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GENERAL AGREEMENT ON TARIFFS AND TRADE

Multilateral Trade Negotiations

Group "Safeguards"

DISPUTE SETTLEMENT IN INTERNATIONAL ECONOMIC AGREEMENTS

Factual Study by the Secretariat

1. The Group "Safeguards" has asked the secretariat at its last meeting on 17-20 November 1975 to draw up "a factual study on dispute settlement setting out the history of this question in the GATT and identifying alternative approaches used in other international bodies in the commercial policy field" (MTN/SG/3, paragraph 3(b)).

2. The secretariat has already circulated a Factual Note on Safeguards for Maintenance of Access which deals with Articles XXII and XXIII and the use that has been made of them (MTN/3D/2 and Corr.1). In the present paper the GATT procedures for dispute settlement are compared with those of other international economic agreements. The paper is organized as follows:

I. The Organizational Structure of the Dispute Procedures

II. Conditions of Access to the Dispute Settlement Bodies
   (a) Bilateral Consultation
   (b) Prior Conciliation

III. Competence of the Dispute Settlement Bodies
   (a) Legal Nature of the Dispute
   (b) Parties to the Dispute

IV. Procedures of the Dispute Settlement Bodies
   (a) Voting
   (b) Temporal Requirements
   (c) Interim Measures

V. Decision of the Dispute Settlement Bodies
   (a) Legal Nature
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3. Under each of these headings the dispute settlement procedures under GATT, as they have been applied in the past, will be compared with those of six other international economic agreements: the Arrangement Regarding International Trade in Textiles, the Convention Establishing the European Free Trade Association, the ACP-EEC Convention of Lomé, the Treaty Establishing the Caribbean Community, the International Cocoa Agreement and the Articles of Agreement of the International Monetary Fund. These six agreements were selected because they seem representative of the various procedures for dispute settlement that are presently used in multilateral economic treaties. The rules for dispute settlement in the commodity agreements for tin, coffee, sugar and cocoa are so similar that only one - the Cocoa Agreement - has been chosen for this study. The International Monetary Fund does not deal directly with commercial policy matters but has been included for comparative purposes because the Fund has regulatory functions in the international economic sphere that are similar to, and related to, those of the GATT.

4. The relevant dispute settlement provisions of the GATT and the six other agreements are reproduced in Annex A. A brief bibliography on dispute settlement in international economic organizations is contained in Annex B.

I. The organizational structure of the disputes procedures

5. Under the General Agreement disputes not settled bilaterally may be referred to the CONTRACTING PARTIES acting as a whole. However, this body has generally been considered too large to take decisions without the assistance of a smaller body, and therefore the CONTRACTING PARTIES' function has been in most cases that of ratifying dispute settlement decisions prepared for them. In the very early days of GATT, disputes were sometimes referred to the Chairman of the CONTRACTING PARTIES for his decision. It was for instance in this way that a dispute between the Cuban and the Benelux Governments regarding the application of Article I to consular taxes was settled.[1] However, this procedure did not last very long. By the Third Session in 1949 the CONTRACTING PARTIES had already developed the practice of referring disputes to Working Parties. 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 unanimity, there is always some measure of negotiation and compromise in the formulation of the Working Party's report.

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[1] CP.2/SR.11

6. The CONTRACTING PARTIES experienced difficulties with the Working Party approach, which were described in a note by the Executive Secretary as follows: "It often proved embarrassing for the representative of a country against which a complaint was lodged to associate himself with the Working Party report. On the other hand, it was often equally embarrassing for him to dissent from the report and to file a minority statement. Furthermore, the majority of the Working Party themselves were frequently inhibited in a frank expression of views in their report to the CONTRACTING PARTIES because of their desire to reach unanimous agreement in the Working Party".[1] The Executive Secretary's note also pointed to the difficulties that Working Parties had in preparing "an objective analysis for consideration by the CONTRACTING PARTIES, in which the special interests of individual governments are subordinated to the basic objective of applying the General Agreement impartially and for the benefit of the contracting parties in general".[2]

7. By the seventh session in 1952, the dissatisfaction with the Working Party approach had become so widespread that the CONTRACTING PARTIES adopted a fundamentally different procedure and established a Panel of Complaints for all legal disputes that arose during that session. The terms of reference of the Sessional Panelwere: "To consider, in consultation with the representatives of the countries directly concerned and of other interested countries, complaints referred to the CONTRACTING PARTIES under Article XXIII and such other complaints as the CONTRACTING PARTIES may expressly refer to the Panel and to submit findings and recommendations to the CONTRACTING PARTIES."[3] Following the creation of an Intersessional Committee in 1955, the CONTRACTING PARTIES stopped appointing Sessional Panels and began establishing instead ad hoc Panels for each individual dispute. The terms of reference of the ad hoc Panels have generally been "to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or rulings provided for in paragraph 2 of Article XXIII".[4] The Panels have been composed of about three to five persons from countries not directly affected by the charges to be examined, who are expected to act impartially without instructions from their governments. Whereas Working Parties negotiate disputes, Panels tend to adjudicate them. Panels therefore act to some extent in a court-like fashion. Each party is invited to present its case and the Panels then prepare, in the absence of the parties, their findings and recommendations in the light of the information and arguments laid before them. However, there is also an element of negotiation, albeit small, in the Panel proceedings. The Panels' conclusions and the form of their presentation are customarily discussed with the parties to the dispute before the Panel reports are submitted to the CONTRACTING

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[1] L/392/Rev.1, paragraph 4

[2] Idem, paragraph 5

[3] SR.7/7

[4] Cf. for instance the terms of reference of the DISC Panel (C/M/89)

PARTIES. This practice has either encouraged bilateral settlements without a final Panel decision, or has facilitated the acceptance of the Panels' decisions by governments, when such decisions were necessary.

8. The reports of both the Working Parties and the Panels are advisory opinions, on the basis of which the CONTRACTING PARTIES take their final decision. Only in one exceptional case (disputes under a waiver from Article I given to the United Kingdom in 1953) did the CONTRACTING PARTIES decide that the Panel's determination would be final if the parties to the dispute so agree either before or after the Panel examination.[1] Failing such agreement, each party had the right of appeal to the CONTRACTING PARTIES. Under this procedure the CONTRACTING PARTIES thus either did not take a decision on the dispute at all, or acted only as a second instance. The Panel on Poultry, which was established in 1963 at the request of the United States and the European Economic Community, rendered an advisory opinion to the parties to the dispute, not to the CONTRACTING PARTIES. This was a special case because the parties to this dispute did not refer the matter to the CONTRACTING PARTIES under Article XXIII but asked for an advisory opinion from a GATT Panel to assist them in their bilateral Article XXVIII negotiations.[2]

9. A tabular analysis of twenty-five Article XXIII:2 cases that have arisen since 1948 can be found in the Annex of document MTN/3D/2.

10. Under the Textiles Arrangement dispute settlement functions are assigned to the Textiles Committee, composed of representatives of the parties to the Arrangement, and the Textiles Surveillance Body (TSB) consisting of a chairman and eight members appointed by the parties to the Arrangement. The TSB is a standing body and continuously on call. The Arrangement provides for a rotation of its members as appropriate so as to keep the membership balanced and broadly representative. The members are appointed as experts in their own names and are expected to operate with a considerable degree of freedom from direction. One of the TSB's main responsibilities is to assist in the settlement of disputes regarding the implementation of the Arrangement, in particular disputes on the conformity of unilateral import restrictions with the provisions of the Arrangement.

11. The TSB's normal procedure in cases of dispute is to invite the parties to state their case, to present questions to them and then to formulate a recommendation in the light of the information received. It should be noted, however, that the TSB has in practice given much attention to its rôle as a conciliator rather than as a judge. A member of the TSB whose country is party to a dispute may not act as a spokesman and may not stand in the way of achieving a consensus on a recommendation or finding, although he remains present throughout the discussion of the TSB. To ensure equitable treatment in such cases, also, the spokesman of the other party to the dispute may remain present even if he is not a member of the TSB. If the recommendation of the TSB does not settle a dispute, the matter may be brought before the Textiles Committee or before the GATT Council.

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[1] BISD, 2nd Supplement, page 20; BISD, 3rd Supplement, page 13

[2] C/M/18

12. The authority to interpret the Textiles Arrangement is divided between the TSB and the Textiles Committee. Disputes regarding the interpretation of Article 12, which inter alia defines the term "textiles" for the purposes of the Arrangement, may be referred to the TSB. The interpretation of the remaining provisions of the Arrangement is formally reserved to the Textiles Committee.

13. Under the EFTA Convention, disputes among member States may be referred to the Council, in which each member State is represented. The Council may decide to refer the dispute to an examining committee consisting of "persons selected /by the Council/ for their competence and integrity, who, in the performance of their duties, shall neither seek nor receive instructions from any State, or from any authority or organization other than the Association". The report of the examining committee has the status of an advisory opinion; the final decision on disputes is taken by the Council "in the light of the report".

14. The Lomé Convention regulates disputes between one or more ACP States on the one hand and the Community, or one or more member States of the Community, on the other. Such disputes may be placed before the Council of Ministers, in which all ACP States, and the members of the Council and the Commission of the European Communities are represented. If the Council of Ministers fails to settle the dispute, either party may notify the other of the appointment of an arbitrator. The other party then has to appoint a second arbitrator and the Council of Ministers a third. The arbitrators' decision is final and binding.

15. Disputes under the Caribbean Community Treaty, may, when they relate to the Caribbean Common Market established in the Annex to this Treaty, be referred to the Common Market Council, in which each member State is represented. The Council may, and at the request of any member State concerned must, refer the matter to an ad hoc Tribunal. For the purpose of establishing the Tribunal the Common Market secretariat maintains a list of arbitrators consisting of qualified jurists serving for renewable terms of five years. Each party to the Treaty may nominate two arbitrators for the list. When a dispute is referred to the Tribunal each party to the dispute appoints one arbitrator from the list. The two arbitrators appoint a third arbitrator who serves as chairman. If the arbitrators are not appointed within a specified time-limit, the Secretary-General of the Caribbean Common Market is authorized to make the appointment. The Tribunal decides its own procedures. If the Tribunal finds that any benefit conferred on a member State by the provisions relating to the Caribbean Common Market or any objective of the Common Market is being or may be frustrated, the Council may make to the member State concerned such recommendations as it considers appropriate. The members are obliged to employ the Tribunal procedure and to refrain from any other method of disputes settlement.

16. Under the Cocoa Agreement disputes concerning the interpretation or application of the Agreement and complaints that a member has failed to fulfil its obligations may be referred to the Cocoa Council, a body composed of representatives of all member countries. If the dispute concerns the interpretation or application of the Agreement, the Council may seek the opinion of an ad hoc advisory panel. Unless the Council unanimously decides otherwise, the ad hoc advisory panel consists of:

> two persons, one having wide experience in matters of the kind in dispute and the other having legal standing and experience, nominated by the exporting members;
>
> two such persons nominated by the importing members; and
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> a chairman selected unanimously by the four persons nominated by the parties or, if they fail to agree, by the Chairman of the Council.

17. The persons appointed act in their personal capacities and without instructions from any government. The opinion of the panel and the reasons therefore are submitted to the Council which decides the dispute "after considering all relevant information".

18. Complaints that a member has failed to fulfil its obligations under the Cocoa Agreement may be referred to the Council, which considers it and makes a decision on the matter specifying the nature of the breach.

19. There are two different procedures for the settlement of disputes under the Articles of Agreement of the International Monetary Fund: one procedure for questions of interpretation arising between members of the Fund or between a member and the Fund, and another procedure for disagreements between the Fund and a former member, or between the Fund in liquidation and a member. Under the first procedure the decision is taken by the Fund's Executive Directors. Any member dissatisfied with the Directors' decision may request that the question of interpretation be referred to the Board of Governors. The Board of Governors appoints a Committee on Interpretation and establishes the Committee's procedures. The Committee's decision is that of the Board of Governors and is final, unless the Board decides otherwise. Disputes between a former member and the Fund or between a member and the Fund in liquidation are submitted to a tribunal of three arbitrators: one appointed by the Fund, another by the (former) member and an umpire who, unless the parties otherwise agree, is appointed by an authority to be prescribed by a Fund regulation. The umpire has the power to settle all questions of procedure if the parties disagree. While the interpretation procedures have frequently been used by the Executive Directors, no arbitration tribunal has ever been appointed.

20. The organization of the dispute settlement procedures in GATT and the six other international economic agreements examined reflect two opposing desiderata: on the one hand, the wish to take into account the interests of governments and the need for negotiation and compromise, which led to the assignment of dispute settlement functions to bodies composed of government representatives; and, on the other hand, the desire to have an objective and fair evaluation of disputes by an impartial instance that takes into account community interests, which led to the creation of dispute settlement bodies composed of independent individuals. The agreements examined contain the whole spectrum of possible compromises between these two desiderata. On one end of the spectrum is the Lomé Convention, under which all disputes that are not settled through negotiation can be submitted by each party to binding third party adjudication; on the other end of the spectrum is the General Agreement, which confers the power to decide disputes on the CONTRACTING PARTIES.

II. Conditions of access to the dispute settlement bodies

(a) Bilateral consultation

21. Under the General Agreement bilateral consultations must take place before disputes can be referred to the CONTRACTING PARTIES.[1] While the secretariat does not have systematic information on bilateral consultations since contracting parties have no obligation to notify these, it seems clear from the fact that only twenty-five Article XXIII:2 cases have arisen in GATT's twenty-eight-year history that most disputes have been settled bilaterally. The existence of Article XXIII:2 appears to have acted as an inducement for contracting parties to resolve disputes

[1]The CONTRACTING PARTIES at their seventeenth session in 1960 agreed 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" (BISD, 9th Supplement, pages 18-20, paragraph 9). Similarly, the CONTRACTING PARTIES agreed in April 1966 that "consultations held under paragraph 2 of Article XXXVII:2 in respect of restrictions for which there is no authority under any provisions of the General Agreement 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" (BISD, 14th Supplement, pages 18-20, paragraph 11). Prior consultations are not required in Article XXIII:1(c) cases.

bilaterally. The Textiles Arrangement prescribes that disputes may only be referred to the TSB if bilateral consultations have failed to achieve a mutually satisfactory solution. Similarly, under the EFTA Convention and the Caribbean Community Treaty, disputes may only be referred to the Council "if no satisfactory settlement is reached between the Member States concerned". The Lomé Convention provides that only disputes that could not be settled by the Council, in which the two parties to possible disputes are represented, may be referred to binding arbitration. The Cocoa Agreement prescribes prior consultations only for disputes concerning the interpretation or application of the Agreement, but not for complaints that a member has failed to fulfil its obligations. However, members of the Agreement have the right to have sympathetic consideration to their representations accorded to them by other members, and members are likely to make use of this right before filing a formal complaint. The Fund's Articles do not provide explicitly for prior consultations.

(b) Prior conciliation

22. The General Agreement itself does not provide for prior conciliation or good offices procedures. However, on 5 April 1966, the CONTRACTING PARTIES decided 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 measure 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 intergovernmental 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.[1]

[1] BISD, 14th Supplement, pages 18-20

This good offices procedure has never been used even though it has now been available for a decade. Informally, however, the Director-General has frequently acted as conciliator in disputes.

23. Only two of the other agreements examined contain clauses on prior conciliation. Under the Cocoa Agreement, the Executive Directors may, at the request of both parties to a dispute, assist by establishing an appropriate conciliation procedure. The Lomé Convention permits the Contracting Parties to have recourse to a good offices procedure "where circumstances permit, and subject to the Council of Ministers being informed, so that any parties concerned may assert their rights". In both these cases, the conciliation or good offices procedures are voluntary and not a condition of access to the formal dispute settlement procedures.

III. Competence of the dispute settlement bodies

(a) Legal nature of the dispute

24. Under the Lomé Convention, the Cocoa Agreement and the Fund's Articles the dispute must concern the interpretation or application of the agreement. The General Agreement, the Textiles Arrangement, the EFTA Convention and the Caribbean Community Treaty however go further. Under the General Agreement, not only breaches of obligations but also measures not conflicting with the General Agreement, and even the existence of "any other situation" permits recourse to Article XXIII procedures provided the measure or situation nullifies or impairs benefits accruing under the Agreement or the objectives of the Agreement. It should be noted however that there has been no Article XXIII case in which a contracting party has claimed that there was a nullification or impairment of the "objectives" of the agreement, and only one case in which the claim was based on a nullification or impairment resulting from "any other situation".[1] The Textiles Arrangement authorizes the TSB to examine, at the request of any participating country, "any particular measures or arrangements, which that country considers to be detrimental to its interests". The EFTA Convention procedures are open to any member State who "considers that any benefit conferred upon it by this Convention or any objective of the Association is being or may be frustrated". The Caribbean Community Treaty contains a similarly worded provision.

25. The competence of the dispute settlement bodies examined thus varies greatly. They are all empowered to interpret the agreements and some may in addition determine whether the "objectives" of the agreements or "benefits" accruing under

[1] Cf. C/W/250

them are frustrated. The TSB may deal with all textiles measures adversely affecting trade interests. As a result the TSB plays not only the rôle of arbitrator applying norms but can also act as a mediator for conflicts of interests not involving norms. The GATT is the only agreement in which not only governmental actions but "any situation" may give rise to a suspension of obligations. This broadens the scope of Article XXIII beyond disputes over governmental actions and gives this provision the character of an emergency clause permitting the suspension of obligations by the CONTRACTING PARTIES in situations in which the Agreement's purposes or the negotiated balance of benefits cannot be realized. In the Fund's Articles the procedures for disputes and emergencies have been separated. The temporary suspension of obligations in the event of an emergency or the development of unforeseen circumstances is subject to regulations on voting, temporal requirements, decision making etc. that are completely different from those governing interpretations.[1]

(b) Parties to the dispute

26. The interpretation procedures under the Fund's Articles are designed not only for disputes between Fund members but also for disputes between a member and the organization. By contrast, the procedures in the other six agreements examined only refer to disputes between States. In GATT, for instance, a contracting party which feels that its balance-of-payments consultations were not conducted correctly or that it was unfairly refused a waiver has no recourse to an independent instance.[2] In 1955 the Executive Secretary proposed to extend the use of Panels to matters arising out of the relationship between individual contracting parties and the CONTRACTING PARTIES. He felt that also in respect of such matters "it may be especially desirable to obtain an objective and technical consideration of the issues involved ... which is difficult to obtain through the normal working party technique".[3] However, the Executive Secretary's proposal was not accepted. One delegation stressed the need for "negotiation and

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[1] Cf. Articles XVI and XVIII of the Fund Agreement.

[2] It may be interesting to note in this context that in 1961 the Executive Secretary took the view that neither a contracting party nor the CONTRACTING PARTIES acting as a whole could take a ruling of the CONTRACTING PARTIES to the International Court of Justice (SR.19/7, page 88).

[3] L/392/Rev.1, paragraph 8

compromise" and another said that "for some problems it was most important that consideration be given not in a limited, specific and expert fashion but by the CONTRACTING PARTIES who could draw on the experience of the working of the General Agreement."[1]

27. Two years after its rejection in principle, the Executive Secretary's proposal was applied in one case. In 1957, the CONTRACTING PARTIES decided to appoint a Panel of five independent experts to examine and submit recommendations on a series of requests for releases from GATT obligations in accordance with Article XVIII:C.[2] The Panel operated until 1960, after which requests for releases ceased.[3] This case was the only one in GATT history in which a Panel was appointed to deal with a matter arising out of the relationship between a contracting party and the CONTRACTING PARTIES.

IV. Procedures of the dispute settlement bodies

(a) Voting

28. The decision of the CONTRACTING PARTIES under Article XXIII of GATT may legally be taken by majority vote, but in practice decisions are taken by consensus. The same applies to the EFTA Convention and the Caribbean Community Treaty. There are no formal rules on voting for the independent bodies that can be established under GATT, the EFTA Convention and Caribbean Community Treaty. These bodies act by consensus and would theoretically have to issue dissenting opinions if the need to do so ever arose. The Textiles Arrangement contains no rules on voting. The TSB decided to take its decisions by consensus. The TSB member representing a country which is party to a dispute may however not obstruct the consensus; in this case agreement among the other members of the TSB suffices. Disputes on which the necessary consensus in the TSB cannot be reached would have to be left undecided.

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[1] SR 10/1

[2] SR 12/2

[3] Cf. Panel reports in: BISD, 6th Supplement, page 112; 7th Supplement, page 75; 8th Supplement, page 90; 9th Supplement, pages 95 and 100.

29. Under the Lomé Convention, the Council of Ministers acts by mutual agreement between the Community on the one hand and the ACP States on the other. The Community and the ACP States arrive at their respective positions on the basis of separate internal protocols. The decisions of the three arbitrators that may be appointed under the Lomé Convention is taken by majority vote. The Cocoa Agreement prescribes that the decisions of the Council, in the case of dispute settlements, are taken by a simple distributed majority vote. No voting rules are laid down for the decision of the ad hoc advisory panel. Under the Fund's Articles, the Executive Directors decide questions of interpretation by a majority of the weighted votes cast; in practice, however, formal votes are avoided. In the Committee on Interpretation of the Board of Governors each member has one vote. The Committee is the only Fund body in which votes are taken on a non-weighted basis. The voting majorities necessary for decisions of the Committee are established by the Board of Governors. The decision of the Committee on Interpretation is final, unless the Board, by an 85 per cent majority of the total weighted votes, decides otherwise.

(b) Temporal requirements

30. The General Agreement imposes no time-limits to be observed by the parties to a dispute or by the CONTRACTING PARTIES. This was considered unsatisfactory by some developing countries and, at their request, the CONTRACTING PARTIES established in 1966 specific time-limits for Article XXIII procedures when used for complaints of a developing country against a developed country. These time-limits are:

1. Duration of good offices procedures: two months
2. Preparation of Panel report: sixty days
3. Implementation of decision: ninety days[1]

31. The Textiles Arrangement provides that the Textiles Surveillance Body shall make its recommendations or findings "within a period of thirty days whenever practicable". The EFTA Convention establishes no fixed time-limits for the dispute settlement procedures nor do the Caribbean Community Treaty and the Cocoa Agreement.

32. The Lomé Convention declares that disputes referred to the Council of Ministers must be dealt with at the next meeting. If one party to a dispute has appointed an arbitrator, the other party must appoint the second arbitrator within two months. The Fund's Articles specify that decisions of the Executive Directors must be referred to the Board of Governors within three months.

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[1] BISD, 14th Supplement, pages 18-20

(c) Interim measures

33. Under the EFTA Convention and the Caribbean Community Treaty a member State may request the Council at any time while the dispute is under consideration to authorize, as a matter of urgency, interim measures to safeguard the member States' position. None of the other agreements examined contain such emergency provisions. The EFTA Convention and the Caribbean Community Treaty are also the only agreements that permit recourse to the dispute settlement procedures when a benefit of the Convention or an objective of the Association "may be" frustrated, that is in the case of a threat of damage and not only when the damage has already occurred.

V. Decision of the dispute settlement bodies

(a) Legal nature

34. The decision of the CONTRACTING PARTIES under Article XXIII of the General Agreement is either a "recommendation" or a "ruling". However, independently of whether the CONTRACTING PARTIES have issued a recommendation or a ruling, in either case they may authorize the suspension of GATT concessions or obligations so that the concrete consequences of not abiding by a recommendation and a ruling may be the same. The Textiles Arrangement provides that the decisions of the TSB are recommendations. The participating countries are to endeavour to accept in full the recommendations, and, if they consider themselves unable to do so, to inform forthwith the TSB of the reasons therefor. Under the EFTA Convention the decisions of the Council in cases of disputes are recommendations. In contrast to GATT, however, a sanction (discriminatory suspension of obligations) may only be applied in cases in which an obligation has not been fulfilled. In cases in which a member State has frustrated a benefit accruing under the Convention or an objective of the Association but has fulfilled its obligations the EFTA Council may make recommendations but may not authorize the suspension of obligations. Under the Caribbean Community Treaty, the decision of the Council is a recommendation. The Council may authorize any member State to suspend in relation to the member State which has not complied with the recommendation the application of such obligations as the Council considers appropriate. Under the Lomé Convention, the decision of the Council of Ministers or the arbitrators is binding on the Contracting Parties, which must take the measures required to implement the decision. The Cocoa Agreement provides that members accept as binding all decisions of the Cocoa Council, including those in dispute settlement cases. Under the Fund Agreement, the decisions on questions of interpretation bind all members.

(b) Means of enforcement

35. Under GATT, the only means to enforce the CONTRACTING PARTIES' decisions is to authorize the retaliatory suspension of trade concessions and other obligations. Retaliation has generally been regarded as an unsatisfactory enforcement technique because it leads to lower levels of trade liberalization, it may snowball, and the contracting party applying the sanction suffers itself to the extent that it loses the benefits of the international division of labour. Moreover, it is always very difficult to direct the retaliatory action only against those segments of the economy that have brought about, and that benefit from, the governmental action giving rise to the dispute. In most cases, retaliation will confer undeserved losses and benefits on sectors that had no part in the disputed action. It is probably for these reasons that the CONTRACTING PARTIES have authorized the suspension of obligations under Article XXIII only in a single exceptional case.[1] In 1966, some delegates proposed a system of monetary compensation for injuries resulting from breaches of the General Agreement. However, this proposal was rejected partly because of the difficulty of enforcing this enforcement mechanism.[2]

36. The Textiles Arrangement contains no provision on sanctions but the possibility of recourse to Article XXIII of the General Agreement is provided for. The EFTA Convention and the Caribbean Community Treaty follow the model of the General Agreement as far as sanctions are concerned. The Lomé Convention does not provide for sanctions in the case of a failure to abide by the decision of the Council or the arbitrators. The Cocoa Agreement declares that the Council may, if it finds that a member is in breach of an obligation, decide to:

1. Suspend that member's voting rights;

2. Suspend additional rights of such member, including that of being eligible for, or of holding, office in the Council or in any of its committees until it has fulfilled its obligations;

3. Exclude such member from the organization.

A member whose voting rights are suspended remains liable for its financial and other obligations under the Cocoa Agreement. The Fund Agreement provides that "if a member fails to fulfil any of its obligations under this Agreement, the Fund may declare the member ineligible to use the resources of the Fund" and it further declares that "if, after the expiration of a reasonable period the

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[1] BISD, 1st Supplement, page 32

[2] COM.TD/F/2, page 8; COM.TD/F/3, pages 3-6

member persists in its failure to fulfil any of its obligations... that member may be required to withdraw from membership ..." [1] There has only been one case of a compulsory withdrawal in the Fund's history.

37. The dispute settlement decisions and their legal consequences under the agreements examined can be categorized as follows:

1. Binding decision with possibility of sanctions (e.g. Cocoa Agreement)

2. Binding decision without possibility of sanctions (e.g. Lomé Convention)

3. Recommendation with the possibility of sanctions (e.g. Caribbean Community Treaty)

4. Recommendation without the possibility of sanctions (e.g. EFTA Convention in case of actions that are legal but frustrate benefits accruing under the Convention or objectives of the Association).

The CONTRACTING PARTIES may make recommendations or give rulings and may resort to sanctions in either case.

VI. Expenses

38. The expenses of the disputes under GATT, the Textiles Arrangement, the EFTA Convention and the Fund's Articles are paid out of the general budget of the respective organizations. Under the Caribbean Community Treaty, the Council has the power to decide how the expenses of the ad hoc tribunal are to be defrayed. The parties to the Lomé Convention have agreed, in a separate protocol, on the expenses of arbitration as follows: The arbitrators are entitled to a refund of their travel and subsistence expenditure. The latter is determined by the Council of Ministers. One half of travel and subsistence expenditure incurred by the arbitrators is borne by the Community and the other half by the ACP States. Expenditure relating to any Registry set up by the arbitrators, to preparatory inquiries into disputes and to the organization of hearings (premises, personnel, interpreting, etc.) are borne by the Community. Expenditures relating to special inquiries are settled together with the other costs and the parties have to deposit advances as determined by an order of the arbitrators.

39. The Cocoa Agreement provides that the cost of voluntary conciliation procedures is borne by the parties to the dispute; the expenses incurred in establishing an ad hoc advisory panel are paid by the organization.

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[1] Gold, Joseph "Membership and Non-Membership in the International Monetary Fund" (Washington: 1974), pages 345-372.

ANNEX A

The Dispute Settlement Provisions of GATT and Six Other International Economic Agreements

1. THE GENERAL AGREEMENT ON TARIFFS AND TRADE

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.

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 consultations 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.

2. THE ARRANGEMENT REGARDING INTERNATIONAL TRADE IN TEXTILES

Article 10

1. There is established within the framework of GATT a Textiles Committee consisting of representatives of the parties to this Arrangement. The Committee shall carry out the responsibilities ascribed to it under this Arrangement.

2. ------

3. Any case of divergence of view between the participating countries as to the interpretation or application of this Arrangement may be referred to the Committee for its opinion.

Article 11

1. The Textiles Committee shall establish a Textiles Surveillance Body to supervise the implementation of this Arrangement. It shall consist of a Chairman and eight members to be appointed by the parties to this Arrangement on a basis to be determined by the Textiles Committee so as to ensure its efficient operation. In order to keep its membership balanced and broadly representative of the parties to this Arrangement provision shall be made for rotation of the members as appropriate.

2. The Textiles Surveillance Body shall be considered as a standing body and shall meet as necessary to carry out the functions required of it under this Arrangement. It shall rely on information to be supplied by the participating countries, supplemented by any necessary details and clarification it may decide to seek from them or from other sources. Further, it may rely for technical assistance on the services of the GATT secretariat and may also hear technical experts proposed by one or more of its members.

3. The Textiles Surveillance Body shall take the action specifically required of it in articles of this Arrangement.

4. 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.

5. 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.

6. Before formulating its recommendations on any particular matter referred to it, the Textiles Surveillance body shall invite participation of such participating countries as may be directly affected by the matter in question.

7. When the Textiles Surveillance Body is called upon to make recommendations or findings it shall do so, except when otherwise provided in this Arrangement, within a period of thirty days whenever practicable. All such recommendations or findings shall be communicated to the Textiles Committee for the information of its members.

8. Participating countries shall endeavour to accept in full the recommendations of the Textiles Surveillance Body. Whenever they consider themselves unable to follow any such recommendations, they shall forthwith inform the Textiles Surveillance Body of the reasons therefor and of the extent, if any, to which they are able to follow the recommendations.

9. 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.

10. 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.

3. THE CONVENTION ESTABLISHING THE EUROPEAN FREE TRADE ASSOCIATION

Article 31

General Consultations and Complaints Procedure

1. If any member State considers that any benefit conferred upon it by this Convention or any objective of the Association is being or may be frustrated and if no satisfactory settlement is reached between the member States concerned, any of those member States may refer the matter to the Council.

2. The Council shall promptly, by majority vote, make arrangements for examining the matter. Such arrangements may include a reference to an examining committee constituted in accordance with Article 33. Before taking action under paragraph 3 of this Article, the Council shall so refer the matter at the request of any member State concerned. Member States shall furnish all information which they can make available and shall lend their assistance to establish the facts.

3. When considering the matter, the Council shall have regard to whether it has been established that an obligation under the Convention has not been fulfilled, and whether and to what extent any benefit conferred by the Convention or any objective of the Association is being or may be frustrated. In the light of this consideration and of the report of any examining committee which may have been appointed, the Council may, by majority vote, make to any member State such recommendations as it considers appropriate.

4. If a member State does not or is unable to comply with a recommendation made in accordance with paragraph 3 of this Article and the Council finds, by majority vote, that an obligation under this Convention has not been fulfilled, the Council may, by majority decision, authorize any member State to suspend to the member State which has not complied with the recommendation the application of such obligations under this Convention as the Council considers appropriate.

5. Any member State may, at any time while the matter is under consideration, request the Council to authorize, as a matter of urgency, interim measures to safeguard its position. If it appears to the Council that the circumstances are sufficiently serious to justify interim action, and without prejudice to any action which it may subsequently take in accordance with the preceding paragraphs of this Article, the Council may, by majority decision, authorize a member State to suspend its obligations under this Convention to such an extent and for such a period as the Council considers appropriate.

4. ACP-EEC CONVENTION OF LOME

Article 81

1. Any dispute which arises between one or more member States or the Community on the one hand, and one or more ACP States on the other, concerning the interpretation or the application of this Convention may be placed before the Council of Ministers.

2. Where circumstances permit, and subject to the Council of Ministers being informed, so that any parties concerned may assert their rights, the Contracting Parties may have recourse to a good offices procedure.

3. If the Council of Ministers fails to settle the dispute at its next meeting, either Party may notify the other of the appointment of an arbitrator; the other Party must then appoint a second arbitrator within two months. For the application of this procedure, the Community and the member States shall be deemed to be one Party to the dispute.

The Council of Ministers shall appoint a third arbitrator.

The decisions of the arbitrators shall be taken by majority vote.

Each Party to the dispute must take the measures required for the implementation of the arbitrators' decision.

Lomé Convention: Protocol No. 4

Article 3

The arbitrators appointed in accordance with Article 81 of the Convention shall be entitled to a refund of their travel and subsistence expenditure. The latter shall be determined by the Council of Ministers.

One half of travel and subsistence expenditure incurred by the arbitrators shall be borne by the Community and the other half by the ACP States.

Expenditure relating to any Registry set up by the arbitrators, to preparatory inquiries into disputes, and to the organization of hearings (premises, personnel, interpreting, etc.) shall be borne by the Community.

Expenditure relating to special inquiries shall be settled together with the other costs and the parties shall deposit advances as determined by an order of the arbitrators.

5. THE TREATY ESTABLISHING THE CARIBBEAN COMMUNITY

Article 11

Disputes Procedure Within the Common Market

1. If any Member State considers that any benefit conferred upon it by this Annex or any objective of the Common Market is being or may be frustrated and if no satisfactory settlement is reached between the Member States concerned any of those Member States may refer the matter to the Council.

2. The Council shall promptly, make arrangements for examining the matter. Such arrangements may include a reference to a Tribunal constituted in accordance with Article 12 of this Annex. The Council shall refer the matter at the request of any Member State concerned to the Tribunal. Member States shall furnish all information which may be required by the Tribunal or the Council in order that the facts may be established and the issue determined.

3. If in pursuance of the foregoing provisions of this Article the Council or the Tribunal, as the case may be, finds that any benefit conferred on a Member State by this Annex or any objective of the Common Market is being or may be frustrated, the Council may, by majority vote, make to the Member State concerned such recommendations as it considers appropriate.

4. If a Member State to which a recommendation is made under paragraph 3 of this Article does not or is unable to comply with such recommendation the Council may, by majority vote, authorize any Member State to suspend in relation to the Member State which has not complied with the recommendation the application of such obligations under this Annex as the Council considers appropriate.

5. Any Member State may at any time while any matter is under consideration under this Article request the Council to authorize, as a matter of urgency, interim measures to safeguard its position. If the matter is being considered by the Tribunal such request shall be referred by the Council to the Tribunal for its recommendation. If it is found by a majority vote of the Council that the circumstances are sufficiently serious to justify interim action, and without prejudice to any action which it may subsequently take in accordance with the preceding paragraphs of this Article, the Council may, by majority vote, authorize a Member State to suspend its obligations under this Annex to such an extent and for such period as the Council considers appropriate.

Article 12

Reference to Tribunal

1. The establishment and composition of the Tribunal referred to in Article 11 of this Annex shall be governed by the following provisions of this Article.

2. For the purposes of establishing an ad hoc tribunal referred to in Article 11 of this Annex, a list of arbitrators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General. To this end, every Member State shall be invited to nominate two persons, and the names of the persons so nominated shall constitute the list. The term of an arbitrator, including that of any arbitrator nominated to fill a vacancy, shall be five years and may be renewed.

3. Each party to the dispute shall be entitled to appoint from the list an arbitrator to an ad hoc tribunal. The two arbitrators chosen by the parties shall be appointed within thirty days following the date on which the notification was received by the Secretary-General. The two arbitrators shall within fifteen days following the date of the last of their own appointments, appoint a third arbitrator from the list who shall be the chairman; as far as practicable the chairman shall not be a national of any of the parties to the dispute.

4. Where the first two arbitrators fail to appoint a chairman within the period prescribed, the Secretary-General shall within fifteen days following the expiry of that period appoint a chairman. If any party fails to appoint an arbitrator within the period prescribed for such an appointment, the Secretary-General shall appoint an arbitrator within fifteen days following the expiry of such period. Any vacancy shall be filled in the manner specified for the initial appointment.

5. Where more than two Member States are parties to a dispute, the parties concerned shall agree among themselves on the two arbitrators to be appointed from the list. In the absence of such appointment within the prescribed period, the Secretary-General shall appoint a sole arbitrator whether from the list or otherwise, for the purpose.

6. An ad hoc tribunal shall decide its own procedure and may, with the consent of the parties to the dispute, invite any party to this Annex to submit its views orally or in writing.

7. The Secretary-General shall provide the ad hoc tribunal with such assistance and facilities as it may require.

8. The expenses of the ad hoc tribunal shall be defrayed in such manner as determined by the Council.

9. Member States undertake to employ the procedures set out in this Article for the settlement of any dispute specified in paragraph 1 of Article 11 and to refrain from any other method of disputes settlement.

6. THE INTERNATIONAL COCOA AGREEMENT

Article 61

Consultations

Each member shall accord sympathetic consideration to any representations made to it by another member concerning the interpretation or application of this Agreement and shall afford adequate opportunity for consultations. In the course of such consultations, on the request of either party and with the consent of the other, the Executive Director shall establish an appropriate conciliation procedure. The costs of such procedure shall not be chargeable to the Organization. If such procedure leads to a solution, this shall be reported to the Executive Director. If no solution is reached, the matter may, at the request of either party, be referred to the Council in accordance with Article 62.

Article 62

Disputes

1. Any dispute concerning the interpretation or application of this Agreement which is not settled by the parties to the dispute shall, at the request of either party to the dispute, be referred to the Council for decision.

2. When a dispute has been referred to the Council under paragraph 1, and has been discussed, a majority of members, or members holding not less than one third of the total votes, may require the Council, before giving its decision, to seek the opinion on the issues in dispute of an ad hoc advisory panel to be constituted as described in paragraph 3.

3. (a) Unless the Council unanimously decides otherwise, the ad hoc advisory panel shall consist of:

(i) two persons, one having wide experience in matters of the kind in dispute and the other having legal standing and experience, nominated by the exporting members;

(ii) two such persons nominated by the importing members; and

(iii) a chairman selected unanimously by the four persons nominated under (i) and (ii) or, if they fail to agree, by the Chairman of the Council.

(b) Nationals of members shall not be ineligible to serve on the ad hoc advisory panel.

(c) Persons appointed to the ad hoc advisory panel shall act in their personal capacities and without instructions from any government.

(d) The costs of the ad hoc advisory panel shall be paid by the Organization.

4. The opinion of the ad hoc advisory panel and the reasons therefor shall be submitted to the Council which, after considering all the relevant information, shall decide the dispute.

Article 63

Complaints and Action by the Council

1. Any complaint that any member has failed to fulfil its obligations under this Agreement shall, at the request of the member making the complaint, be referred to the Council, which shall consider it and make a decision on the matter.

2. Any finding by the Council that a member is in breach of its obligations under this Agreement shall be made by a simple distributed majority vote and shall specify the nature of the breach.

3. Whenever the Council, whether as a result of a complaint or otherwise, finds that a member is in breach of its obligations under this Agreement it may, without prejudice to such other measures as are specifically provided for in other Articles of this Agreement, including Article 73, by special vote:

(a) suspend that member's voting rights in the Council and in the Executive Committee; and

(b) if it considers necessary, suspend additional rights of such member, including that of being eligible for, or of holding, office in the Council or in any of its committees until it has fulfilled its obligations.

4. A member whose voting rights are suspended under paragraph 3 shall remain liable for its financial and other obligations under this Agreement.

Article 73

Exclusion

If the Council finds, under paragraph 3 of Article 63, that any member is in breach of its obligations under this Agreement and decides further that such breach significantly impairs the operation of this Agreement, it may by special vote exclude such member from the Organization. The Council shall immediately notify the Secretary-General of the United Nations of any such exclusion. Ninety days after the date of the Council's decision, that member shall cease to be a member of the Organization and, if such member is a Contracting Party, a Party to this Agreement.

7. THE ARTICLES OF AGREEMENT OF THE INTERNATIONAL MONETARY FUND

Article XVIII

Interpretation

(a) Any question of interpretation of the provisions of this Agreement arising between any member and the Fund or between any members of the Fund shall be submitted to the Executive Directors for their decision. If the question particularly affects any member not entitled to appoint an executive director it shall be entitled to representation in accordance with Article XII, Section 3(j).

(b) In any case where the Executive Directors have given a decision under (a) above, any member may require, within three months from the date of the decision, that the question be referred to the Board of Governors, whose decision shall be final. Any question referred to the Board of Governors shall be considered by a Committee on Interpretation of the Board of Governors. Each Committee member shall have one vote. The Board of Governors shall establish the membership, procedures, and voting majorities of the Committee. A decision of the Committee shall be the decision of the Board of Governors unless the Board by an eighty-five percent majority of the total voting power decides otherwise. Pending the result of the reference to the Board the Fund may, so far as it deems necessary, act on the basis of the decision of the Executive Directors.

(c) Whenever a disagreement arises between the Fund and a member which has withdrawn, or between the Fund and any member during liquidation of the Fund, such disagreement shall be submitted to arbitration by a tribunal of three arbitrators, one appointed by the Fund, another by the member or withdrawing member and an umpire who, unless the parties otherwise agree, shall be appointed by the President of the Permanent Court of International Justice or such other authority as may have been prescribed by regulation adopted by the Fund. The umpire shall have full power to settle all questions of procedure in any case where the parties are in disagreement with respect thereto.

Article XV

Withdrawal from Membership

Section 1. ---

Section 2. Compulsory withdrawal

(a) If a member fails to fulfil any of its obligations under this Agreement, the Fund may declare the member ineligible to use the resources of the Fund. Nothing in this Section shall be deemed to limit the provisions of Article IV; Section 6, Article V, Section 5, or Article VI, Section 1.

(b) If, after the expiration of a reasonable period the member persists in its failure to fulfil any of its obligations under this Agreement, or a difference between a member and the Fund under Article IV, Section 6, continues, that member may be required to withdraw from membership in the Fund by a decision of the Board of Governors carried by a majority of the governors representing a majority of the total voting power.

(c) Regulations shall be adopted to ensure that before action is taken against any member under (a) or (b) above, the member shall be informed in reasonable time of the complaint against it and given an adequate opportunity for stating its case, both orally and in writing.

ANNEX B

Selected Bibliography on Dispute Settlement in International Economic Organizations

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[1] Hudec's book is the most detailed study on dispute settlement in GATT. Attention is drawn to Appendix A of this book which compiles the disputes proceedings between 1948 and 1974.

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