MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND

RESTRICTED

MTN.GNG/NG13/W/31
14 July 1989

Special Distribution

Group of Negotiations on Goods (GATT)

Negotiating Group on Dispute Settlement

NON-VIOLATION COMPLAINTS UNDER GATT ARTICLE XXIII:2

Note by the Secretariat

1. At its meeting on 12 May 1989, the Negotiating Group requested the Secretariat to prepare a note on "non-violation complaints under GATT Article XXIII:2" for the next meeting of the Group (MTN.GNG/NG13/14, paragraph 4). Part I of this note presents a brief analysis of the distinction between "violation complaints" and "non-violation complaints" in the text of Article XXIII. Part II summarizes the pertinent drafting history of Article XXIII. Part III surveys past GATT practice in respect of non-violation complaints. Part IV concludes with a list of questions which the Negotiating Group might wish to consider in its discussions on this matter. The note has been prepared on the sole responsibility of the Secretariat and does not commit any delegation.

I. The Distinction between "Violation Complaints" and "Non-Violation Complaints" in the Text of Article XXIII

2. The text of the dispute settlement provisions in Article XXIII (reproduced in Annex I) differs from the dispute settlement provisions of most other international agreements in several respects. Traditionally, the dispute settlement provisions of international treaties focus on legal concepts such as the rights and obligations of the contracting parties, infringement of treaty obligations, or "legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation" (Article 36 of the Statute of the International Court of Justice). By contrast, Article XXIII makes use of certain concepts that are rather unique in the law. It proceeds from the concept of "nullification or impairment of any benefit ... accruing under this Agreement". Even breaches of obligations are described in GATT practice as "prima facie nullification or impairment of benefits". Article XXIII permits any contracting party to request consultations with other contracting parties and recommendations, rulings, and an authorization by the CONTRACTING PARTIES to suspend the application of concessions or other obligations, if the complaining party considers that:

> (1) any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or

(2) 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.

Many of these unusual legal concepts (e.g. "nullification or impairment" of "any benefit", "any objective ... being impeded", "any situation") have neither been defined in the General Agreement itself nor in subsequent GATT practice. This legal uncertainty has sometimes been criticized as reducing the legal predictability of GATT dispute settlement proceedings. It appears to make the procedural rules on the exercise of this broad grant of jurisdiction all the more important.

3. Article XXIII also differs from most other international dispute settlement provisions in that it grants a very broad jurisdiction to the CONTRACTING PARTIES to deal with

- complaints about government measures consistent with the General Agreement;

- matters arising from "any other situation" even if not related to specific governmental actions;

- impediments to "the attainment of any objective of the Agreement".

4. While complaints based upon an alleged "failure of another contracting party to carry out its obligations under this Agreement" (Article XXIII:1(a)) are sometimes referred to as "violation complaints", complaints invoking Article XXIII:1(b) have in a few instances been denoted as "non-violation complaints"[1] or as being based on "the well-established principle of non-violation nullification or impairment".[2] But the term "non-violation complaint" has never been precisely defined by the CONTRACTING PARTIES. Nor have the differences between "non-violation complaints" based upon Article XXIII:1(b) and "situation complaints" based upon Article XXIII:1(c), or the relationship between "situations" in terms of Article XXIII:1(c) and "situations" referred to in other safeguard clauses (such as Articles XII, XVIII and XIX), or the relationship between

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[1] E.g. in the Panel Report on EEC Production Aids on Canned Fruit (GATT doc. L/5778, paragraphs 14, 49 et seq.).

[2] GATT doc. C/M/194, at 24; C/M/186, at 17

the altogether six different types of complaints mentioned in Article XXIII:1 and the three different kinds of remedial actions by the CONTRACTING PARTIES mentioned in Article XXIII:2, been specifically regulated in the text of Article XXIII.

Table 1

Complaints and Remedies under Article XXIII

	If any contracting party should consider that		
Two types of:	any benefit accruing to it ... is being nullified or impaired	or	the attainment of any objective of the Agreement is being impeded
	as the result of		
- "violation complaints"	(a) the failure of another contracting party to carry out its obligations under this Agreement,	or	
- "non-violation complaints" related to governmental measures	(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement,	or	
- "situation complaints"	(c) the existence of any other situation		
Three types of remedial actions by the CONTRACTING PARTIES:	..... the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and		
- recommendations	shall make appropriate recommendations ...		
- rulings	or give a ruling on the matter ...		
- authorizations to suspend obligations	they may authorize '... to suspend ... the application ... of such concessions or other obligations ...		

II. Non-Violation Complaints and the Drafting History of Article XXIII

5. The concept of nullification and impairment originated in the bilateral trade agreements negotiated in the 1920s and 1930s. In order to protect the agreed tariff reductions as well as the reciprocal "balance of concessions" from being undermined by non-tariff trade barriers or by other governmental measures (e.g. outside the trade sphere), those agreements

made use of three complementary legal techniques: (1) substantive legal rules prohibiting or limiting the use of trade restricting or distorting trade policy measures; (2) procedural rules providing for legal remedies not only in case of treaty violations but also in situations where the commercial opportunities protected by those trade agreements were being nullified by other (e.g. purely domestic) measures; and (3) termination clauses allowing a disappointed party to terminate the trade policy obligations altogether on short notice (mostly three to six months). For instance, a report by a group of trade experts at the 1933 London Monetary and Economic Conference recommended the inclusion of the following general consultation and adjustment clause into international trade agreements:

> "If, subsequent to the conclusion of the present treaty, one of the Contracting Parties introduces any measure, which even though it does not result in an infringement of terms of the treaty, is considered by the other Party to be of such a nature as to have the effect of nullifying or impairing any object of the treaty, the former shall not refuse to enter into negotiations with the purpose either of an examination of proposals made by the latter or of the friendly adjustment of any complaint preferred by it."[3]

Another example was the dispute settlement provision in the 1942 Reciprocal Trade Agreement between Mexico and the United States which provided that if either party

> "should consider that any measure adopted by the other Government, even thcugh it does not conflict with the terms of this Agreement, has the effect of nullifying or impairing any object of the Agreement, such other Government shall give sympathetic consideration to such written representations or proposals as may be made with a view to effecting a mutually satisfactory adjustment of the matter".[4]

A 1931 League of Nations survey of dispute settlement procedures showed that in seventy-three bilateral commercial treaties between European States, not one distinguished between disputes on legal obligations and those on other claims involving an impairment of reciprocal commitments.[5]

6. During the drafting of the dispute settlement provisions which were later incorporated into GATT Article XXIII and into Chapter VIII of the 1948 Havana Charter for an International Trade Organization (reproduced in

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[3]Monetary and Economic Conference, League of Nations, Reports Approved by the Conference on 27 July 1933, and Resolutions Adopted by the Bureau and the Executive Committee, document C.435.M.220.1933.II.Spec.4, at 29-30.

[4]Text in: US Department of State, Executive Agreement Series 276 (1943).

[5]Memorandum Relating to the Pacific Settlement of International Disputes Concerning Economic Questions in General and Commercial and Customs Questions in Particular, League of Nations Doc. E 666 (1931) II.B.1

Annex II), it was stated that the dispute settlement provisions (corresponding to Article XXIII) could be invoked also in situations in which considerations came up under Chapter II (on "Employment and Economic Activity") or Chapter III of the draft Havana Charter (on "Economic Development and Reconstruction") which were not dealt with under the specific Articles on restrictions to safeguard the balance of payments.[6] It was also stated that Article [XXIII] 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-payments difficulties; if we become subject again to widespread fluctuations in the prices of primary products with devastating effects upon individual economies."[7] 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 [XXIII], if the measures adopted by the other Member under the provisions of Article 3 [of the Charter] had not produced the effects which they were designed to achieve and thus did not result in such benefits as might reasonably be anticipated."[8]

7. In accordance with this broad scope of application of Article XXIII, it was further said

> "by the word 'benefits' we conceive not merely benefits accorded for instance, under the provisions of Article 24 [referring to tariff concessions], but the benefits which other countries derive from the acceptance of the wider obligations imposed by the Charter; that is the benefit which we, amongst other people, would derive from the acceptance of the employment obligations by major industrial countries, and the benefit which industrial countries would derive from the improvements in the standard of living resulting from the operations of Chapter IV to countries with under-developed economies. So I would like to make it quite clear that we have used benefit in this context in a very wide sense."[9]

In Article 93 of the Havana Charter, which corresponds to Article XXIII of the General Agreement, the terms used in Article XXIII:1 ("benefit accruing ... directly or indirectly") were further expanded ("benefit accruing ... directly or indirectly, implicitly or explicitly") so as to make sure that

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[6] EPCT/TAC/PV/13 (1947), at 41

[7] EPCT/A/PV/5 (1947), at 14

[8] Reports of Committees and Principal Sub-Committees, UN Conference on Trade and Employment held at Havana, Cuba, from 21 November 1947 to 24 March 1948, ICITO 1948, at 155.

[9] EPCT/A/PV/12 (1947), at 7

nullification or impairment of "any benefit" could also be claimed to exist if the attainment of any objective of the Agreement was being impeded (the second clause in the heading of Article XXIII:1 on "attainment of any objective of the Agreement ... being impeded" was not included into the text of Article 93 of the Havana Charter on the ground that it had no discernible limits).[10]

8. The six different types of complaints provided for in Article XXIII:1, their undefined substantive conditions and the broad jurisdiction of the CONTRACTING PARTIES under Article XXIII:2 to adjust the mutual rights and obligations confirm that Article XXIII goes beyond the traditional dispute settlement provisions focusing on treaty violations and was meant to deal also with matters which are often addressed in separate "escape clauses" in other Agreements (see, for example, the "emergency provisions" in Article XXVII of the Agreement establishing the International Monetary Fund). But the vague legal concepts used in Article XXIII, the seemingly identical remedies for six different types of complaints, and the broad power of the CONTRACTING PARTIES to apply and "interpret this clause intelligently"[11] were also criticized in the drafting conferences. One participant stated:

> "Of all the vague and woolly punitive provisions that one could make, this seems to me to hold the prize place. It appears to me that what it says is this: In this wide world of sin there are certain sins which we have not yet discovered and which after long examination we cannot define; but there being such sins, we will provide some sort of punishment for them if we find out what they are and if we find anybody committing them."[12]

The reply to this criticism was:

> "We shall achieve ..., if our negotiations are successful, a careful balance of the interests of the contracting parties. This balance rests upon certain assumptions as to the character of the underlying situation in the years to come. And it involves a mutuality of obligations and benefits. If, with the passage of time, the underlying situation should change or the benefits accorded any contracting party should be impaired, the balance would be destroyed. It is the purpose of Article XXIII to restore this balance by providing for a compensatory adjustment in the obligations which the contracting party has assumed. What we have really provided, in the last analysis, is not that retaliation shall be invited or sanctions invoked, but that a balance of interest, once established, shall be maintained."[13]

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[10] E/CONF.2/C.6/W.30 (1948)

[11] This expectation was expressed by the Australian delegate, see: EPCT/A/PV/12, at 21

[12] EPCT/186, at 53

[13] EPCT/A/PV6, at 5

At the Havana Conference the meaning of the dispute settlement provisions was clarified in several respects also as regards non-violation complaints. In particular:

- the number of the different types of complaints was reduced from six to three by deleting the second heading about "the attainment of any objective of this Agreement ... being impeded" as a separate cause of complaint (see Article 93, paragraph 1, of the Havana Charter);

- the enforcement and remedy provisions distinguished more clearly between "violation complaints" (e.g. Article 94, paragraph 2(d)) and "non-violation" and "situation complaints" (e.g. Article 94, paragraph 2(e), Article 95, paragraph 3);

- it was made clear in Article 93, paragraph 2(e), as well as in Committee Reports[14], that the power to issue "recommendations" regarding measures not in violation of GATT rules does not comprise the power to "require" a member to suspend or withdraw a measure not in conflict with the Charter[15];

- and it was further clarified that in the provisions authorizing withdrawal of concessions "the nature of the relief to be granted ... (under Article XXIII:2) is compensatory and not punitive. The word 'appropriate' in the texts should not be read to provide for relief beyond compensation."[16]

After the Havana Conference, none of these changes to the dispute settlement provisions was incorporated into the text of Article XXIII.

III. Non-Violation Complaints in GATT Practice

9. Article XXIII:1(b) or (c) was invoked in thirteen cases out of a total of about 130 complaints formally raised under Article XXIII since 1948 up to the end of 1988.[17] These cases were:

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[14] Reports of Committees (note 8), at 155

[15] Already at the 1947 preparatory meeting at Geneva, it was stated that members would be "under no specific and contractual obligations to accept those recommendations" (EPCT/A/PV/5, at 16). At the Havana Conference, it was even agreed in a Sub-Committee that the power to make recommendations did not empower to "propose" the suspension or withdrawal of a measure not in conflict with the Charter, see: E/CONF.2/C.6/83, at 2, and E/CONF.2/C.6/W/103, at 2. But the word "propose" was later changed in favour of the term "require" (see above note 14).

[16] Report of Committees (note 8), at 155

[17] See the chronological list of Article XXIII complaints in document MTN.GNG/NG13/W/4, at 51-79 (an update of this document is in preparation).

(1) Cuban Import Restrictions on Textiles

10. In 1948, the United States complained that certain import restrictions by Cuba on textiles, whether or not they were in violation of Article XI, were restricting trade and thereby impairing the value of tariff concessions granted by Cuba on textiles in October 1947. The dispute was referred to a GATT Working Party which reported that the two parties had agreed on a bilateral settlement of their dispute.[18]

(2) The Australian Subsidy on Ammonium Sulphate

11. In 1949, Chile complained that Australia's discontinuance of a policy of parallel subsidies on two competing fertilizer products, as a result of which a subsidy on imported sodium nitrate was removed whereas domestic ammonium sulphate continued to be subsidized, had nullified or impaired the tariff concession granted by Australia to Chile on sodium nitrate in 1947. The Working Party report, adopted by the CONTRACTING PARTIES on 3 April 1950, concluded "that no evidence had been presented to show that the Australian Government had failed to carry out its obligations under the Agreement".[19] But the Working Party agreed that "the injury which the Government of Chile said it had suffered represented a nullification or impairment of a benefit accruing to Chile directly or indirectly under the General Agreement" in terms of Article XXIII

> "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;

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[18] CP.2/43 (1948)

[19] BISD II (1952), 188-196, at paragraph 11

(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 "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. The working party has no intention of implying that the action taken by the Australian Government was unreasonable, but simply that the Chilean Government could not have been expected during the negotiations in 1947 to have foreseen such action or the reasons which led to it."[20]

The Working Party "thus concluded that there was a prima facie case that the value of a concession granted to Chile had been impaired as a result of a measure which did not conflict with the provisions of the General Agreement."[21] The Working Party submitted the following text of a draft recommendation to the CONTRACTING PARTIES so as to assist the Australian and Chilean governments to arrive at a satisfactory adjustment:

"The CONTRACTING PARTIES recommend that the Australian Government consider, with due regard to its policy of stabilizing the cost of production of certain crops, means to remove any competitive inequality between nitrate of soda and sulphate of ammonia for use as fertilizers which may in practice exist as a result of the removal of nitrate of soda from the operations of the subsidized pool of nitrogenous fertilizers and communicate the results of their consideration to the Chilean Government, and that the two parties report to the CONTRACTING PARTIES at the next session."[22]

But in making this recommendation, the Working Party drew attention to its view that:

"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

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[20]BISD II (1952), at 193, paragraph 12

[21]BISD II (1952), at 194, paragraph 13

[22]BISD II (1952), at 195, paragraph 17

> 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."[23]

12. The annex to the Working Party report notes that agreement on this matter was reached between the two governments and notified to the CONTRACTING PARTIES on 6 November 1950. The annex further reproduces a statement by the Australian representative expressing his disagreement with the reasoning of the Working Party.

13. For the understanding of the scope and rationale of non-violation complaints, the following considerations of the Working Party are also worth mentioning:

> "the Working Party considered that the removal of a subsidy, in itself, would not normally result in nullification or impairment. In the case under consideration, the inequality created and the treatment that Chile could reasonably 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 conclusion.
>
> 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."[24]

14. In his statement annexed to the Working Party report, the Australian representative had criticized, inter alia, that the Working Party had gone to considerable trouble to show the reasonable expectations of Chile without attributing equal importance to the "question of what obligations with respect to ammonium sulphate Australia could reasonably have expected when she consented to a binding of the free-duty rate on sodium nitrate."[25]

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[23]BISD II (1952), at 195, paragraph 16

[24]BISD II (1952), at 193, paragraph 12

[25]According to the Australian statement, "the history and practice of tariff negotiations show clearly that if a country seeking a tariff

(Footnote Continued)

The relationship between tariff bindings and the "freedom under the General Agreement ... to impose subsidies", explicitly acknowledged in the Working Party, was further clarified in a Working Party report, adopted on 3 March 1955 during the 1954-55 Review Session of the CONTRACTING PARTIES, which 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."[26]

This 1955 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."[27]

The question of whether an assumption of "reasonable expectations" and of a "prima facie nullification or impairment" of tariff concessions is no longer justified when the subsidy was granted not on the concession product concerned but on a competitive substitute product, was not further elaborated in the report.

15. A Panel report on "Operation of the Provisions of Article XVI", adopted on 21 November 1961, noted in respect of the above-mentioned quotation from the 1955 Working Party report that the expression "reasonable expectation" was qualified by the words "failing evidence to the contrary". By this the Panel understood:

> "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

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(Footnote Continued)
concession on a product desires to assure itself of a certain treatment for that product in a field apart from rates of duty and to an extent going further than is provided for in the various articles of the General Agreement, the objective sought must be a matter for negotiation in addition to the actual negotiation respecting the rates of duty to be applied", see: BISD II (1952), at 196

[26] BISD, Third Supplement (1955), at 224

[27] BISD Third Supplement (1955), at 225

nullified and impaired by the introduction or increase of a domestic subsidy."[28]

(3) Treatment by Germany of Imports of Sardines

16. In 1952, Norway complained that the imposition by Germany of different tariff rates, border tax rates and quantitative restrictions on biologically distinct but commercially competitive kinds of sardines discriminated in favour of sardines exported mainly by Portugal ("clupea pilchardus") in a manner inconsistent with Articles I:1 and XIII:1 and nullified or impaired the German tariff bindings on "sprats" ("clupea sprattus") and "herrings" ("clupea harengus") negotiated by Norway in the 1951 Torquay negotiations. The Panel Report, adopted on 31 October 1952, concluded "that no sufficient evidence had been presented to show that the German Government had failed to carry out its obligations under Article I:1 and Article XIII:1."[29] But the Panel agreed that nullification or impairment in terms of 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. In reaching this conclusion, the Panel was influenced in particular by the following circumstances:
>
> (a) the products of the various varieties of clupaea are closely related and are considered by many interested parties as directly competitive;
>
> (b) that both parties agreed that the question of the equality of treatment was discussed in the course of the Torquay negotiations; and
>
> (c) although no conclusive evidence was produced as to the scope and tenor of the assurances or statements which may have been given or made in the course of these discussions, it is reasonable to assume that the Norwegian delegation in assessing the value of the concessions offered by Germany regarding preparations of clupeae and in offering counter concessions, had taken into

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[28] BISD Tenth Supplement (1962), at 209, paragraph 28

[29] BISD First Supplement (1953), 53-59, at 58

account the advantages resulting from the continuation of the system of equality which had prevailed ever since 1925."[30]

Notwithstanding the lack of a panel finding as to whether the German Government actually had given any assurances and what it had said, the Panel Report concluded from this:

"As the measures taken by the German Government have nullified the validity of the assumptions which governed the attitude of the Norwegian delegation and substantially reduced the value of the concessions obtained by Norway, the Panel found that the Norwegian Government is justified in claiming that it had suffered an impairment of a benefit accruing to it under the General Agreement.

In the light of the considerations set out above, 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."[31]

17. In a Recommendation adopted on 31 October 1952, the CONTRACTING PARTIES accordingly recommended

"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."[32]

In October 1953, the parties to the dispute informed the CONTRACTING PARTIES of their agreement on a settlement of the dispute, under which Germany undertook to correct all but one per cent of the tariff differential and to make satisfactory adjustments in the other areas.[33]

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[30] BISD First Supplement (1953), at 59, paragraph 16

[31] Idem, paragraphs 17 and 18

[32] BISD First Supplement (1953), at 31

[33] GATT doc. G/52/Add.1 (1953)

(4) German Import Duties on Starch

18. In 1954, the Benelux countries complained that their 1950-51 exchange of tariff concessions with Germany had been out of balance as a result of the failure by Germany to bring down to the level of the Benelux tariff rates the German duties on certain starch products. During these tariff negotiations, the chief of the German delegation had agreed in a letter delivered to the Benelux delegations

> "that the duties in the German draft custom tariff on these products should be reduced as soon as possible to the level of the duties applied by Benelux ... The Government of the Federal Republic of Germany is prepared to open negotiations with the Governments of the Benelux countries on the subject of a new reduction of German duties on starch and starch derivatives with a view to applying as soon as possible under the new German custom tariff a duty of 15 per cent on starch and potato flour and similar duties on starch derivatives."[34]

The Panel Report, which was "noted" by the CONTRACTING PARTIES on 16 February 1955, states that:

> "it was not necessary for the Panel to submit definite recommendations to the CONTRACTING PARTIES since the German delegation was in a position to make an offer which was considered by the Benelux delegations as providing a satisfactory adjustment of the matter for the time being."[35]

The Panel nonetheless considered the case and found that the two parties agreed that the "two promises" contained in the letter by the chief of the German delegation, "formed part of the balance of concessions granted at Torquay and that the contemplated reduction of the German duties would be made without any further concession from the Benelux Governments."[36] The Panel findings appear to indicate that a "promise" to negotiate on progressive tariff reductions, even though it had neither been made part of the formal schedule of tariff concessions nor deposited formally with the Secretariat, can justify a finding of "non-violation nullification or impairment of benefits" in terms of Article XXIII if the failure to implement the promised tariff advantages upsets the "reasonable expectations" and the balance of reciprocal tariff concessions.

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[34]The text of the letter is annexed to the Panel Report, in: BISD Third Supplement (1955) at 80

[35]Idem (note 34), at 78

[36]Idem (note 34), at 78

(5) Uruguayan Recourse to Article XXIII

19. In 1961, Uruguay complained that benefits accruing to it under the General Agreement had been nullified or impaired as the result of 562 listed trade restrictions in fifteen industrialized countries, each affecting an Uruguayan export product.[37] The three Panel reports, adopted on 16 November 1962 and 3 March 1963[38], respectively, note that Uruguay did not "claim that there was infringement of GATT provisions or otherwise ... demonstrate the grounds for the invocation of the procedures relating to nullification and impairment"[39], except for a reference to the "existence of any other situation" in terms of Article XXIII:1(c).[40] The Panel considered, inter alia, 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. 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."[41]

The Panel initiated consultations with the contracting parties concerned and took the position that, in cases where Uruguay had not challenged the contention that the individual measures were not in violation of specific GATT obligations and where such contention was 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."[42] The Panel examined all restrictions on an individual basis, item by item, and - where the Panel found the measures to be inconsistent with the General Agreement - recommended the removal of the measures concerned. In respect of certain other import restrictions (such as import charges and State trading), the Panel report found there were "a priori grounds for assuming that they could have an adverse effect on Uruguay's exports" and

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[37] L/1647, L/1679 (1961)

[38] BISD Eleventh Supplement (1963), 95-148; Thirteenth Supplement (1965), 33-55

[39] BISD Thirteenth Supplement (1965), at 47

[40] See L/1679 (1961)

[41] BISD Eleventh Supplement (1963), at 100, paragraph 15

[42] Idem (note 41), at 100, paragraph 16

"recalled the provisions of Article XXII pursuant to which the Government of ... would no doubt accord sympathetic consideration to any concrete representations which Uruguay might wish to make concerning these measures, or their administration, with a view to minimizing any such adverse effects."[43] The third Panel report, adopted on 3 March 1965, noted that certain contracting parties had complied with the recommended removal of the measures in question or of their adverse effects on Uruguayan exports also in cases where the Panel had been unable to find that the measures concerned had nullified or impaired benefits in terms of Article XXIII:1.[44]

(6) French Import Restrictions

20. In 1962, the United States complained that residual balance-of-payments restrictions maintained by France were inconsistent with Article XI and nullified or impaired tariff concessions granted by the EEC to the United States in the 1960-61 Dillon Round negotiations. France acknowledged the inconsistency of the quantitative restrictions with GATT Article XI but denied an additional nullification or impairment of the tariff concessions on the ground that the United States had negotiated and obtained these tariff concessions in full knowledge of the residual import restrictions and of the French policy toward their future liberalization.[45] The Panel report, adopted on 14 November 1962, did not specifically decide the issue and merely found that the import restrictions were inconsistent with GATT Article XI and, as a result, "there is nullification or impairment of benefits to which the United States is entitled under GATT."[46]

(7) Article XXIV:6 Renegotiations between Canada and the EEC

21. In 1974, when Article XXIV:6 negotiations between Canada and the European Communities in connection with the enlargement of the EEC did not produce satisfactory results, 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.[47] 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

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[43] Idem (note 41), at 105, 108, 111, 113, 116, 119, 123, 127, 130, 133, 138, 141, 144, 148

[44] BISD Thirteenth Supplement (1965), at 48

[45] L/1899 (1962); SR.20/8, at 109-111 (1962)

[46] BISD Eleventh Supplement (1963), at 95

[47] GATT doc. L/4107 (1974), C/M/101, at 7

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."[48] 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."[49] The Panel never met due to agreement reached between the parties in March 1975.

(8) EEC - Production Aids Granted on Canned Fruits and Dried Grapes

22. In 1982, the United States complained under Article XXIII:1(b) that production aids granted by the EEC on certain canned fruits and dried grapes had altered the previously existing competitive relationship between EEC and imported products and, thereby, nullified or impaired the competitive benefits deriving from previous tariff concessions granted by the EEC in 1962, 1967, 1973 and 1979 on the products in question. In the United States' view, the mere introduction of such subsidies constituted prima facie nullification and impairment of the tariff bindings. The Panel report of 20 February 1985, which was not adopted by the GATT Council after the parties to the dispute had agreed on a bilateral settlement, found, inter alia, 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."[50]
>
> "... 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."[51]
>
> "The Panel was of the view that the three Panel reports which had examined 'non-violation complaints' under Article XXIII of the General Agreement (i.e. the Report of the Working Party on the Australian subsidy on ammonium sulphate, BISD II/188; the Report of the Panel on the treatment by Germany of imports of sardines, BISD 1S/53; and the

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[48] C/M/101, at 8

[49] C/M/102, at 4

[50] GATT doc. L/5778 (1985), paragraph 49

[51] L/5778, paragraph 51

Panel Report on Uruguay's recourse to Article XXIII, BISD 11S/95) had not precluded the possibility that an unforeseeable subsequent introduction or increase of a domestic subsidy on a product, for which a tariff concession had been previously granted, could constitute an assumption of prima facie nullification or impairment of the tariff concession concerned ..." "Since the Panel agreed that it had established the existence of nullification or impairment of tariff concessions and that this finding did not depend on any assumptions of prima facie nullification or impairment of tariff concessions, the Panel found that an examination of whether the production aid systems constitute prima facie nullification or impairment would have no bearing on the Panel conclusions. The Panel decided, therefore, not to include its deliberations on this legal question in the Panel report."[52]

"The Panel concluded that the production aids granted by the EEC since 1978 to processors of peaches and since 1979 to processors of pears nullified or impaired benefits accruing to the United States from tariff concessions granted by the EEC under Article II of the General Agreement in 1974 on canned peaches, canned pears and canned fruit mixtures and in 1979 on canned pears ..."[53]

"Having established the existence of nullification and impairment of tariff concessions with respect to canned peaches, canned pears, and canned fruit mixtures, the Panel considered what suggestions it could make so as to assist CONTRACTING PARTIES in their task of formulating recommendations to achieve a satisfactory settlement of the matter. The Panel noted that in past 'non-violation' complaints of nullification or impairment of tariff concessions (BISD II/195; 1S/30, 31, 59) the CONTRACTING PARTIES had recommended that the party against which the finding had been made consider ways and means to remove the competitive inequality brought about by the measure at issue. The Panel was aware of the finding of the Working Party Report on the Australian subsidy on ammonium sulphate that 'there is nothing in Article XXIII which would empower the CONTRACTING PARTIES to require a contracting party to withdraw or reduce a consumption subsidy' .. and that 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' (BISD II/195, para.16). In making the following draft recommendation, the Panel also wishes to emphasize that the recommendation cannot constitute a legal obligation for the EEC to remove or reduce its domestic production subsidies and does not preclude other modes of settling the dispute such as granting of compensation or, in the last resort, a request for authorization of

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[52] L/5778, paragraph 76

[53] L/5778, paragraph 78. For a detailed justification of this Panel conclusion, see paragraphs 49 to 74 and 79 to 81.

suspension of concessions. The Panel also wishes to emphasize that this recommendation cannot detract from the rights of contracting parties under Article XXIV:6 of the General Agreement."[54]

"The Panel therefore suggests that the CONTRACTING PARTIES recommend to the EEC that it consider ways and means to restore the competitive relationship between imported US and domestic EC canned peaches, canned pears and canned fruit cocktail which derived from the tariff concessions granted in 1974 on these products and in 1979 on canned pears. In accordance with agreed dispute settlement procedures (BISD 29S/15, para. (viii), the EEC should be invited to report within a reasonable, specified period on action taken pursuant to this recommendation."[55]

(9) EEC Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region

23. In 1982, the United States brought a complaint under Article XXIII that the preferences granted by the EEC on citrus products from certain Mediterranean countries were inconsistent with Article I and continued to have an adverse effect on United States' citrus exports.[56] The Panel report of 7 February 1985, which was not adopted by the GATT Council in view of the objections raised by a number of contracting parties and a bilateral agreement reached among the disputing parties on a settlement of their dispute, found, inter alia:

- "that the question of the conformity of the agreements with the requirements of Article XXIV and their legal status remained open..."[57]

- "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."[58]

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[54] L/5778, paragraph 82

[55] L/5778, paragraph 83

[56] L/5337 (1982)

[57] GATT doc. L/5776 (1985), paragraph 4.10

[58] L/5776, paragraph 4.16

- "The Panel then examined if Article XXIII:1(b) applied to the case; i.e., whether the consequences of the implementation of the agreements could be considered as nullifying or impairing the benefits accruing from the General Agreement as the result of the application of measures not conflicting with the provisions of the General Agreement. In this respect 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 ... The situation created by the CONTRACTING PARTIES suspended the normal impact of certain GATT rules. However, this could not mean that contracting parties no longer had any rights and obligations..."[59]

- "In the light of the above, 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 (ref. para.4.2). 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 provisions of Article XXIII:1, and therefore the matter could also be considered under Article XXIII:1(b). The US had indeed contended inter alia that the preferences continued to have an adverse effect on US citrus exports. 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 (ref. para.3.33)."[60]

- "The Panel considered whether it could be guided in its examination of the matter at hand by the two previous rulings that had been made by CONTRACTING PARTIES with reference to Article XXIII:1(b); i.e. the report of the Working Party on the Australian subsidy on ammonium sulphate (BISD Vol. II/188-196) and the report of the Panel on the treatment by Germany of imports of sardines (BISD 1S/53-59), which were adopted by CONTRACTING PARTIES on 3 April 1950 and 31 October 1952, respectively. In these two cases nullification or impairment (in one case prima facie nullification or impairment) of a benefit was found, as a result of the existence of the following three conditions:

"(a) a tariff concession was negotiated;

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[59] L/5776, paragraphs 4.21 and 4.22

[60] L/5776, paragraph 4.25

(b) a governmental measure, not inconsistent with the General Agreement, had been introduced subsequently which upset the competitive relationship between the bound product with regard to directly competitive products from other origins; and

(c) the measure could not have been reasonably anticipated by the party to whom the binding was made, at the time of the negotiation of the tariff concession (BISD Vol.II/192-193, para.12, BISD 1S/58-59, paras.16 and 17)."[61]

The Panel concluded, inter alia:

"(f) 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;

(g) One of the fundamental benefits accruing to the contracting parties under the General Agreement was the right to adjustment in situations in which the balance of their rights and obligations had been upset to their disadvantage. In view of the fact that:

- the CONTRACTING PARTIES had refrained from making a recommendation under Article XXIV:7 on EEC agreements with the Mediterranean countries on the understanding that the rights of third countries would thereby not be affected,

- the CONTRACTING PARTIES had not prevented the EEC to implement the agreements with the Mediterranean countries on the understanding that the practical effects of their implementation would be kept under review,

- and further that the formation of customs unions or free-trade areas between the EEC and the Mediterranean countries concerned had not yet been realized since the examination of the agreements by the CONTRACTING PARTIES,

the balance of rights and obligations underlying Articles I and XXIV of the General Agreement had been upset to the disadvantage

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[61] L/5776, paragraph 4.26

of the contracting parties not parties to these agreements. 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;

(h) Tariff preferences were obviously less favourable to a non-beneficiary exporter but the existence of the EEC tariff preferences in itself could not be presumed in the light of the conclusions contained in (d) and (f) above, as prima facie evidence of injury to trade or of adverse effect on trade based on past precedents;"[62]

"(j) On the basis of all the available evidence taken together, it appeared that the EC tariff preferences accorded to certain Mediterranean countries on fresh oranges and fresh lemons had operated in practice to affect adversely US trade in these products with the EC and upset the competitive relationship between the United States and the EC's Mediterranean suppliers;

(k) In light of the undetermined legal status of the EC agreements with certain Mediterranean countries under which the EC granted tariff preferences on certain citrus products and of the fact that the formation of a customs union or free-trade area had not yet been realized between the EC and the countries concerned, the benefit accruing to the United States directly or indirectly under Article I:1 has been impaired as a result of the EEC's application of tariff preferences on fresh oranges and lemons from certain Mediterranean countries in the sense of Article XXIII:1(b)."[63]

"The Panel did not feel it necessary for it to evaluate precisely the extent to which the US had suffered damage to its actual trade or trade opportunities, as a result of the EC tariff preferences on fresh oranges and lemons, or by what amount the preferences had upset the competitive relationship between the US and the Mediterranean countries. It believed such matters would best be left to the two parties concerned to establish, taking into account the Panel's findings and conclusions. Without prejudice to other solutions the two parties might ultimately arrive at, the Panel wished to submit to the CONTRACTING PARTIES the following draft recommendation, which after its lengthy examination of the matter, the Panel considered appeared to afford the best prospect of an adjustment of the matter

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[62] L/5776, paragraph 5.1

[63] L/5776, paragraph 5.1

satisfactory to both parties, taking into account the interests of all other parties concerned:

The EEC should consider limiting the adverse effect on US exports of fresh oranges and fresh lemons, as a result of the preferential tariff treatment the EEC has accorded to these products originating in certain Mediterranean countries. This could be accomplished by reducing the most-favoured-nation tariff rates applied by the EEC on fresh lemons; and as regards fresh oranges, by extending the period of application of the lower m.f.n. tariff rates and/or reducing the m.f.n. tariff rates. In view of the passage of time on this trade problem, the EEC should take action to this effect by no later than 15 October 1985."[64]

(10) Japan - Nullification or Impairment of the Benefits Accruing to the EEC under the General Agreement and Impediment to the Attainment of GATT Objectives

24. In 1983, the EEC brought a complaint against Japan under Article XXIII:2 on the ground "that benefits of successive GATT negotiations with Japan have not been realized owing to a series of factors particular to the Japanese economy which have resulted in a lower level of imports, especially of manufactured products, as compared with those of 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."[65] The EEC's request for the establishment of a Working Party under Article XXIII:2 was opposed by Japan and was not pursued.

(11) United States Trade Measures Affecting Nicaragua

25. In 1985, Nicaragua requested the establishment of a Panel under Article XXIII to review certain trade measures by the United States affecting Nicaragua. The terms of reference explicitly instructed the Pnel not to "examine or judge the validity of or motivation for the invocation of Article XXI:(b)(iii) by the United States." The Panel report of 13 October 1986, which has not yet been adopted by the GATT Council, records, inter alia, the following arguments submitted by Nicaragua to the Panel:

"Nicaragua stressed that, whether the invocation of Article XXI:(b)(iii) was justified or not, in either case benefits accruing to Nicaragua under the General Agreement had been seriously

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[64] L/5776, paragraph 5.3

[65] GATT doc. L/5479 (1983)

impaired or nullified as a result of the embargo. As recognized by the CONTRACTING PARTIES in the Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement, recourse to Article XXIII was permitted if nullification or impairment resulted from measures taken by other contracting parties whether or not these conflicted with the provisions of the General Agreement (BISD 26S/216). It had also been recognized both by the drafters of the General Agreement (EPCT/A/SR.33) and by the CONTRACTING PARTIES (BISD 29S/29) that an invocation of Article XXI did not prevent recourse to Article XXIII. According to long-standing GATT practice, the benefits accruing to contracting parties under Article II could be nullified or impaired by measures consistent with the General Agreement that could not reasonably have been anticipated at the time when the tariff concessions were negotiated. Nicaragua had no reason to expect that an embargo would cut off all trade relations with the United States when the United States tariff concessions were negotiated, i.e. between 1949 and 1961. The benefits accruing to Nicaragua under Article II had therefore been nullified or impaired as a result of the embargo. Nicaragua further stated that it was clear from the drafting history of Article XXIII that this provision was intended to protect not only the benefits under Article II but any benefit accruing to contracting parties under the General Agreement (EPCT/A/PV.12). The embargo had in fact nullified or impaired the benefits accruing to Nicaragua under all the trade-facilitating provisions of the General Agreement. On previous occasions panels had recommended the withdrawal of measures which, though not inconsistent with the General Agreement, had nullified or impaired benefits accruing to the contracting parties under it (BISD Vol. II/195 and 13S/48). Nicaragua asked the Panel to do so also in the present case."[66]

The Panel report includes, inter alia, the following findings of the Panel:

"5.4 Being precluded from examining the embargo in light of paragraph (a) of Article XXIII:1, the Panel proceeded to examine it in the light of paragraph (b) of Article XXIII:1. Consequently, it considered the question of whether benefits accruing to Nicaragua under the General Agreement had been nullified or impaired by the embargo whether or not it conflicted with the provisions of the General Agreement.

5.5 The Panel noted that the previous cases under paragraph (b) of Article XXIII:1 (BISD Vol. II/192-193 and BISD 1S/58-59) involved measures that had been found to be consistent with the General Agreement while in the present case it could not be determined whether or not the measure was consistent with the General Agreement. The Panel nevertheless considered the principles established in the previous cases to be applicable in the present case because a

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[66] L/6053 (1986), paragraph 4.8

contracting party has to be treated as if it is observing the General Agreement until it is found to be acting inconsistently with it.

5.6 The Panel noted that the embargo had virtually eliminated all opportunities for trade between the two contracting parties and that it had consequently seriously upset the competitive relationship between the embargoed products and other directly competitive products. The Panel considered the question of whether the nullification or impairment of the trade opportunities of Nicaragua through the embargo constituted a nullification or impairment of benefits accruing to Nicaragua within the meaning of Article XXIII:1(b). The Panel noted that this question raised basic interpretative issues relating to the concept of non-violation nullification and impairment which had neither been addressed by the drafters of the GATT nor decided by the CONTRACTING PARTIES. Against this background the Panel felt that it would only be appropriate for it to propose a ruling on these issues if such a ruling would enable the CONTRACTING PARTIES to draw practical conclusions from it in the case at hand.

5.7 The Panel then noted that Article XXIII:2 would give the CONTRACTING PARTIES essentially two options in the present case if the embargo were found to have nullified or impaired benefits accruing to Nicaragua under the General Agreement independent of whether or not it was justified under Article XXI. They could either (a) recommend that the United States withdraw the embargo (or, which would amount in the present case to the same, that the United States offer compensation) or (b) authorize Nicaragua to suspend the application of obligations under the General Agreement towards the United States.

5.8 As to the first of the above options the Panel noted the following: It is clear from the drafting history that in case of recommendations on measures not found to be inconsistent with the General Agreement, the contracting parties 'are under no specific and contractual obligations to accept those recommendations' (EPCT/A/PV/5, p.16). The report of the Sixth Committee during the Havana Conference notes with respect to the power of the Executive Board to make recommendations to member States in any matter arising under Article 93:1(b) or (c) of the Havana Charter (which corresponds to Article XXIII:1(b) and (c) of the General Agreement): 'It was agreed that sub-paragraph 2(e) of Article 94 does not empower the Executive Board or the Conference to require a Member to suspend or withdraw a measure not in conflict with the Charter'. The 1950 Working Party on the Australian Subsidy on Ammonium Sulphate took the same view as to the powers of the CONTRACTING PARTIES (BISD Vol. II/195). In their 1982 Ministerial Declaration, the CONTRACTING PARTIES stated that the dispute settlement process could not 'add to or diminish the rights and obligations provided in the General Agreement' (BISD 26S/16).

5.9 In the light of the above drafting history and decisions of the CONTRACTING PARTIES the Panel found that the United States, as long as

the embargo was not found to be inconsistent with the General Agreement, was under no obligation to follow a recommendation by the CONTRACTING PARTIES to remove the embargo.

5.10 The Panel noted that in the past cases under paragraph (b) of Article XXIII:1, the CONTRACTING PARTIES had recommended that the contracting party complained against consider ways and means to restore the competitive relationship that existed when the tariff concession was made (BISD Vol. II/195 and BISD 1S/31). However, the Panel also noted that these recommendations had been made only because they were considered to offer the best prospect of a mutually agreed settlement of the dispute. ... The Panel noted that the United States had declared from the outset that it would not remove the embargo without a solution to the underlying political problem (paragraph 4.9 above). It also noted that Nicaragua had recognized that 'it seemed unfortunately unlikely that the United States would accept a recommendation to lift the embargo' (paragraph 4.10 above). The Panel therefore considered that a decision of the CONTRACTING PARTIES under Article XXIII:2 recommending the withdrawal of the embargo would not seem to offer the best prospect of an adjustment of the matter satisfactory to both parties and that, in these circumstances, it would not appear to be appropriate for the CONTRACTING PARTIES to take such a decision unless they had found the embargo to be inconsistent with the General Agreement.

5.11 The Panel then turned to the second option available to the CONTRACTING PARTIES under Article XXIII:2 in the present case, namely a decision to authorize Nicaragua to suspend the application of obligations to the United States. The Panel noted that, under the embargo imposed by the United States, not only imports from Nicaragua into the United States were prohibited but also exports from the United States to Nicaragua. In these circumstances, a suspension of obligations by Nicaragua towards the United States could not alter the balance of advantages accruing to the two contracting parties under the General Agreement in Nicaragua's favour. The Panel noted that the United States had stated that an authorization permitting Nicaragua to suspend obligations towards the United States 'would be of no consequence in the present case because the embargo had already cut off all trade relations between the United States and Nicaragua' (paragraph 4.9 above) and that Nicaragua had agreed that 'a recommendation by the Panel that Nicaragua be authorized to withdraw its concessions in respect of the United States would indeed be a meaningless step because of the two-way embargo' (paragraph 4.10 above). The Panel therefore had to conclude that, even if it were found that the embargo nullified or impaired benefits accruing to Nicaragua independent of whether or not it was justified under Article XXI, the CONTRACTING PARTIES could, in the circumstances of the present case, take no decision under Article XXIII:2 that would re-establish the balance of advantages which had accrued to Nicaragua under the General Agreement prior to the embargo. In the light of the foregoing considerations the Panel decided not 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. "

(12) Japan - Trade in Semi-Conductors

26. In 1987, the EEC brought a complaint under Article XXIII:2 relating to certain aspects of a bilateral arrangement between Japan and the United States concerning trade in semi-conductor products.[67] The Panel report, adopted on 4 May 1988, noted the argument by the EEC that, even if the measures applied by the Japanese Government were considered to be consistent with the General Agreement, "they nullified or impaired benefits accruing to the EEC under the General Agreement and impeded the attainment of the objectives of the General Agreement".[68] The Panel report includes the following finding on this subsidiary "non-violation complaint":

> "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 noted that the EEC had alleged that, even if the Japanese measures relating to exports and imports of semi-conductors were considered to be consistent with the General Agreement, they nullified or impaired benefits accruing to the EEC under the General Agreement and impeded the attainment of objectives of the General Agreement within the meaning of Article XXIII. According to the dispute settlement procedures adopted on 28 November 1979 (BISD 26S/216), a contracting party claiming that benefits accruing to it under the General Agreement had been nullified or impaired as a result of a measure consistent with the General Agreement would be called upon to provide a detailed justification. 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."[69]

(13) EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins

27. In 1988, the United States brought a complaint under Article XXIII:2 on the ground that certain payments by the EEC to processors and producers of oilseeds and related animal-feed proteins were inconsistent with Article III and also "constitute a prima facie nullification and impairment of tariff concessions granted by the EC in 1962 pursuant to Article II of

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[67] GATT doc. L/6129 (1987)

[68] L/6309 (1988), paragraph 97

[69] L/6309, paragraph 131

the General Agreement."[70] The matter is under examination by a Panel established by the GATT Council in June 1988.

IV. ISSUES FOR CONSIDERATION

28. The Negotiating Group might wish to consider the following questions relating to "non-violation complaints" under Article XXIII:1(b) or (c):

(a) Is there a need to define in more detail the four different types of "non-violation complaints" which are distinguished in Article XXIII:1(b) and (c)? Should such definitions be left to GATT dispute settlement practice as in the past?

(b) Is there a need to clarify the relationship between the first heading in Article XXIII:1 ("any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired") and the second heading ("any objective of the Agreement is being impeded") which was deleted at the Havana Conference on the ground that it had no discernible limits? Does the "any benefit clause" have "discernible limits" and, if so, what are these limits?

(c) The CONTRACTING PARTIES have not used Article XXIII as broadly as it was conceived. Recommendations under Article XXIII:2 in respect of non-violation complaints have always related to the nullification or impairment of tariff concessions, or of the balance of reciprocal exchanges of tariff advantages. In this respect, Article XXIII:1(b) has served to supplement the provisions in Article XXVIII on "Modification of Schedules" by enabling compensatory adjustments also in situations where the competitive benefits accruing under tariff concessions were impaired not as a result of a formal withdrawal of tariff concessions in accordance with Article XXVIII, but by some other unexpected governmental measure. Have the substantive conditions for such "non-violation complaints" under Article XXIII:1(b) in respect of tariff concessions, or in respect of other "reliance-inducing behaviour" in the context of tariff negotiations (see cases Nos. 3 and 4 mentioned above in Part III), been satisfactorily defined in past GATT practice? Since tariff concessions merely promise a certain maximum rate of duty: what are the "benefits" deriving from tariff concessions? What is the rationale of non-violaton complaints in respect of tariff concessions?

(d) In a few non-violation complaints (see cases Nos. 5, 9-12 mentioned above in Part III), the terms "benefits accruing ...

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[70] L/6328 (1988)

under this Agreement' were applied also outside the area of tariff benefits and tariff negotiations to larger "benefits" derived from the General Agreement. Are the "benefits" deriving from the GATT rules on non-tariff trade barriers larger than the GATT rules themselves (e.g. do they protect also freedom from market-distorting measures other than those explicitly prohibited in these GATT rules)? Or are expectations of market access protected only after a tariff has been bound under Article II? The "Citrus Panel report" was the only panel report which did not base its "non-violation" finding on Article II; it found that "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". Article 8.3 and 11:2 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII (the "Subsidy Code") recognize that production subsidies, even though permitted under GATT Article XVI and Subsidy Code Article 11:1, may nullify or impair also benefits other than tariff benefits accruing to another signatory under the General Agreement.[71] The differences between the "benefits" deriving from reciprocal tariff concessions on particular concession products negotiated in successive "GATT Rounds", on the one hand, and the "benefits" deriving from the basic GATT obligations negotiated in 1947, on the other hand, may warrant consideration of a number of questions. For instance: Has the relationship between "violation complaints" and the supplementary protection offered by "non-violation complaints" been adequately defined in GATT practice? What benefits other than tariff benefits are "actionable" under Article XXIII:1(b) or (c)? Can the relationship between the "freedoms" protected under GATT law (e.g. the freedom to grant subsidies in accordance with Article XVI:1, the freedom to participate in free-trade areas pursuant to Article XXIV) and the "responsibility" under Article XXIII:1(b) or (c) for unexpected competitive distortions be properly determined by reliance on the "reasonable expectations" of one or both parties to the dispute? Or must there be an additional "wrong", failure of reciprocity or "reliance-inducing behaviour" on the part of the defendant government to justify a legal claim protected under Article XXIII:1(b) and (c), such as the non-fulfilment of the "two promises" identified by the Panel on the German Starch Duties, or the only incomplete formation of free-trade areas identified by the "Citrus Panel"?

(e) During the drafting of Article XXIII, it was said that Article XXIII was designed to protect "a careful balance of the interests of the contracting parties", and that "this balance rests upon

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[71] See: The Texts of the Tokyo Round Agreements, GATT, 1986, at 63 and 66

certain assumptions as to the character of the underlying situation in the years to come". Do the "balance-of-interests"-theory and reliance on the "reasonable expectations" of the drafters still provide adequate, predictable and justiciable standards of review more than forty years after the negotiation of the General Agreement?

(f) The drafters conceived Article XXIII not only as a dispute settlement clause but, notably as regards "situations complaints" in terms of Article XXIII:1(c), also as a sort of escape clause in situations of changed circumstances (somewhat like the general legal concepts of "contract frustration" and "clausula rebus sic stantibus"). Yet, over the past forty years, the CONTRACTING PARTIES appear to have never based any ruling or recommendation on Article XXIII:1(c). Are there still adequate, predictable and justiciable standards of review for "situation complaints" in terms of Article XXIII:1(c)?

(g) If it were to be found that the "non-violation" provisions in Article XXIII:1(b) and (c) do not offer an adequate definition of the regulatory purposes, of the "actionable conduct" and "actionable situations": Should it be left to the CONTRACTING PARTIES and to GATT panels established under Article XXIII:2 to elaborate more precise definitions and legal standards of review as disputed cases arise? Is there a need for additional substantive and/or procedural limitations on such a broad "common law jurisdiction" of the CONTRACTING PARTIES under Article XXIII:1(b) or (c)?

(h) The text of Article XXIII:2 seems to suggest that the same basic remedies are available for violation complaints as for non-violation complaints. Subsequent GATT practice has recognized, however, that recommendations by the CONTRACTING PARTIES based upon Article XXIII:1(b) or (c) are not binding on the contracting party to which it is addressed and that, if the recommendation is not followed, their only power is to authorize adversely affected contracting parties to suspend their obligations towards the country that has impaired the tariff concessions. The impairing country can of course attempt to forestall the request for authorization to suspend obligations by offering compensation, but the General Agreement establishes no obligation to grant compensation.[72] Is there a need for regulating in more detail the legal remedies available in non-violation complaints under Article XXIII:1(b) or (c)?

(i) Past panel reports on non-violation complaints, adopted by the CONTRACTING PARTIES, have emphasized that the concept of

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[72]See: MTN.GNG/NG13/W/32

"nullification or impairment of benefits" relates not to trade damage, but to unexpected changes in the conditions of competition; consequently, panels have found that it was not "necessary for a finding of nullification or impairment under Article XXIII first to establish statistical evidence of damage."[73] They have further admitted, also in non-violation cases, an assumption of "prima facie nullification or impairment of benefits" when competitive benefits deriving from tariff concessions were upset as a result of unexpected, subsequent government measures. These findings are in line with the findings of various panel reports on violation complaints, adopted by the CONTRACTING PARTIES, that GATT obligations "establish certain competitive conditions for imported products in relation to domestic products" and, consequently, "a change in the competitive relationship contrary to that provision must ... be regarded ipso facto as a nullification or impairment of benefits accruing under the General Agreement."[74] The Negotiating Group might nonetheless wish to consider the question of whether the concept of (prima facie) "nullification or impairment of benefits" requires further clarification in respect of non-violation complaints under Article XXIII:1(b) or (c).

(j) Under Article XXIII:2, the CONTRACTING PARTIES "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". Is the purpose of such counter-measures in non-violation complaints under Article XXIII, as in the case of counter-measures under Article XXVIII, limited to the restoration of the balance of benefits agreed upon in GATT law? Should GATT panels be asked to assist the contracting parties in restoring the balance of benefits, for instance by means of a quantitative estimate of the competitive distortions caused by the defendant government? Should any such estimates be

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[73]Panel report on German Treatment of Imports of Sardines, BISD First Supplement (1953), at 56. The same view was expressed by the Panel on EEC Production Aids on Canned Fruit: "The Panel was of the view that it was not necessary to establish statistical evidence of trade damage in order to make a finding of nullification and impairment under Article XXIII ... 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 ..." (L/5778, paragraph 77).

[74]Panel report on United States Taxes on Petroleum and Certain Imported Substances, BISD Thirty-Fourth Supplement (1988), 136-166, at 158 (paragraph 5.1.9)

separated from the ordinary panel report so as not to further complicate the adoption of the legal panel findings?

(k) Many waivers granted under GATT Article XXV explicitly reserve "the right of affected contracting parties to have recourse to Article XXIII of the General Agreement."[75] Since the purpose of waivers is to authorize action that would otherwise be inconsistent with the General Agreement, this reference is presumably a reference to Article XXIII:1(b) or (c). Is there a need to clarify the meaning and implications of such waiver clauses?

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[75]For example, Basic Instruments and Selected Documents, Thirty-First Supplement (1985), at 23

ANNEX I

Text of Article XXIII (BISD IV/39)

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 intergovernmental 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.

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*See Preface to BISD Vol. IV

ANNEX II

Text of Chapter VIII of the 1948 Havana Charter for an International Trade Organization

Settlement of Differences

Article 92

Reliance on the Procedures of the Charter

1. The Members undertake that they will not have recourse, in relation to other Members and to the Organization, to any procedure other than the procedures envisaged in this Charter for complaints and the settlement of differences arising out of its operation.

2. The Members also undertake, without prejudice to any other international agreement, that they will not have recourse to unilateral economic measures of any kind contrary to the provisions of this Charter.

Article 93

Consultation and Arbitration

1. If any Member considers that any benefit accruing to it directly or indirectly, implicitly or explicitly, under any of the provisions of this Charter other than Article 1, is being nullified or impaired as a result of

(a) a breach by a Member of an obligation under this Charter by action or failure to act, or

(b) the application by a Member of a measure not conflicting with the provisions of this Charter, or

(c) the existence of any other situation

the Member may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to such other Member or Members as it considers to be concerned, and the Members receiving them shall give sympathetic consideration thereto.

2. The Members concerned may submit the matter arising under paragraph 1 to arbitration upon terms agreed between them; Provided that the decision of the arbitrator shall not be binding for any purpose upon the Organization or upon any Member other than the Members participating in the arbitration.

3. The Members concerned shall inform the Organization generally of the progress and outcome of any discussion, consultation or arbitration undertaken under this Charter.

Article 94

Reference to the Executive Board

1. Any matter arising under sub-paragraphs (a) or (b) of paragraph 1 of Article 93 which is not satisfactorily settled and any matter which arises under paragraph 1(c) of Article 93 may be referred to any Member concerned to the Executive Board.

2. The Executive Board shall promptly investigate the matter and shall decide whether any nullification or impairment within the terms of paragraph 1 of Article 93 in fact exists. It shall then take such of the following steps as may be appropriate:

(a) decide that the matter does not call for any action;

(b) recommend further consultation to the Members concerned;

(c) refer the matter to arbitration upon such terms as may be agreed between the Executive Board and the Members concerned;

(d) in any matter arising under paragraph 1(a) of Article 93, request the Member concerned to take such action as may be necessary for the Member to conform to the provisions of this Charter;

(e) in any matter arising under sub-paragraph (b) or (c) of paragraph 1 of Article 93, make such recommendations to Members as will best assist the Members concerned and contribute to a satisfactory adjustment.

3. If the Executive Board considers that action under sub-paragraphs (d) and (e) of paragraph 2 is not likely to be effective in time to prevent serious injury, and that any nullification or impairment found to exist within the terms of paragraph 1 of Article 93 is sufficiently serious to justify such action, it may, subject to the provisions of paragraph 1 of Article 95, release the Member or Members affected from obligations or the grant of concessions to any other Member or Members under or pursuant to this Charter, to the extent and upon such conditions as it considers appropriate and compensatory, having regard to the benefit which has been nullified or impaired.

4. The Executive Board may, in the course of its investigation, consult with such Members or inter-governmental organizations upon such matters within the scope of this Charter as it deems appropriate. It may also consult any appropriate commission of the Organization on any matter arising under this Chapter.

5. The Executive Board may bring any matter, referred to it under this Article, before the Conference at any time during its consideration of the matter.

Article 95

Reference to the Conference

1. The Executive Board shall, if requested to do so within thirty days by a Member concerned, refer to the Conference for review any action, decision or recommendation by the Executive Board under paragraphs 2 or 3 of Article 94. Unless such review has been asked for by a Member concerned, Members shall be entitled to act in accordance with any action, decision or recommendation of the Executive Board under paragraphs 2 or 3 of Article 94. The Conference shall confirm, modify or reverse such action, decision or recommendation referred to it under this paragraph.

2. Where a matter arising under this Chapter has been brought before the Conference by the Executive Board, the Conference shall follow the procedure set out in paragraph 2 of Article 94 for the Executive Board.

3. If the Conference considers that any nullification or impairment found to exist within the terms of paragraph 1(a) of Article 93 is sufficiently serious to justify such action, it may release the Member or Members affected from obligations or the grant of concessions to any other Member or Members under or pursuant to this Charter, to the extent and upon such conditions as it considers appropriate and compensatory, having regard to the benefit which has been nullified or impaired. If the Conference considers that any nullification or impairment found to exist within the terms of sub-paragraphs (b) or (c) of paragraph 1 of Article 93 is sufficiently serious to justify such action, it may similarly release a Member or Members to the extent and upon such conditions as will best assist the Members concerned and contribute to a satisfactory adjustment.

4. When any Member or Members, in accordance with the provisions of paragraph 3, suspend the performance of any obligation or the grant of any concession to another Member, the latter Member shall be free, not later than sixty days after such action is taken, or if an opinion has been requested from the International Court of Justice pursuant to the provisions of Article 96, after such opinion has been delivered, to give written notice of its withdrawal from the Organization. Such withdrawal shall become effective upon the expiration of sixty days from the day on which such notice is received by the Director-General.

Article 96

Reference to the International Court of Justice

1. The Organization may, in accordance with arrangements made pursuant to paragraph 2 of Article 96 of the Charter of the United Nations, request from the International Court of Justice advisory opinions on legal questions arising within the scope of the activities of the Organization.

2. Any decision of the Conference under this Charter shall, at the instance of any Member whose interests are prejudiced by the decision, be

subject to review by the International Court of Justice by means of a request, in appropriate form, for an advisory opinion pursuant to the Statute of the Court.

3. The request for an opinion shall be accompanied by a statement of the question upon which the opinion is required and by all documents likely to throw light upon the question. This statement shall be furnished by the Organization in accordance with the Statute of the Court and after consultation with the Members substantially interested.

4. Pending the delivery of the opinion of the Court, the decision of the Conference shall have full force and effect; Provided that the Conference shall suspend the operation of any such decision pending the delivery of the opinion where, in the view of the Conference, damage difficult to repair would otherwise be caused to a Member concerned.

5. The Organization shall consider itself bound by the opinion of the Court on any question referred to it by the Court. In so far as it does not accord with the opinion of the Court, the decision in question shall be modified.

Article 97

Miscellaneous Provisions

1. Nothing in this Chapter shall be construed to exclude other procedures provided for in this Charter for consultation and the settlement of differences arising out of its operation. The Organization may regard discussion, consultation or investigation undertaken under any other provisions of this Charter as fulfilling, either in whole or in part, any similar procedural requirement in this Charter.

2. The Conference and the Executive Board shall establish such rules of procedure as may be necessary to carry out the provisions of this Chapter.