway	A	A	A	A	A	A	A
Pakistan	A	A	A		A	O	
Paraguay							
Peru	O	O	O		O	O	O
Philippines	O	A*	A		A	O	O
Poland	A	S	A	O	O	S	O

	ADP	SCM	LIC	AIR	TBT	VAL + Prot.	GPR
Portugal		W		A	A		
Romania	A	O	A	A	A	A	O
Rwanda					S		
Saint Lucia							
Saint. Vincent & the Grenadines							
Senegal	O	O	O		O		
Sierra Leone							
Singapore	A	O	A	O	A	O	A
Slovak Republic	A		A		A	A	
South Africa	O	O	A			A	O
Spain	W	W		A	A		
Sri Lanka	O	O	O	O	O	O	
Suriname							
Sweden	A	A	A	A	A	A	A
Switzerland	A	A	A	A	A	A	A
Tanzania	O	O	O		O		
Thailand	O	O	O		A	O	O
Togo							
Trinidad and Tobago	O	O	O	O	O	O	O
Tunisia	O	O	O	O	A		
Turkey	O	A	O	O	O	A*	O
Uganda							
United Arab Emirates							
United Kingdom			A*	A*	A*	A*	A*
United States	W	W	W	A	W	W	A
Uruguay	O	A					
Venezuela		O	O				
Zaire	O	O	O		O	O	O
Zambia							
Zimbabwe						A*	O
OTHER							
Bulgaria***	O	O	O		O	O	
China	O		O		O	O	O
Chinese Taipei	O	O	O	O	O	O	O
Ecuador	O	O	O		O	O	O
Panama							
Russian Federation	O		O	O	O	O	

**Korea has been invited by the signatories to be present in the Informal Working Group on Government Procurement from October 1991, pending its formal accession to the Agreement on Government Procurement.

***Bulgaria negotiated a schedule of tariff concessions in the Tokyo Round.

VIII. MEMBERS OF THE WORLD TRADE ORGANIZATION

As of 1 August 1995, the following Governments had accepted the Marrakesh Agreement Establishing the World Trade Organization. The membership of each in the World Trade Organization is effective as of the dates indicated.

Antigua and Barbuda	1 January 1995	Lesotho.....	31 May 1995
Argentina	1 January 1995	Luxembourg.....	1 January 1995
Australia	1 January 1995	Macau	1 January 1995
Austria	1 January 1995	Malawi	31 May 1995
Bahrain	1 January 1995	Malaysia	1 January 1995
Bangladesh	1 January 1995	Maldives	31 May 1995
Barbados	1 January 1995	Mali	31 May 1995
Belgium	1 January 1995	Malta	1 January 1995
Belize	1 January 1995	Mauritania	31 May 1995
Botswana.....	31 May 1995	Mauritius	1 January 1995
Brazil	1 January 1995	Mexico	1 January 1995
Brunei Darussalam.....	1 January 1995	Morocco	1 January 1995
Burkina Faso.....	3 June 1995	Myanmar	1 January 1995
Canada	1 January 1995	Namibia	1 January 1995
Central African Republic	31 May 1995	Netherlands - for the Kingdom in Europe	
Chile.....	1 January 1995	and for the Netherlands Antilles	1 January 1995
Colombia	30 April 1995	New Zealand.....	1 January 1995
Costa Rica	1 January 1995	Nigeria	1 January 1995
Côte d'Ivoire.....	1 January 1995	Norway	1 January 1995
Cuba	20 April 1995	Pakistan	1 January 1995
Czech Republic.....	1 January 1995	Paraguay	1 January 1995
Denmark	1 January 1995	Peru	1 January 1995
Djibouti	31 May 1995	Philippines.....	1 January 1995
Dominica	1 January 1995	Poland	1 July 1995
Dominican Republic	9 March 1995	Portugal	1 January 1995
Egypt	30 June 1995	Romania	1 January 1995
El Salvador.....	7 May 1995	Saint Lucia	1 January 1995
European Community	1 January 1995	Saint Vincent & the Grenadines.....	1 January 1995
Finland	1 January 1995	Senegal.....	1 January 1995
France	1 January 1995	Singapore	1 January 1995
Gabon	1 January 1995	Slovak Republic	1 January 1995
Germany	1 January 1995	South Africa.....	1 January 1995
Ghana	1 January 1995	Spain.....	1 January 1995
Greece.....	1 January 1995	Sri Lanka	1 January 1995
Guinea Bissau.....	31 May 1995	Suriname.....	1 January 1995
Guyana	1 January 1995	Swaziland	1 January 1995
Honduras	1 January 1995	Switzerland.....	1 July 1995
Hong Kong.....	1 January 1995	Sweden	1 January 1995
Hungary.....	1 January 1995	Tanzania	1 January 1995
Iceland	1 January 1995	Thailand.....	1 January 1995
India	1 January 1995	Togo	31 May 1995
Indonesia.....	1 January 1995	Trinidad and Tobago	1 March 1995
Ireland.....	1 January 1995	Tunisia	29 March 1995
Israel.....	21 April 1995	Turkey.....	26 March 1995
Italy	1 January 1995	Uganda	1 January 1995
Jamaica.....	9 March 1995	United Kingdom.....	1 January 1995
Japan	1 January 1995	United States.....	1 January 1995
Kenya.....	1 January 1995	Uruguay.....	1 January 1995
Korea	1 January 1995	Venezuela.....	1 January 1995
Kuwait.....	1 January 1995	Zambia	1 January 1995
		Zimbabwe	3 March 1995

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Disputes have been indexed under the name of the contracting party to whose measures the dispute relates, except for the Uruguayan Recourse to Article XXIII, which has been indexed under Uruguay. The headings for cases do not exactly correspond to the official titles used in the Basic Instruments and Selected Documents series and in this book, but have been chosen as a quick reference to the country, measure and product involved. For the purposes of this subject index only, "disputes" include claims brought under Article XXIII:2, disputes that resulted in panel reports, and consultations under Article XXII:2. Separate tables of invocations of Article XXIII, and consultations under Articles XXII:1 and XXII:2 appear in the chapters on Article XXIII and XXII.

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