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Documents of interest

4.a Import Restrictions. Procedures for Dealing with New Import Restrictions Applied for Balance-of-Payments Reasons and Residual Import Restrictions. Approved on 16 November 1960

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DECISIONS, DECLARATIONS, ETC.

(…)

IMPORT RESTRICTIONS

**PROCEDURES FOR DEALING WITH NEW IMPORT
RESTRICTIONS APPLIED FOR BALANCE-OF-PAYMENTS
REASONS AND RESIDUAL IMPORT RESTRICTIONS**

Approved on 16 November 1960

**A. Introduction or substantial intensification of import restrictions
applied for balance-of-payments reasons**

1. A contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under Articles XII or XVIII: B is required, under paragraph 4 (a) of Article XII or under paragraph 12 (a) of Article XVIII as the case may be, to enter into consultations with the CONTRACTING PARTIES as to the nature of its balance-of-payment difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties. Such consultation should take place immediately after the measure is taken or, in circumstances in which prior consultation is practicable, before the measure is taken.

2. In order to implement these provisions, any contracting party modifying its import restrictions is required to furnish detailed information promptly to the Executive Secretary, for circulation to the contracting parties.¹

¹ Under established procedures, contracting parties should furnish such information not only when they wish to initiate a consultation pursuant to Articles XII: 4 (a) or XVIII: 12 (a) but whenever any significant changes are made in their restrictive systems.

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IMPORT RESTRICTIONS

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3. Upon the receipt of a notification from a contracting party that it has taken measures requiring a consultation under Article XII: 4 (a) or Article XVIII: 12 (a), the Council should be convened to meet with the shortest possible delay, which should normally be not less than forty-eight hours and not more than ten days after the receipt of the notification, to carry out the consultation.
4. In cases where the contracting party applying the restrictions has not asked for a consultation with the CONTRACTING PARTIES, the Council may invite that contracting party to consult in accordance with Articles XII: 4 (a) or XVIII: 12 (a), if the Council considers that there is a *prima facie* case of "substantial intensification" requiring such a consultation.
5. The Council should carry out, or arrange for, consultations initiated under these provisions of the General Agreement, and submit reports to the CONTRACTING PARTIES for consideration normally at their subsequent regular session.
6. As soon as a consultation is initiated the International Monetary Fund should be invited to consult with the CONTRACTING PARTIES pursuant to paragraph 2 of Article XV of the General Agreement. This consultation will be conducted by the Council.

B. Residual import restrictions*Notifications*

7. Contracting parties are invited to communicate to the Executive Secretary lists of import restrictions which they are applying contrary to the provisions of the General Agreement and without having obtained the authorization of the CONTRACTING PARTIES. Any subsequent changes in a list should likewise be communicated to the Executive Secretary who will circulate the lists received to all the contracting parties.

Consultations under Article XXII

8. Bilateral consultations may be sought, pursuant to paragraph 1 of Article XXII either by the contracting party applying the restrictions or by contracting parties affected by them. The Executive Secretary should be informed of consultations requested so that in cases where the restrictions in question affect the interests of a number of contracting parties, the procedures adopted by the CONTRACTING PARTIES on 10 November 1958 should apply.

Consideration by the CONTRACTING PARTIES

9. If consultations held under paragraph 1 of Article XXII do not lead to a satisfactory solution, any of the parties to the consultations may request

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DECISIONS, DECLARATIONS, ETC.

that consultations be carried out by the CONTRACTING PARTIES pursuant to paragraph 2 of Article XXII. Alternatively, a country whose interests are affected may resort to paragraph 2 of Article XXIII, it being understood that a consultation held under paragraph 1 of Article XXII would be considered by the CONTRACTING PARTIES as fulfilling the conditions of paragraph 1 of Article XXIII.

(...)

4.b Restrictive Business Practices. Arrangements for Consultations. Decision of 18 November 1960

GENERAL AGREEMENT ON
TARIFFS AND TRADE

RESTRICTED

L/1397

5 December 1960

Limited Distribution

DECISIONS OF SEVENTEENTH SESSION

Decisions, Declarations, etc. of the CONTRACTING PARTIES

Between the End of the Sixteenth Session and the End of the Seventeenth Session

(June to November 1960)

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14. RESTRICTIVE BUSINESS PRACTICES

(Decision of 18 November 1960)

Having considered the report (L/1015) submitted by the Group of Experts, which was appointed under the Resolution of 5 November 1958, and related documents¹;

Recognizing that business practices which restrict competition in international trade may hamper the expansion of world trade and the economic development in individual countries and thereby frustrate the benefits of tariff reduction and removal of quantitative restrictions or may otherwise interfere with the objectives of the General Agreement on Tariffs and Trade;

Recognizing, further, that international co-operation is needed to deal effectively with harmful restrictive practices in international trade;

Desiring that consultations between governments on these matters should be encouraged;

Considering, however, that in present circumstances it would not be practicable for the CONTRACTING PARTIES to undertake any form of control of such practices nor to provide for investigations,

The CONTRACTING PARTIES

Recommend that at the request of any contracting party a contracting party should enter into consultations on such practices on a bilateral or a multilateral basis as appropriate. The party addressed should accord sympathetic consideration to and should afford adequate opportunity for consultations with the requesting party, with a view to reaching mutually satisfactory conclusions, and if it agrees that such harmful effects are present it should take such measures as it deems appropriate to eliminate these effects, and

Decide that

- (a) If the requesting party and the party addressed are able to reach a mutually satisfactory conclusion, they should jointly advise the secretariat of the nature of the complaint and the conclusions reached;
- (b) If the requesting party and the party addressed are unable to reach a mutually satisfactory conclusion, they should advise the secretariat of the nature of the complaint and the fact that a mutually satisfactory conclusion cannot be reached;
- (c) The secretariat shall convey the information referred to under (a) and (b) to the CONTRACTING PARTIES.

¹The related documents are L/1287 and Add.1, L/1301, L/1333 and W.17/23.

(...)

4.c Dispute Settlement in International Economic Agreements. Factual Study by the Secretariat

GENERAL AGREEMENT ON
TARIFFS AND TRADERESTRICTED

MTN/SG/W/8

6 April 1976

Special Distribution

Multilateral Trade NegotiationsGroup "Safeguards"DISPUTE SETTLEMENT IN INTERNATIONAL
ECONOMIC AGREEMENTSFactual Study by the Secretariat

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

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

- I. The Organizational Structure of the Dispute Procedures
- II. Conditions of Access to the Dispute Settlement Bodies
 - (a) Bilateral Consultation
 - (b) Prior Conciliation
- III. Competence of the Dispute Settlement Bodies
 - (a) Legal Nature of the Dispute
 - (b) Parties to the Dispute
- IV. Procedures of the Dispute Settlement Bodies
 - (a) Voting
 - (b) Temporal Requirements
 - (c) Interim Measures
- V. Decision of the Dispute Settlement Bodies
 - (a) Legal Nature
 - (b) Means of Enforcement
- VI. Expenses

4.c Dispute Settlement in International Economic Agreements. Factual Study by the Secretariat (continued)

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

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

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I. The organizational structure of the disputes procedures

5. Under the General Agreement disputes not settled bilaterally may be referred to the CONTRACTING PARTIES acting as a whole. However, this body has generally been considered too large to take decisions without the assistance of a smaller body, and therefore the CONTRACTING PARTIES' function has been in most cases that of ratifying dispute settlement decisions prepared for them. In the very early days of GATT, disputes were sometimes referred to the Chairman of the CONTRACTING PARTIES for his decision. It was for instance in this way that a dispute between the Cuban and the Benelux Governments regarding the application of Article I to consular taxes was settled.¹ However, this procedure did not last very long. By the Third Session in 1949 the CONTRACTING PARTIES had already developed the practice of referring disputes to Working Parties. Working Parties consist of a number of delegations varying from about five to twenty according to the importance of the question and the interests involved. The countries who are parties to the dispute are always members of the Working Party and have the same status as other delegations. The report of the Working Party represents the views of all its members and therefore records different views if necessary. Since the tendency is to strive for unanimity, there is always some measure of negotiation and compromise in the formulation of the Working Party's report.

¹ CP.2/SR.11

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

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

¹L/392/Rev.1, paragraph 4

²Idem, paragraph 5

³SR.7/7

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

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

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

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

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

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

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

²C/M/18

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

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

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

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

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

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

two such persons nominated by the importing members; and

a chairman selected unanimously by the four persons nominated by the parties or, if they fail to agree, by the Chairman of the Council.

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

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

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

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

II. Conditions of access to the dispute settlement bodies

(a) Bilateral consultation

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

¹The CONTRACTING PARTIES at their seventeenth session in 1960 agreed that "a consultation held under paragraph 1 of Article XXII would be considered by the CONTRACTING PARTIES as fulfilling the conditions of paragraph 1 of Article XXIII" (BISD, 9th Supplement, pages 18-20, paragraph 9). Similarly, the CONTRACTING PARTIES agreed in April 1966 that "consultations held under paragraph 2 of Article XXVII:2 in respect of restrictions for which there is no authority under any provisions of the General Agreement will be considered by the CONTRACTING PARTIES as fulfilling the conditions of paragraph 1 of Article XXIII if the parties to the consultations so agree" (BISD, 14th Supplement, pages 18-20, paragraph 11). Prior consultations are not required in Article XXIII:1(c) cases.

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

(b) Prior conciliation

22. The General Agreement itself does not provide for prior conciliation or good offices procedures. However, on 5 April 1966, the CONTRACTING PARTIES decided that:

1. If consultations between a less-developed contracting party and a developed contracting party in regard to any matter falling under paragraph 1 of Article XXIII do not lead to a satisfactory settlement, the less-developed contracting party complaining of the measure may refer the matter which is the subject of consultations to the Director-General so that, acting in an ex officio capacity, he may use his good offices with a view to facilitating a solution.
2. To this effect the contracting parties concerned shall, at the request of the Director-General, promptly furnish all relevant information.
3. On receipt of this information, the Director-General shall consult with the contracting parties concerned and with such other contracting parties or intergovernmental organizations as he considers appropriate with a view to promoting a mutually acceptable solution.
4. After a period of two months from the commencement of the consultations referred to in paragraph 3 above, if no mutually satisfactory solution has been reached, the Director-General shall, at the request of one of the contracting parties concerned, bring the matter to the attention of the CONTRACTING PARTIES or the Council, to whom he shall submit a report on the action taken by him, together with all background information.¹

¹BISD, 14th Supplement, pages 18-20

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

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

III. Competence of the dispute settlement bodies

(a) Legal nature of the dispute

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

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

¹Cf. C/W/250

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

(b) Parties to the dispute

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

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

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

³L/392/Rev.1, paragraph 8

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

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

IV. Procedures of the dispute settlement bodies

(a) Voting

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

¹SR 10/1

²SR 12/2

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

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

(b) Temporal requirements

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

1. Duration of good offices procedures: two months
2. Preparation of Panel report: sixty days¹
3. Implementation of decision: ninety days¹

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

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

¹BISD, 14th Supplement, pages 18-20

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(c) Interim measures

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

V. Decision of the dispute settlement bodies

(a) Legal nature

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

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(b) Means of enforcement

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

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

1. Suspend that member's voting rights;
2. Suspend additional rights of such member, including that of being eligible for, or of holding, office in the Council or in any of its committees until it has fulfilled its obligations;
3. Exclude such member from the organization.

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

¹BISD, 1st Supplement, page 32

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

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

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

1. Binding decision with possibility of sanctions (e.g. Cocoa Agreement)
2. Binding decision without possibility of sanctions (e.g. Lomé Convention)
3. Recommendation with the possibility of sanctions (e.g. Caribbean Community Treaty)
4. Recommendation without the possibility of sanctions (e.g. EFTA Convention in case of actions that are legal but frustrate benefits accruing under the Convention or objectives of the Association).

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

VI. Expenses

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

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

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

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ANNEX A

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

1. THE GENERAL AGREEMENT ON TARIFFS AND TRADE

Article XXII

Consultation

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.

2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

Article XXIII

Nullification or Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

- (a) the failure of another contracting party to carry out its obligations under this Agreement, or
- (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
- (c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

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2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultations necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

2. THE ARRANGEMENT REGARDING INTERNATIONAL TRADE IN TEXTILES

Article 10

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

2. -----

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

Article 11

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

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

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

4. In the absence of any mutually agreed solution in bilateral negotiations or consultations between participating countries provided for in this Arrangement, the Textiles Surveillance Body at the request of either party, and following a thorough and prompt consideration of the matter, shall make recommendations to the parties concerned.

5. The Textiles Surveillance Body shall, at the request of any participating country, review promptly any particular measures or arrangements which that country considers to be detrimental to its interests where consultations between it and the participating countries directly concerned have failed to produce a satisfactory solution. It shall make recommendations as appropriate to the participating country or countries concerned.

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

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

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

9. If, following recommendations by the Textiles Surveillance Body, problems continue to exist between the parties, these may be brought before the Textiles Committee or before the GATT Council through the normal GATT procedures.

10. Any recommendations and observations of the Textiles Surveillance Body would be taken into account should the matters related to such recommendations and observations subsequently be brought before the CONTRACTING PARTIES to the GATT, particularly under the procedures of Article XXIII of the GATT.

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3. THE CONVENTION ESTABLISHING THE EUROPEAN FREE TRADE ASSOCIATION

Article 31

General Consultations and Complaints Procedure

1. If any member State considers that any benefit conferred upon it by this Convention or any objective of the Association is being or may be frustrated and if no satisfactory settlement is reached between the member States concerned, any of those member States may refer the matter to the Council.
2. The Council shall promptly, by majority vote, make arrangements for examining the matter. Such arrangements may include a reference to an examining committee constituted in accordance with Article 33. Before taking action under paragraph 3 of this Article, the Council shall so refer the matter at the request of any member State concerned. Member States shall furnish all information which they can make available and shall lend their assistance to establish the facts.
3. When considering the matter, the Council shall have regard to whether it has been established that an obligation under the Convention has not been fulfilled, and whether and to what extent any benefit conferred by the Convention or any objective of the Association is being or may be frustrated. In the light of this consideration and of the report of any examining committee which may have been appointed, the Council may, by majority vote, make to any member State such recommendations as it considers appropriate.
4. If a member State does not or is unable to comply with a recommendation made in accordance with paragraph 3 of this Article and the Council finds, by majority vote, that an obligation under this Convention has not been fulfilled, the Council may, by majority decision, authorize any member State to suspend to the member State which has not complied with the recommendation the application of such obligations under this Convention as the Council considers appropriate.
5. Any member State may, at any time while the matter is under consideration, request the Council to authorize, as a matter of urgency, interim measures to safeguard its position. If it appears to the Council that the circumstances are sufficiently serious to justify interim action, and without prejudice to any action which it may subsequently take in accordance with the preceding paragraphs of this Article, the Council may, by majority decision, authorize a member State to suspend its obligations under this Convention to such an extent and for such a period as the Council considers appropriate.

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4. ACP-EEC CONVENTION OF LOME

Article 81

1. Any dispute which arises between one or more member States or the Community on the one hand, and one or more ACP States on the other, concerning the interpretation or the application of this Convention may be placed before the Council of Ministers.
2. Where circumstances permit, and subject to the Council of Ministers being informed, so that any parties concerned may assert their rights, the Contracting Parties may have recourse to a good offices procedure.
3. If the Council of Ministers fails to settle the dispute at its next meeting, either Party may notify the other of the appointment of an arbitrator; the other Party must then appoint a second arbitrator within two months. For the application of this procedure, the Community and the member States shall be deemed to be one Party to the dispute.

The Council of Ministers shall appoint a third arbitrator.

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

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

Lomé Convention: Protocol No. 4

Article 3

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

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

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

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

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5. THE TREATY ESTABLISHING THE CARIBBEAN COMMUNITY

Article 11

Disputes Procedure Within the Common Market

1. If any Member State considers that any benefit conferred upon it by this Annex or any objective of the Common Market is being or may be frustrated and if no satisfactory settlement is reached between the Member States concerned any of those Member States may refer the matter to the Council.
2. The Council shall promptly, make arrangements for examining the matter. Such arrangements may include a reference to a Tribunal constituted in accordance with Article 12 of this Annex. The Council shall refer the matter at the request of any Member State concerned to the Tribunal. Member States shall furnish all information which may be required by the Tribunal or the Council in order that the facts may be established and the issue determined.
3. If in pursuance of the foregoing provisions of this Article the Council or the Tribunal, as the case may be, finds that any benefit conferred on a Member State by this Annex or any objective of the Common Market is being or may be frustrated, the Council may, by majority vote, make to the Member State concerned such recommendations as it considers appropriate.
4. If a Member State to which a recommendation is made under paragraph 3 of this Article does not or is unable to comply with such recommendation the Council may, by majority vote, authorize any Member State to suspend in relation to the Member State which has not complied with the recommendation the application of such obligations under this Annex as the Council considers appropriate.
5. Any Member State may at any time while any matter is under consideration under this Article request the Council to authorize, as a matter of urgency, interim measures to safeguard its position. If the matter is being considered by the Tribunal such request shall be referred by the Council to the Tribunal for its recommendation. If it is found by a majority vote of the Council that the circumstances are sufficiently serious to justify interim action, and without prejudice to any action which it may subsequently take in accordance with the preceding paragraphs of this Article, the Council may, by majority vote, authorize a Member State to suspend its obligations under this Annex to such an extent and for such period as the Council considers appropriate.

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Article 12

Reference to Tribunal

1. The establishment and composition of the Tribunal referred to in Article 11 of this Annex shall be governed by the following provisions of this Article.
2. For the purposes of establishing an ad hoc tribunal referred to in Article 11 of this Annex, a list of arbitrators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General. To this end, every Member State shall be invited to nominate two persons, and the names of the persons so nominated shall constitute the list. The term of an arbitrator, including that of any arbitrator nominated to fill a vacancy, shall be five years and may be renewed.
3. Each party to the dispute shall be entitled to appoint from the list an arbitrator to an ad hoc tribunal. The two arbitrators chosen by the parties shall be appointed within thirty days following the date on which the notification was received by the Secretary-General. The two arbitrators shall within fifteen days following the date of the last of their own appointments, appoint a third arbitrator from the list who shall be the chairman; as far as practicable the chairman shall not be a national of any of the parties to the dispute.
4. Where the first two arbitrators fail to appoint a chairman within the period prescribed, the Secretary-General shall within fifteen days following the expiry of that period appoint a chairman. If any party fails to appoint an arbitrator within the period prescribed for such an appointment, the Secretary-General shall appoint an arbitrator within fifteen days following the expiry of such period. Any vacancy shall be filled in the manner specified for the initial appointment.
5. Where more than two Member States are parties to a dispute, the parties concerned shall agree among themselves on the two arbitrators to be appointed from the list. In the absence of such appointment within the prescribed period, the Secretary-General shall appoint a sole arbitrator whether from the list or otherwise, for the purpose.
6. An ad hoc tribunal shall decide its own procedure and may, with the consent of the parties to the dispute, invite any party to this Annex to submit its views orally or in writing.
7. The Secretary-General shall provide the ad hoc tribunal with such assistance and facilities as it may require.

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

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

6. THE INTERNATIONAL COCOA AGREEMENT

Article 61

Consultations

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

Article 62

Disputes

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

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

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

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

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- (ii) two such persons nominated by the importing members; and
 - (iii) a chairman selected unanimously by the four persons nominated under (i) and (ii) or, if they fail to agree, by the Chairman of the Council.
 - (b) Nationals of members shall not be ineligible to serve on the ad hoc advisory panel.
 - (c) Persons appointed to the ad hoc advisory panel shall act in their personal capacities and without instructions from any government.
 - (d) The costs of the ad hoc advisory panel shall be paid by the Organization.
4. The opinion of the ad hoc advisory panel and the reasons therefor shall be submitted to the Council which, after considering all the relevant information, shall decide the dispute.

Article 63

Complaints and Action by the Council

1. Any complaint that any member has failed to fulfil its obligations under this Agreement shall, at the request of the member making the complaint, be referred to the Council, which shall consider it and make a decision on the matter.
2. Any finding by the Council that a member is in breach of its obligations under this Agreement shall be made by a simple distributed majority vote and shall specify the nature of the breach.
3. Whenever the Council, whether as a result of a complaint or otherwise, finds that a member is in breach of its obligations under this Agreement it may, without prejudice to such other measures as are specifically provided for in other Articles of this Agreement, including Article 73, by special vote:
 - (a) suspend that member's voting rights in the Council and in the Executive Committee; and
 - (b) if it considers necessary, suspend additional rights of such member, including that of being eligible for, or of holding, office in the Council or in any of its committees until it has fulfilled its obligations.
4. A member whose voting rights are suspended under paragraph 3 shall remain liable for its financial and other obligations under this Agreement.

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Article 73

Exclusion

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

7. THE ARTICLES OF AGREEMENT OF THE INTERNATIONAL MONETARY FUND

Article XVIII

Interpretation

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

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

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

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Article XV

Withdrawal from Membership

Section 1. ---

Section 2. Compulsory withdrawal

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

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

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

4.c Dispute Settlement in International Economic Agreements. Factual Study by the Secretariat (continued)

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ANNEX B

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4.c Dispute Settlement in International Economic Agreements. Factual Study by the Secretariat
(continued)

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4.d Notification and Surveillance. Proposal by the Director-General

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

C/111

14 March 1980

Limited Distribution

COUNCIL
26 March 1980

NOTIFICATION AND SURVEILLANCEProposal by the Director-General

1.. At their thirty-fifth session, the CONTRACTING PARTIES adopted an Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance (L/4907) drawn up in the Multilateral Trade Negotiations. An invitation to contracting parties to indicate at the beginning of every year to the Director-General the name of one or two persons who would be available to serve on panels has been issued in GATT/AIR/1607 in accordance with paragraph 13 of the Understanding. Some action is required with regard to the other parts of the Understanding and in paragraph 1.2.2 of the GATT Work Programme, also adopted at the thirty-fifth session (L/4884/Add.1, Annex VI), the CONTRACTING PARTIES specifically agreed that "the agreement relating to the conduct of the regular and systematic review of developments in the trading system as agreed in the Group "Framework" and in the Trade Negotiations Committee, should be referred to the Council, with the request that appropriate procedures be taken up at an early meeting of the Council".

2. This note makes a number of suggestions relating to action necessary to implement paragraphs 2, 3 and 24 of the Understanding which read as follows:

"Notification

"2. Contracting parties reaffirm their commitment to existing obligations under the General Agreement regarding publication and notification.

"3. Contracting parties moreover undertake, to the maximum extent possible, to notify the CONTRACTING PARTIES of their adoption of trade measures affecting the operation of the General Agreement, it being understood that such notification would of itself be without prejudice to views on the consistency of measures with or their relevance to rights and obligations under the General Agreement. Contracting parties should endeavour to notify such measures in advance of implementation. In other cases, where prior notification has not been possible, such measures should be notified promptly ex post facto. Contracting parties which have reason to believe that such trade measures have been adopted by another contracting party may seek information on such measures bilaterally, from the contracting party concerned.

4.d Notification and Surveillance. Proposal by the Director-General (*continued*)

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"Surveillance"

"24. The CONTRACTING PARTIES agree to conduct a regular and systematic review of developments in the trading system. Particular attention would be paid to developments which affect rights and obligations under the GATT, to matters affecting the interests of less-developed contracting parties, to trade measures notified in accordance with this understanding and to measures which have been subject to consultation, conciliation or dispute settlement procedures laid down in this understanding."

Action relating to paragraph 2

3. During the Multilateral Trade Negotiations the secretariat drew up a list of publication and notification requirements accepted by all contracting parties. The text of this document, originally circulated as MTN/FR/W/17, is reproduced in Annex I. As the introduction to Annex I makes clear, it deals only with requirements which apply to all governments to submit notifications to the CONTRACTING PARTIES. The secretariat has now completed the information contained in Annex I by drawing up a list of notification requirements which relate in each case only to some government or governments: this is contained in Annex II. The secretariat has also established a calendar of the dates on which regular notifications fall due: this is contained in Annex III.

4. It is suggested that the Council draw the attention of all contracting parties to paragraph 2 of the Understanding and to the notification requirements set out in Annexes I and II. It is also suggested that the Council invite contracting parties to submit notifications in accordance with the calendar set out in Annex III.

Action relating to paragraphs 3 and 24

5. Any arrangements which the Council might make at the present stage will necessarily be experimental and initially some amount of overlap may be unavoidable. This suggests that arrangements should be kept as simple as possible and that they should be reviewed, and if necessary modified, in the light of experience.

6. With these considerations in mind, the following suggestions are presented to the Council for discussion and adoption:

- (a) The attention of contracting parties should be drawn to paragraph 3 of the Understanding. Contracting parties should be invited to submit notifications under this paragraph, in particular when notifications covering the measures are not made under other GATT procedures.

4.d Notification and Surveillance. Proposal by the Director-General (*continued*)

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- (b) The reviews referred to in paragraph 24 of the Understanding should be conducted by the Council at sessions specially held for that purpose.
- (c) Reviews should be held twice a year, the first taking place in autumn 1980.
- (d) The secretariat should prepare a factual note, drawing on the notifications made and other relevant information, on which the first review could be based.
- (e) These arrangements should be reviewed by the Council in the light of the experience gained with the first review.

4.d Notification and Surveillance. Proposal by the Director-General (*continued*)

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ANNEX I

NOTIFICATIONS REQUIRED FROM CONTRACTING PARTIES¹

Note by the Secretariat

Under the provisions of the General Agreement and under special procedures established by the CONTRACTING PARTIES for the implementation of these provisions, the contracting parties are requested to submit notifications on a periodic basis or in connexion with certain trade policy actions, including actions for which prior approval by the CONTRACTING PARTIES is required. Furthermore, notification procedures have been established under certain special arrangements drawn up within the framework of the GATT and applicable only to contracting parties participating in such arrangements. Finally, certain notification procedures apply to particular contracting parties in accordance with their terms of accession or pursuant to certain waiver conditions.

In connexion with discussions in the Group "Framework", regarding notification, consultation, dispute settlement and surveillance, the question of the notifications required from contracting parties under various provisions of the General Agreement was raised. The present note is being circulated to facilitate discussions on this subject. The note is intended to give a comprehensive summary of the various notification procedures in force, as applicable to contracting parties generally, leaving aside notifications required under special arrangements or applicable to particular contracting parties only.

Article II:6(a) - Adjustment of specific duties

A contracting party wishing to adjust its specific duties under the provisions of Article II:6(a) is required to seek the concurrence of the CONTRACTING PARTIES pursuant to these provisions. Under current procedures the communication of the contracting party concerned is submitted to the Council for consideration. Since 1948, these procedures have been invoked ten times.

Article VI - Anti-dumping and countervailing duties

Article VI does not provide for the notification of specific anti-dumping or countervailing duty cases, although certain annual reports are required from the parties to the Agreement on Implementation of Article VI.

¹This text was originally issued as MTN/FR/W/17.

4.d Notification and Surveillance. Proposal by the Director-General (*continued*)C/111
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However, a contracting party wishing to impose an anti-dumping or countervailing duty for the purpose referred to in sub-paragraph 6(b) is required to seek the prior approval of the CONTRACTING PARTIES.

Article VI:6(c) requires that if in exceptional circumstances a contracting party levies a countervailing duty for the purpose referred to in sub-paragraph 6(b) of this Article without the prior approval of the CONTRACTING PARTIES such action shall be reported immediately to the CONTRACTING PARTIES.

The provisions of paragraphs 6(b) and 6(c) have, so far, not been invoked.

Article X - Publication of trade regulations

Under the provisions of Article X:1 contracting parties are required to publish promptly their trade regulations and matters relating thereto. In March 1964 the CONTRACTING PARTIES adopted a recommendation that contracting parties should forward promptly to the secretariat copies of the laws, regulations, decisions, rulings and agreements of the kind described in paragraph 1 of Article X (BISD 12S/49).

The response to this recommendation has been limited. The secretariat, however, does receive from a number of contracting parties copies of the national tariffs and amendments thereto.

At a meeting of the Council in November 1974 a representative referred to the serious deterioration of the international market for certain products and the need for rapid dissemination of information on developments in these markets and on the measures taken by governments. He considered it appropriate for contracting parties to make more use of the procedures for notification and information provided by GATT, independently of whether or not there was a formal obligation to provide such information. He referred in this connexion to the above-mentioned recommendation of 20 March 1964 (C/M/102).

There was no further response to this matter.

Quantitative restrictions(a) Residual restrictions

Quantitative restrictions applied by eighteen developed contracting parties were examined by a Joint Working Group set up by the Council in January 1970. In June 1971 the Council decided that the data assembled by the Joint Working Group should be kept up to date and contracting parties should be invited to notify annually by 30 September any changes which should be made concerning restrictions contained in the consolidated document.

4.d Notification and Surveillance. Proposal by the Director-General (*continued*)

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Every year the secretariat issues an airgram inviting contracting parties to communicate any necessary changes to the basic documentation (see L/4604 and Notes on individual import restrictions contained in COM.IND/W/67/Add.1 and MTN/3E/DOC/7). About half of the eighteen developed contracting parties concerned regularly respond to this invitation.

(b) Licensing

At their twenty-eighth session in November 1972 the CONTRACTING PARTIES decided that the data assembled on licensing systems should be kept up to date and that contracting parties should be invited to notify annually by 30 September any changes which should be made concerning the information contained in the consolidated document.

Every year the secretariat issues an airgram inviting contracting parties to communicate any necessary changes to the basic documentation (see L/4598 and COM.IND/W/55 - COM.AG/W/72). Since 1971 responses have been received from fifty-six contracting parties.

(c) Import restrictions applied for balance-of-payments purposes

(i) Articles XII:4(a) and XVIII:12(a)

Introduction or substantial intensification of import restrictions

A contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under Articles XII or XVIII:B is required, pursuant to the provisions of Article XII:4(a) or Article XVIII:12(a), to enter into consultations with the CONTRACTING PARTIES.

In November 1960 the CONTRACTING PARTIES established procedures for the implementation of these provisions under which the contracting party concerned is required to furnish detailed information promptly for circulation to the contracting parties, after which the consultation is conducted by the Council (BISD, 9S/18).

The number of notifications under this procedure has been limited.

(ii) Consultations under Articles XII:4(b) and XVIII:12(b)

In accordance with the provisions of Articles XII:4(b) and XVIII:12(b) the Committee on Balance-of-Payments Restrictions conducts consultations with contracting parties. The consulting countries submit a basic document or a statement to the Committee.

A series of consultations is held twice or three times a year in accordance with a programme established in consultation with the consulting contracting parties concerned and with the International Monetary Fund.

4.d Notification and Surveillance. Proposal by the Director-General (*continued*)C/111
Page 7Article XVI - Subsidies

Article XVI requires that contracting parties which maintain subsidies having the effects described in paragraph 1 of the Article, are to notify in writing the nature and extent of the subsidization. The CONTRACTING PARTIES established procedures for such notifications and adopted a questionnaire with a view to achieving a standardized reporting system.

Under current procedures (BISD, 11S/59) the contracting parties are invited to submit by the end of January every third year, new and full responses to the questionnaire on subsidies (BISD, 9S/193) and to notify changes to the basic notifications in the intervening years.

Every year the secretariat circulates a document inviting contracting parties to submit such a notification (see L/4622).

The number of responses to the last full notification, in 1975, was seventeen (L/4141 and addenda).

Article XVII - State trading

Article XVII requires that contracting parties which maintain State-trading enterprises, in the sense of paragraph 1 of that Article, shall notify the CONTRACTING PARTIES of the products imported into or exported from their territories by such enterprises. The CONTRACTING PARTIES established procedures for such notifications and adopted a questionnaire designed to achieve a standardized reporting system.

Under current procedures (BISD, 11S/59) the contracting parties are invited to submit by the end of January every third year new and full responses to the questionnaire (BISD, 9S/184) and to notify changes to the basic notifications in the intervening years.

Every year the secretariat circulates a document inviting contracting parties to submit such a notification (see L/4623).

The number of responses to the last full notification, in 1975, was seventeen (L/4140 and addenda).

Article XVIII:A - Modification of concessions

A contracting party wishing to modify or withdraw a concession pursuant to the provisions of Article XVIII:7(a), in order to promote the establishment of a particular industry, is required to notify the CONTRACTING PARTIES and to enter into negotiations in this regard.

These provisions have been invoked eight times.

4.d Notification and Surveillance. Proposal by the Director-General (*continued*)

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Article XVIII:C

A contracting party wishing to have recourse to the provisions of Section C of Article XVIII and to provide governmental assistance to promote the establishment of a particular industry is required to notify the special difficulties it meets and to indicate the specific measure which it proposes to introduce. A questionnaire for the guidance of contracting parties was approved in 1958 (BISD, 7S/85).

Since 1957 when the revised provisions of Article XVIII:C entered into force, the provisions have been invoked by two contracting parties. Since 1966 the provisions have not been invoked.

Article XVIII:D

A contracting party wishing to have recourse to the provisions of Section D of Article XVIII is required to seek the approval of the CONTRACTING PARTIES for the introduction of the measure it desires to take to promote the establishment of a particular industry.

These provisions have not been invoked.

Article XIX - Emergency action

Article XIX:2 requires any contracting party, before taking emergency action pursuant to the provisions of Article XIX:1, to give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable. However, in critical circumstances action may be taken provisionally without prior consultation. In virtually all cases it has been this latter provision which has been applied.

Article XXII - Consultation

Procedures under Article XXII on questions affecting the interests of a number of contracting parties were adopted in 1958 (BISD, 7S/24). Under these procedures any contracting party seeking a consultation under Article XXII is required to inform the Director-General for the information of all contracting parties, so as to enable any other contracting party to express its desire to be joined in the consultation.

Article XXIV - Customs unions and free-trade areas; regional agreements

(a) Notifications

Article XXIV:7(a) requires that any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES.

4.d Notification and Surveillance. Proposal by the Director-General (*continued*)C/111
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At its meeting in October 1972 the Council established procedures for the examination of such agreements. The Council decided, without prejudice to the legal obligation to notify in pursuance of Article XXIV, to invite contracting parties that sign an agreement falling within the terms of Article XXIV, paragraphs 5 to 8, to inscribe the item on the agenda for the first meeting of the Council following such signature. This should allow the Council to determine the procedures for examination of the agreement (BISD, 19S/13).

(b) Progress reports

At their twenty-seventh session the CONTRACTING PARTIES discussed the question of periodic reports on progress under customs unions and free-trade areas notified under Article XXIV. The CONTRACTING PARTIES instructed the Council to establish a calendar fixing dates for the examination, every two years, of reports on developments under regional agreements submitted by the parties to the agreements (see L/4445).

Biennial reports under these procedures are regularly provided.

Article XXVIII - Modification of schedules(a) Article XXVIII:1

A contracting party wishing to have recourse to the provisions of Article XXVIII:1 for the renegotiation or withdrawal of certain concessions in its schedule is required to notify the CONTRACTING PARTIES. Such notification is to take place not earlier than six months, nor later than three months before the termination date of the three-year period referred to in Article XXVIII:1 (see Notes and Supplementary provisions ad Article XXVIII). The current three-year period will terminate on 31 December 1978.

These provisions were invoked in 1966 by five, in 1969 by seven and in 1972 by four contracting parties. These provisions were not invoked in 1975.

(b) Article XXVIII:4

A contracting party intending to seek authorization of the CONTRACTING PARTIES to enter into negotiations for the modification or withdrawal of a concession under the provisions of Article XXVIII:4 should submit its request for consideration by the Council.

Since 1953 these provisions have been invoked fifty-six times.

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(c) Article XXVIII:5

Any contracting party wishing to reserve the right for the duration of the three-year period envisaged in paragraph 1, to modify its schedule is required to notify the CONTRACTING PARTIES before the termination of the current three-year period. The current three-year period will terminate on 31 December 1978.

In the three-year period 1970-72 these provisions were invoked by nine contracting parties of which eventually four carried out negotiations. The number of invocations for the three-year periods 1973-75 and 1976-79 was twelve in both cases, of which five in 1973-75 and four in 1976-79 eventually led to renegotiations.

Article XXXVII:2(a) - Non-fulfilment of Article XXXVII:1

The provisions of Article XXXVII:1 contain certain commitments of developed contracting parties. Under the provisions of paragraph 2(a) of Article XXXVII any contracting party not giving effect to any of the provisions of paragraph 1, or any other interested contracting party, is required to report the matter to the CONTRACTING PARTIES.

Review of implementation of Part IV

In order to enable the Committee on Trade and Development to keep under continuous review the application of the provisions of Part IV, the Committee agreed, in March 1965, on reporting procedures (BISD, 13S/79). Guidelines for the submission of notifications, the preparation of reports and the carrying out of reviews on the implementation of Part IV which provide that notifications made by governments should be as exhaustive and comprehensive as possible, and should relate both to measures specifically mentioned in paragraphs 1 and 3, or paragraph 4, as the case may be of Article XXXVII, as well as to all steps and measures of interest to the CONTRACTING PARTIES in relation to the objectives and provisions of Part IV, were adopted by the Committee on Trade and Development (COM.TD/24, paragraph 10).

Every year the secretariat issues an airgram inviting contracting parties to make the relevant information available.

In November 1977 the Committee on Trade and Development was of the view that the existing reporting procedures were not being complied with to the fullest extent possible (BISD, 24S/55, paragraph 24).

4.d Notification and Surveillance. Proposal by the Director-General (*continued*)C/111
Page 11Border tax adjustments

Based on the recommendations of the Working Party on Border Tax Adjustments, the Council, in December 1970, introduced a notification procedure, on a provisional basis, whereby contracting parties would report changes in their tax adjustments (BISD, 18S/108). The notifications are to relate to any major changes in tax adjustment legislation and practices involving international trade, and in particular at bringing periodically up to date the information contained in the consolidated document on contracting parties' practices (L/3389) on tax adjustments drawn up in the course of the Working Party's work.

Notifications under this procedure are currently distributed as addenda to document L/3518. Five contracting parties have submitted such notifications (see L/3518 and addenda 1-13).

Liquidation of strategic stocks

Under the Resolution of 4 March 1955 a contracting party intending to liquidate a substantial quantity of strategic stocks should give at least forty-five days' prior notice of such intention (BISD, 3S/51).

Since 1970 one contracting party has submitted a number of notifications under this procedure.

Marks of origin

In 1958 the CONTRACTING PARTIES adopted certain rules on marks of origin which elaborated the basic principles of Article IX in order to reduce the difficulties and inconveniences which marking regulations may cause to the commerce and industry of the exporting country (Recommendation of 21 November 1958, BISD 7S/30). The Recommendation also invites contracting parties to report, before 1 September each year, changes in their legislation, rules and regulations concerning marks of origin.

A number of contracting parties have complied with this invitation, but since 1961 no further submissions have been received (see L/478 and addenda 1-20).

4.d Notification and Surveillance. Proposal by the Director-General (*continued*)

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ANNEX II

Information Required from Some Contracting Parties

(a) Accession Protocols

- Hungary: The Protocol for the Accession of Hungary states, in its paragraph 6(b):

"(b) Particular attention shall be paid, in the course of these consultations, to the operation of paragraph 3(b) of this Protocol. The parties shall consult on the evolution of imports by Hungary from contracting parties as well as regulations affecting Hungarian foreign trade. To this effect the Working Party will examine all aspects of the development of Hungarian imports on the basis of inter alia relevant information to be provided by Hungary." (BISD, 20S/5)

- Poland: The Protocol for the Accession of Poland states, in its paragraph 5:

"5. Nine months after the date of this Protocol and annually thereafter the Polish Government shall consult with the CONTRACTING PARTIES with a view to reaching agreement on Polish targets for imports from the territories of the contracting parties as a whole in the following year. These consultations on Polish trade with contracting parties would follow the lines laid down in Annex A to this Protocol." (BISD, 15S/49)

- Romania: The Protocol for the Accession of Romania states, in its paragraph 5:

"5. Early in the second year after the entry into force of this Protocol and in alternate years thereafter, or in any other year at the specific request of a contracting party or Romania, consultations shall be held between Romania and the CONTRACTING PARTIES in a working party to be established for this purpose to review the development of reciprocal trade and measures taken under the terms of this Protocol. These consultations shall follow the lines laid down in Annex A to this Protocol..." (BISD, 18S/7)

4.d Notification and Surveillance. Proposal by the Director-General (*continued*)C/111
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- Switzerland: The Protocol for the Accession of Switzerland states, in its paragraph 4:

"4... Switzerland shall furnish annually to the CONTRACTING PARTIES a report on the measures maintained consistently with this reservation, and upon request of the CONTRACTING PARTIES enter into consultation with them regarding such measures. Furthermore, the CONTRACTING PARTIES shall conduct a thorough review of the application of the provisions of this paragraph every three years." (BISD, 14S/8)

- Other contracting parties in relation to Poland, Romania and Hungary: The Protocols for the accession of these countries to the General Agreement state respectively:

Hungary, paragraph 4(c):

"4.(c) To this end, contracting parties shall notify, on entry into force of this Protocol, on 1 January 1975, and thereafter before the consultations provided for in paragraph 6 below, discriminatory prohibitions and quantitative restrictions still applied to imports from Hungary. Such notifications shall include a list of the products subject to these prohibitions and restrictions, specifying the type of restrictions applied (import quotas, licensing systems, embargoes, etc.) as well as the value of trade effected in the products concerned and the measures adopted with a view to eliminating these prohibitions and restrictions under the terms of the preceding sub-paragraphs." (BISD, 20S/4)

Poland, paragraph 3(b):

"3.(b) The CONTRACTING PARTIES shall in the course of the annual consultations provided for in paragraph 5 below review measures taken by contracting parties pursuant to the provisions of this paragraph, and make such recommendations as they consider appropriate." (BISD, 15S/48)

Romania, paragraph 3(b):

"3.(b) Contracting parties shall notify, on entry into force of this Protocol, and before the consultations provided for in paragraph 5 below, discriminatory prohibitions and quantitative restrictions still applied at that time to imports

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from Romania. Such notifications shall include a list of the products subject to these prohibitions and restrictions, specifying the type of restrictions applied (import quotas, licensing systems, embargoes, etc.) as well as the value of trade effected in the products concerned and the measures adopted with a view to eliminating these prohibitions and restrictions under the terms of the preceding sub-paragraph." (BISD, 18S/6)

(b) Waivers

- Australia: Products of Papua New Guinea, paragraph 3:

"3. The Government of Australia shall report annually to the CONTRACTING PARTIES on the measures taken and on the effects of those measures on the trade of Papua New Guinea and on imports of the products affected from all sources into Australia." (BISD, 2S/19)¹

- Turkey: Stamp duty paragraph 3:

"3. The Government of Turkey shall, on 15 September 1964 and, so long as the stamp duty is maintained on products included in Schedule XXVII, annually thereafter, submit to the CONTRACTING PARTIES a report on the operation of the stamp duty in relation to the implementation of the Five-Year Plan and shall consult with the CONTRACTING PARTIES on the continued maintenance of the stamp duty taking into account any changes in the application of the stamp duty to individual products." (BISD, 12S/56)

¹The Report of the Working Party established to examine the provisions of the Agreement on Trade and Commercial Relations between Australia and Papua New Guinea adopted on 11 November 1977 states, in its paragraph 5: "It was anticipated that formal action to disinvoke the 1953 waiver would be taken shortly."

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- United States: Agricultural Adjustment Act, paragraph 6:

"6. The CONTRACTING PARTIES will make an annual review of any action taken by the United States under this Decision. For each such review the United States will furnish a report to the CONTRACTING PARTIES showing any modification or removal of restrictions effected since the previous report, the restrictions in effect under Section 22 and the reasons why such restrictions (regardless of whether covered by this waiver) continue to be applied and any steps it has taken with a view to a solution of the problem of surpluses of agricultural commodities."
(BISD, 3S/36)

- United States: imports of automotive products, paragraph 6:

"6. In addition to receiving an annual report as referred to in the procedures adopted by the CONTRACTING PARTIES on 1 November 1956, the CONTRACTING PARTIES will, two years from the date when this waiver comes into force and, if necessary, biennially thereafter, review its operation and consider how far, in the circumstances then prevailing, the United States would continue to need cover to implement the agreement with Canada, having regard to the provisions of paragraph 1 of Article 1 of the GATT." (BISD, 14S/39)

- Generalized System of Preferences, paragraph (c):

"(c) That any contracting party, which introduces a preferential tariff arrangement under the terms of the present Decision or later modifies such arrangement, shall notify the CONTRACTING PARTIES and furnish them with all useful information relating to the actions taken pursuant to the present Decision;"
(BISD, 18S/25)

- Trade Negotiations among Developing Countries, paragraph (e):¹

"(e) That the CONTRACTING PARTIES will review annually, on the basis of a report to be furnished by the participating countries, the operation of this Decision in the light of the aforementioned objectives and considerations and after five years of its operation carry out a major review in order to evaluate its effects. Before the end of the tenth year, the CONTRACTING PARTIES will undertake another major review of its operations with a view to deciding whether this Decision should be continued or modified. In connexion with such annual reviews and major reviews, the participating contracting parties shall make available to the CONTRACTING PARTIES relevant information regarding action taken under this Decision." (BISD, 18S/27)

¹The Committee on Trade and Development at its meeting of March 1980 agreed on arrangements which have a bearing on these notification requirements.

4.d Notification and Surveillance. Proposal by the Director-General (*continued*)

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- (c) Differential and more favourable treatment reciprocity and fuller participation of developing countries, paragraph 4(a):¹

"4.* Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:

- (a) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;" (L/4903)

- (d) Trade arrangements between India, the United Arab Republic and Yugoslavia, operative paragraph:¹

"The CONTRACTING PARTIES

Decide that, notwithstanding the provisions of Article I:1 of the General Agreement, the participating States may continue to implement the Agreement, as amended by the Protocol and with the inclusion of the additional products mentioned in document L/3933, subject to the relevant terms and conditions of the Decisions of 20 February 1970 and 13 November 1973, until 31 March 1983, it being understood, however, that this Decision shall be subject to review by the CONTRACTING PARTIES each two years as well as in the fifth year of the operation of the Decision on the basis of reports to be submitted by the participating States." (BISD, 25S/9)

- (e) Bangkok Agreement¹, operative paragraph (c):

"(c) On the basis of a report by the participating States on developments under the Agreement, the operation of this Decision shall be reviewed biennially by the CONTRACTING PARTIES in the light of the provisions of the General Agreement and of the objectives stated above. The CONTRACTING PARTIES may, in the course of the reviews, make such recommendations to the participating contracting parties as may be appropriate, including any arising out of any consultations held in regard to the effects of the Agreement on the trade of contracting parties. The CONTRACTING PARTIES may also in the course of the reviews, take such decisions regarding the operation of this Decision as may be appropriate in the light of developments at that time." (BISD, 25S/8)

¹The Committee on Trade and Development at its meeting of March 1980 agreed on arrangements which have a bearing on these notification requirements.

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- (f) Agreement on ASEAN Preferential Trading Arrangements¹, operative paragraph (c):

"(c) on the basis of reports by the participating States on developments under the Agreement, the operation of this Decision shall be reviewed biennially by the CONTRACTING PARTIES in the light of the provisions of the General Agreement and of the objectives stated above. The CONTRACTING PARTIES may, in the course of the reviews, make such recommendations to the participating contracting parties as may be appropriate, including any arising out of any consultations held in regard to the effects of the Agreement on the trade of contracting parties. The CONTRACTING PARTIES may also in the course of the reviews, take such decisions regarding the operation of this Decision as may be appropriate in the light of developments at that time." (L/4768)

- (g) Committee on Trade and Development - Sub-Committee on Protective Measures

Developed contracting parties are expected to notify new protective measures affecting imports from developing countries having full regard to the provisions of Part IV and without prejudice to other GATT provisions.

- (h) Arrangement regarding International Trade in Textiles:

Article 10.4 of the Arrangement states:

"4. The Committee shall once a year review the operation of this Arrangement and report thereon to the GATT Council. To assist in this review, the Committee shall have before it a report from the Textiles Surveillance Body, a copy of which will also be transmitted to the Council. The review during the third year shall be a major review of this Arrangement in the light of its operation in the preceding years."

The report of the Textiles Surveillance Body contains a summary of notifications made under the Arrangement.

¹The Committee on Trade and Development at its meeting of March 1980 agreed on arrangements which have a bearing on these notification requirements.

4.d Notification and Surveillance. Proposal by the Director-General (*continued*)

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(i) MTN Agreements and Arrangements

Each of the Agreements provides for regular reports to be made to the CONTRACTING PARTIES. At their thirty-fifth session, the CONTRACTING PARTIES decided that:

"1. The CONTRACTING PARTIES reaffirm their intention to ensure the unity and consistency of the GATT system, and to this end they shall oversee the operation of the system as a whole and take action as appropriate.

"2. The CONTRACTING PARTIES note that as a result of the Multilateral Trade Negotiations, a number of Agreements covering certain non-tariff measures and trade in Bovine Meat and Dairy Products have been drawn up. They further note that these Agreements will go into effect as between the parties to these Agreements as from 1 January 1980 or 1 January 1981 as may be the case and for other parties as they accede to these Agreements.

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

"4. In the context of 1 and 3 above, the CONTRACTING PARTIES would receive adequate information on developments relating to the operation of each Agreement and to this end there will be regular reports from the concerned Committees or Councils to the CONTRACTING PARTIES. The CONTRACTING PARTIES may request additional reports on any aspect of the various Committees' or Councils' work." (L/4905)

4.d Notification and Surveillance. Proposal by the Director-General (*continued*)C/111
Page 19ANNEX IIICalendar of Notifications Required under
Regular Reporting ProceduresDraft

The time-table below was established on the basis of agreed procedures or in the light of past practice.

(a) Requirements accepted by all contracting parties:

(i)	Subsidies (BISD,11S/59)	30 January
(ii)	State trading (BISD,11S/59)	30 January
(iii)	Marks of origin (BISD,7S/30)	1 September
(iv)	Licensing (SR.28/6 and L/3756)	30 September
(v)	Implementation of Part IV (BISD,13S/79)	30 September

(b) Requirements accepted by some contracting parties:

(i)	Joint Working Group on Import Restrictions (C/M/70)	30 September
(ii)	At its meeting of 14 November 1978 the Council agreed on the following biennial time-table for reporting by regional agreements (L/4725):	

Arab Common Market	April 1979
Caribbean Community and Common Market	April 1979
Agreement Australia-Papua New Guinea	October 1979
Agreements EEC-Algeria, Morocco, Tunisia	October 1979
Agreements EEC-Austria, Finland, Iceland, Norway, Portugal, Sweden, Switzerland and Liechtenstein	October 1979
EFTA-FINEFTA	October 1979
Agreement Finland-Hungary	October 1979
New Zealand-Australia Free-Trade Area	October 1979
Agreement EEC-Cyprus	April 1980
Agreements EEC-Egypt, Jordan, Lebanon, Syria	April 1980

4.d Notification and Surveillance. Proposal by the Director-General (*continued*)

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Agreement EEC-Israel	April 1980
Agreement EEC-Malta	April 1980
Agreement EEC-Spain	April 1980
Agreement Finland-Czechoslovakia	April 1980
Central American Common Market	October 1980
ACP-EEC Convention of Lomé	October 1980
Agreement EEC-Greece	October 1980
Agreement EEC-Turkey	October 1980
LAFTA	October 1980
(iii) Accession Protocols:	
Hungary (every two years)	September 1981
Poland	September 1980
Romania (every two years)	January 1982
Switzerland	October
(iv) Waivers:	
Australia (products of Papua-New Guinea)	October
Turkey (stamp duty)	February
United States (Agricultural Adjustment Act)	November
United States (imports of automotive products)	October
Trade Negotiations among Developing Countries	October
(v) Other:	
Trade Arrangements between India, the United Arab Republic and Yugoslavia	November

Source: Document C/111 of 14 March 1980

Note: Adoption of the Proposal, Minutes of the Council Meeting held on 26 March 1980, C/M/139.

4.d Notification and Surveillance. Proposal by the Director-General (*continued*)GENERAL AGREEMENT ON
TARIFFS AND TRADERESTRICTED

C/M/139

24 April 1980

Limited Distribution

COUNCIL
26 March 1980MINUTES OF MEETINGHeld in the Centre William Rappard on 26 March 1980

Chairman: Mr. G.O. MARTINEZ (Argentina)

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(...)

4.d Notification and Surveillance. Proposal by the Director-General (*continued*)

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(...)

8. Notification and surveillance - Proposal by the Director-General (C/111)

The Chairman recalled that at their thirty-fifth session in November 1979 the CONTRACTING PARTIES had adopted an Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance (L/4907). He said that in this connexion the Council had before it a Proposal by the Director-General in respect of Notification and Surveillance, contained in document C/111.

In introducing his proposal, the Director-General said that a number of informal consultations had been held on this subject and that he had attempted to strike a balance between different views expressed during these consultations and to present a pragmatic proposal designed to get the work started. He drew the attention of the Council to the calendar for regular notifications in Annex III of the document and said that there were some regional agreements, such as the Bangkok Agreement and the ASEAN Preferential Trading Arrangements, which had not been included pending further discussion in the Committee on Trade and Development regarding the implementation of the notification provisions of the Enabling Clause (L/4903). For some of the items that did appear in the calendar, the dates indicated could also be subject to change as a result of whatever decision could be taken in regard to the Enabling Clause. He also said that the date relating to the Turkish stamp duty was October instead of February.

In conclusion, he reminded the interested delegations that, in accordance with paragraph 25 of the Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance, the technical assistance services of the secretariat were available to developing countries in connexion with any of the matters dealt with in his proposal.

4.d Notification and Surveillance. Proposal by the Director-General (*continued*)

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The representative of Canada said that throughout the MTN Canada had attached considerable importance to a general improvement in the GATT dispute settlement process. His delegation believed that progress had been made toward that end, through provisions in the various MTN Agreements, and through the Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance. He said that the Canadian delegation could accept the Director-General's proposal with respect to paragraph 2 of the Understanding, but wished to clarify three points relating to paragraphs 3 and 24 thereof, as follows. First, Canada agreed that arrangements at this stage should of necessity be experimental. While noting that some duplication would be unavoidable initially, every effort should be made to avoid it. Second, Canada agreed that it made good sense to consider paragraphs 3 and 24 as an integral package, as in the Director-General's proposal, taken together with paragraph 6(d), and that the review process should simply flow from a compilation of notifications. His delegation did not want to accept such an inference at this time, however, when it was not clear as to how such a review would relate to other reviews of developments of trade and trade measures within the GATT. Third, his delegation pointed to the element within paragraph 24 of the Understanding, on which it placed importance, and which seemed to call for a function not otherwise or elsewhere served in the GATT in a broad overview. He referred to the specific references that attention be paid to developments which affect rights and obligations under the GATT and to measures which have been subject to consultation, conciliation, or dispute settlement procedures. It was his delegation's understanding that from time to time the contracting parties should stand back in order to assess how well the system was working in dealing with trade problems and disputes. He felt that such a function, as it related to the interests of less-developed contracting parties, would play a different, but complementary rôle to functions now agreed within the Committee on Trade and Development, and under Part IV of the General Agreement. He recognized, however, that "a regular and systematic review of developments in the trading system" was a broad mandate, and he did not want to preclude a number of other elements that might be incorporated, as the ideas on this matter further developed.

He said that with respect to actual modalities, his delegation supported the idea that, initially at least, the Council should conduct the reviews at special sessions. The frequency of the reviews and the contents of the secretariat's factual note should be looked at in due course, in the light of further reflection and informal consultations.

The representative of Korea expressed support for the Canadian statement. He felt that the procedure should be preliminary and experimental and that it should be modified in the course of time. He supported the adoption of the proposal.

The Council adopted the proposal on Notification and Surveillance contained in document C/111, bearing in mind the statements made on its experimental nature. Contracting parties were invited to submit notifications in accordance with the calendar set out in Annex III of the document.

(...)

4.e Uniform Interpretation and Effective Application of the Agreement. Report by the Chairman

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

SCM/53

29 November 1984

Special Distribution

Committee on Subsidies
and Countervailing Measures

UNIFORM INTERPRETATION AND EFFECTIVE APPLICATION OF THE AGREEMENT

Report by the Chairman

Past discussions in the Committee have revealed, on several occasions, divergent perceptions regarding the interpretations of Articles 8 and 10 and the application of Article 9. In this respect some delegations proposed that the Committee should undertake a review of these provisions in order to arrive at their uniform interpretation and application (SCM/M/18, paragraphs 14, 15, 17, 18, 24, 34, 47, 50 and 54).

Following these proposals and in pursuance of the agreement reached in the Committee (see SCM/M/18, paragraphs 38 and 59), the Chairman has, over the past several months, organized informal consultations. Interim reports on these consultations were made to the Committee at its meetings on 18 November 1983 (SCM/M/Spec/9, paragraph 2) and 10 May 1984 (SCM/M/Spec/10, paragraph 2).

Set out below are problems identified during the Chairman's consultations, relating to Article 8-10 of the Agreement, as well as proposals aimed at overcoming these problems and thus arriving at a uniform interpretation and effective application of the provisions of the Agreement mentioned above.

Article 8

1. In order to avoid differing interpretations as to the scope and application of Article 8, the following interpretative decision could be taken:
 - (a) Article 8 (Subsidies - General Provisions) is applicable to primary and non-primary products.
 - (b) Paragraph 4 does not explicitly cover all potential adverse effects arising from subsidies.
 - (c) The meaning of footnote 28 is the following: concerning certain primary products if the effects of the subsidized exports are to displace the exports of a like product of another signatory from a third country market, then the determination of whether these effects are such as to

4.e Uniform Interpretation and Effective Application of the Agreement. Report by the Chairman (continued)

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result in nullification or impairment or serious prejudice should be done under Article 10. The emphasis is therefore on the displacement effect. Other possible effects are not affected by this footnote.

- (d) For the above reasons and taking into account footnote 25, the limitation of application of Article 8, resulting from footnote 28, would not affect a finding of serious prejudice in the sense of Article XVI:1 under the Code when the effects of a subsidy on certain primary products are other than displacement from a third country market.

Article 9

2. The language of Article 9:1 seems to be clear, i.e. it prohibits the granting of export subsidies on products other than certain primary products. This prohibition is formulated in an unconditional way, i.e. it does not depend on other considerations, such as primary product component, methods of production or modalities of sale, etc.

3. If Article 9:1 were interpreted to allow the subsidization of primary product components then the scope and impact of Article 9 would be radically reduced as most processed products contain primary components.

4. There would, however, appear to be a certain contradiction between the flat prohibition in Article 9 and paragraph (d) of the Illustrative List. It has to be recognized that although paragraph (d) contains ambiguities it nevertheless allows an interpretation according to which not only primary components but any components used in the production of an exported product may, subject to certain conditions related to the modalities of delivery, be subsidized to cover the difference between their domestic and world market prices. In particular the economic effects on the export market of a system consistent with paragraph (d) could be the same as the effects of the present practices of some signatories to subsidize primary product components of exported processed agricultural products.

5. There is also a certain grey area between Article 9 and Article 10. A country subsidizing exports of a primary product makes it available to foreign producers at a reduced price. It seems therefore economically unsound to refuse the same benefits to its domestic producers. It is also argued that one reason for subsidizing exports or primary products is the need to dispose of surpluses. It seems that the most obvious channel to be used in such a situation is to encourage their domestic consumption, i.e. to offer them to the domestic processing industry at competitive (in relation to the world market) prices.

6. If, however, subsidization of a primary component as such were allowed there would, under the existing provisions, be no discipline applicable to those subsidized primary products contained in exported processed products in so far as Article 9 and Article 10 are concerned.

7. There is a need to overcome problems identified above and to avoid possible interpretations which would allow unlimited subsidization on the basis that each processed product contains primary components. Furthermore,

4.e Uniform Interpretation and Effective Application of the Agreement. Report by the Chairman (continued)

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there is a need to bridge the gap between Articles 9 and 10 and to address the issue of economic parity in the treatment of domestic producers producing for export and of foreign producers using the subsidized primary products. It is therefore necessary to address certain solutions. The solution should preferably establish a general rule based on an agreed interpretation. If a general rule is not possible, the scope for exceptions should be clearly defined.

8. A solution may be sought through an interpretative decision on paragraph (i) of the Illustrative List. Such a decision could read:

"For purposes of Article 9 the Committee decides:

If the imports of a primary agricultural product are subjected to a system for the stabilization of the domestic price or the return to domestic producers, the following interpretation of paragraph (i) of the Illustrative List will apply:

- (a) The domestic producer physically incorporating in a processed agricultural product a quantity of the domestic product equal to, and having the same quality and characteristics as, the product available to him on world markets, may obtain the remission or drawback of import charges (including variable levies) which would have been levied on the same quantity of imported product had he chosen to substitute the domestic primary component by the imported primary component.
- (b) Any remission or drawback in excess of what was or would have been levied by way of import charges on the corresponding quantity of primary component that has been physically incorporated will be subject to the provision of paragraph (i) of the Illustrative List.
- (c) In any case (including a situation where the domestic prices are maintained at a higher level not because of charges on imports but because of quantitative or similar restrictions), the remission or drawbacks shall not be higher than the difference between the domestic price and the world market price of the primary component.
- (d) The calculation of the amount of the remission or drawback will be effectuated according to the criteria to be established by the Group of Experts and approved by the Committee.
- (e) The Committee shall agree on measures to be taken so as to ensure full transparency regarding the actual amount of remission of drawbacks.
- (f) Domestic primary components used in accordance with paragraph (a) above shall be considered as being "internally exported" and, for the purpose of Article 10:1, shall be added to the quantities of the primary product which have been effectively exported.
- (g) The methods to be used for the calculation of the amounts "internally exported" shall be developed by the Group of Experts. The Group will also propose measures ensuring full transparency as to the quantities "internally exported".

4.e Uniform Interpretation and Effective Application of the Agreement. Report by the Chairman (continued)

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Paragraph (d) of the Illustrative List of Export Subsidies

9. Paragraph (d) in its present form, and more specifically its last part starting with "... if (in the case of products) ..." opens a door for an unlimited subsidization. In order to avoid a too permissive interpretation of this paragraph the Committee may adopt the following understanding:

The last part of paragraph (d) of the Illustrative List of Export Subsidies, starting with "... if (in the case of products) ..." shall not be taken into consideration in any determination as to the existence of a prohibited export subsidy.

Article 10

10. There is a certain ambiguity resulting from the "effect-oriented" approach of Article 10. There is, for example, sufficient imprecision in the concept of "more than an equitable share" to allow countries using export subsidies to argue that these subsidies do not result in obtaining such a share. On the other side it is not always possible to prove causality between the subsidy and the increased share. Article 10 also contains other notions which might escape objective criteria, such as special factors, normal market conditions and price undercutting. Furthermore there is a certain ambiguity as to the exact scope of Article 10, the question of newcomers and the rôle of non-commercial sales. Therefore clarification and agreed interpretations of some concepts and notions contained in this Article should facilitate its more effective application.

11. It seems that a more precise definition of special factors would be very helpful in the practical application of the notion of "more than an equitable share". One possible solution could be to make it clear that special factors are those which can be considered as exceptional and/or temporary and beyond the control of the country subject to the complaint, i.e. not present under normal market conditions. The following are illustrative examples of such special factors:¹

- (i) embargo or similar quantitative limitation on exports of the given product from or imports from the complaining country;
- (ii) decision by a state trading country or a country operating a monopoly of trade in the product concerned to shift, for political reasons, imports from the complaining country to another country or countries;
- (iii) natural disasters, crop failures or other force majeure substantially affecting quantities, qualities or prices of the product available for exports from the complaining country;
- (iv) existence of a commodity arrangement limiting exports from the complaining country;

¹ The fact that certain actions are referred to in this paragraph does not, in itself, confer upon them any legal status in terms of either the GATT or the Code.

4.e Uniform Interpretation and Effective Application of the Agreement. Report by the Chairman (continued)

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- (v) significant voluntary decrease in the availability for exports of the product concerned in the complaining country;
- (vi) significant non-commercial transactions¹ by the complaining country in the market of the importing country/countries which lead the country/countries subject to complaint to subsidize in order to be competitive.

In assessing the relevance of special factors in each particular case an attempt shall be made to weigh their effects relative to the effects of the subsidy.

12. On the other side there are other factors which, although they could be described as special features of a given market, are not exceptional or unforeseeable but are within the scope of the commercial considerations characterizing a specific market and therefore should not be considered as special factors within the meaning of Article 10:1. Some examples of such commercial and other considerations are as follows:

- (i) historical links between the subsidizing and the importing country/countries;
- (ii) changes in consumer taste in the importing country/countries;
- (iii) particular taste or dietary demands in the importing country/countries;
- (iv) difference in transportation costs and related factors between the subsidizing country and other countries in their exports to the importing country/countries;
- (v) geographical and climatic situation of the subsidizing country;
- (vi) marketing techniques of respective traders;
- (vii) quality of the product in question;
- (viii) technological changes or new or increased production capacities in the subsidizing exporting or importing country/countries.

13. The concept of "normal market conditions" plays an important rôle in selecting "a previous representative period". If in a given period the world market conditions were affected in a significant way by one or some of the special factors, then these conditions would hardly be considered as normal. The situation is much less clear if world market conditions are influenced by subsidies granted by one or many exporting countries. The ideal solution would be to seek a period when there were no subsidies. However, in practice, such an ideal approach may not always be feasible. It seems therefore that the fact that subsidies have been used during any period should not necessarily exclude this period as being representative. In selecting such a period one should not lose sight of the fact that export

¹ Other than those referred to in paragraph 14(a) and (b).

4.e Uniform Interpretation and Effective Application of the Agreement. Report by the Chairman (continued)

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subsidies in existence during the selected representative period may have influenced the share of the trade obtained by the various exporting countries.

14. Special and concessional transactions¹, despite their apparent non-commercial nature, affect normal market conditions and could have the same practical effects as subsidized sales. This can be easily demonstrated in a situation where a country ties its non-commercial transaction (for example a grant) to a commercial sale of the equivalent amount of a product. The commercial effect of these two transactions would be the same as if the whole delivery were done on commercial terms but benefiting from a 50 per cent subsidy. There is therefore a need to include non-commercial transactions having obvious commercial effects in the volume of world export trade for purposes of Article 10:1. This should not, however, be done in such a way as to discourage their use for humanitarian and economic assistance purposes. One solution could be to agree that for purposes of Article 10:1 of the Code "world export trade" does not include non-commercial transactions in a given market if:

- (a) there are no commercial sales at all from the same country to this market; or
- (b) the exporting country can demonstrate that the non-commercial transaction has been notified to and found by the FAO Consultative Sub-Committee on Surplus Disposal to be likely to be absorbed by additional consumption in the importing country and where the FAO Usual Marketing Requirements provision contains adequate assurances against resale or trans-shipment.

Non-commercial transactions that do not meet the above conditions (or in cases where doubts may persist on whether these conditions have been met), may constitute subsidized sales and may result in the concerned signatory obtaining more than an equitable share and therefore should be examined on a case by case basis.

15. Detailed analysis of hypothetical specific cases would indicate that a certain amount of subjectivity may be involved in determining whether a subsidy has resulted in a country obtaining more than an equitable share. It seems that in order to reduce this subjectivity and to avoid some other difficulties which appeared in the past in relation to the concept of "more than an equitable share", the best approach available under the existing provisions would be to proceed on a case-by-case basis, taking into account agreed interpretations of special factors, normal market conditions, rôle of non-commercial transactions, etc. This approach could also be facilitated by the following understanding:

For purposes of Article 10:1 of the Agreement:

In all cases where, in the absence of proof that special factors are responsible, the share of a country granting subsidies on the export of a primary product has increased compared to the average share it had

¹ As listed in Appendix F to FAO Principles of Surplus Disposal and Consultative Obligations of Member Nations.

4.e Uniform Interpretation and Effective Application of the Agreement. Report by the Chairman
(continued)

SCM/53
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during the previous representative period and that this increase results from a consistent trend over a period when subsidies have been granted "more than an equitable share" will be presumed to exist.

16. For purposes of applying Article 10:1 it is recalled that there is a consensus among contracting parties that the concept of increased exports in Article XVI:1 and XVI:3 includes maintaining exports at a level higher than would otherwise exist in the absence of a subsidy.

17. As there may be some doubts as to the linkage between Article 10:1 and 10:2(a) it may be useful to specify that in order to determine "more than an equitable share" it is not necessary to examine what happens in individual markets.

18. In order to avoid that Article 10:2(b) be used in a manner inconsistent with other provisions of Article 10, an understanding could be reached that invocation of Article 10:2(b) shall not override other provisions of Article 10.

19. In respect to the question of newcomers to the world market it may be appropriate to recall that in accordance with Note 1 to Article XVI:3 the fact that a signatory has not exported the product in question during the previous representative period would not in itself preclude that signatory from establishing its right to obtain a share of the trade in the product concerned.

20. The question of price undercutting will certainly require further (more technical) examination and it may be possible to work out certain technical guidelines (for example on the basis of export values). However, one point seems relatively clear, namely that Article 10:3 should be applicable only in a competitive situation, i.e. where at least two unrelated suppliers have been selling to a particular market. The term "unrelated" should be interpreted to mean that they are from different signatories and that there is no market sharing agreement between them.

4.f Uniform Interpretation and Effective Application of the Agreement. Statement by the Chairman at the Meeting of 5 December 1984

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

SCM/56

13 December 1984

Special Distribution

Committee on Subsidies and
Countervailing Measures

UNIFORM INTERPRETATION AND EFFECTIVE APPLICATION OF THE AGREEMENT

Statement by the Chairman at the Meeting of 5 December 1984

1. Past discussions in the Committee have shown that there were divergent views among signatories on fundamental provisions of the Code. These divergencies created uncertainty as to rights and obligations, seriously affected the application of the Code and practically blocked dispute settlement procedures. There is, however, I think, a unanimous recognition of the importance of the efficient functioning of the Committee and a strong wish to render the Code again fully operational. In this relation a number of delegations proposed that the Committee undertake a review of those provisions of the Code which created problems in order to arrive at their uniform interpretation and application. Starting from these proposals, the Committee authorized the Chairman to hold, as a matter of urgency, informal consultations with a view to proposing an appropriate solution. In pursuance of this mandate my predecessor, Mr. Ikeda, and I have held a series of bilateral and plurilateral consultations. As a result of these consultations I have prepared a report (SCM/53) which, in my view, might be the basis of a satisfactory solution.

2. I would like, from the outset, to make one point very clear. The purpose of these consultations was not to amend the Code or create new rights and obligations. The purpose was to clarify the existing rules and to arrive at their uniform application. With one exception, namely that concerning Article 9, all these clarifications do not go beyond what a reasonable panel could do on its own. But even in the case of Article 9 there are no new rights, only existing rights have been reformulated in such a way as to ensure more clarity and better transparency. You will see from the detailed analysis of my proposals that they are based on logic, common sense and the perceived spirit of the Code. They do not produce new obligations - only increased clarity which should bring about better disciplines in the application of the Code.

3. Another important point I would like to make is the relationship between this exercise and that which is going on in other GATT bodies, in particular the Committee on Trade in Agriculture. First, let me say that as signatories of the Subsidy Code, a multilaterally negotiated legal instrument, which is primarily charged with the responsibilities in the field of subsidies, we have an obligation to ensure the effective operation and application of this Code. This is clearly spelled out in Article 16 of the Code. This Committee has a special responsibility with respect to all sorts of subsidies and none of the other GATT bodies can deal with this matter in such a comprehensive

4.f Uniform Interpretation and Effective Application of the Agreement. Statement by the Chairman at the Meeting of 5 December 1984 (*continued*)

manner as the Committee on Subsidies. The possibility that developments elsewhere on subsidies may take place in the rather distant future, or sooner, cannot justify the Committee's inertia. This Committee cannot stay idle and wait for an external rescue, especially if such a rescue is not promptly forthcoming. It must take concrete actions to overcome difficulties which have been created by divergent views on fundamental issues in the Subsidy Code. Secondly, other GATT bodies deal with the matter in a less complete manner, from the Subsidy Code perspective. For example the Committee on Trade in Agriculture discusses agricultural products which constitute only a part of products covered by Article 10 and an even lesser part of products covered by Article 9. In other words the sectoral approach, commendable and appropriate as it maybe, is not sufficient for the purposes of this Code as it extracts only some elements from the Code. Thirdly, and most importantly, our exercise is limited to the Subsidies Code only and its only aim is to clarify certain existing provisions and to facilitate the application of the Code. As no new obligations result from it, it cannot affect the rights and obligations of the contracting parties under relevant GATT provisions nor can it affect any balance of obligations or any compromise which may be laboriously worked out in future negotiations, for example in the Committee on Trade in Agriculture. Furthermore, this exercise does not jeopardise any bargaining position delegations may have elsewhere. Finally on this point, although the exercise is limited to the Code, the fact that certain provisions have been clarified and their application rendered more effective should give a good example to other GATT bodies and facilitate their efforts in finding a global solution in a given sector, applicable to all contracting parties. I have carefully examined, and consulted some signatories on all aspects of the relationship between this exercise and the work of other GATT bodies and the general conclusion was that this exercise can only help.

4. After these explanations, let me turn now to different parts of the report. It seems that they are self-explanatory. Nevertheless I would like to highlight certain points.

- (a) Article 8 - the proposed text does not intend to achieve anything else but to make it clear that serious prejudice that would be found under Article XVI:1 can also be found under Article 8. Indeed, given the objectives of the Code ("desiring to ensure that the use of subsidies does not adversely affect or prejudice the interests of any signatory..."), one can hardly imagine a legal situation under which, in exactly the same case, one would find serious prejudice in terms of Article XVI:1 but not in terms of Article 8 of the Code. Any other interpretation would mean that the Code is, in fact, weaker than Article XVI:1 and, instead of strengthening disciplines, it rather weakens them. Neither the negotiating history nor the language of Article 8 justifies such an interpretation.
- (b) Article 9 is probably the most complicated issue. It was essential to have clarity as to the starting point and as to what should be achieved. The approach is this: we know what Article 9 says but we also know what it should say and we have to find a way for it to say what we want it to say. This approach seems to be logically more sound and legally much neater than another approach that would pretend, from the very beginning, that Article 9 says something else than what it actually

4.f Uniform Interpretation and Effective Application of the Agreement. Statement by the Chairman at the Meeting of 5 December 1984 (*continued*)

says. Starting from these premises a number of alternatives to arrive at the desired solution have been considered. The proposed solution seems to be the most convenient, although it may seem a little bit complicated. It does not require amending the existing Code provisions. Indeed it builds on them, in particular on paragraphs (d) and (i) of the Illustrative List. To be more specific - certain possibilities which, under certain conditions, exist under the present wording of paragraph (d) have been transferred to paragraph (i). At the same time those elements of paragraph (d) which make Article 9 meaningless have been eliminated. The proposed interpretative decision assimilates certain rights from paragraph (d) and follows the logic and the language of paragraph (i) of the Illustrative List as closely as possible. You will see that several, very technical issues still remain open but the interpretative decision makes it clear that a group of experts, to be established by the Committee, will have promptly to clarify them and propose appropriate solutions.

- (c) As to Article 10 - no modification of the existing obligation has been proposed but an attempt has been made to clarify certain concepts, the vagueness of which have always caused problems. For example it should be clear that special factors must be really special and that one does not confuse them with normal commercial considerations. Another example is the proposed understanding in paragraph 15 of SCM/53. It does not add anything to the existing obligations. It only paraphrases the present language of Article 10:1 and removes certain ambiguities related not to the substance but to proceedings in case this paragraph has to be applied. Furthermore, the relationship between paragraphs 1 and 2 of Article 10 has been somewhat clarified and more precision has been given to paragraph 3. Another example is the attempt to specify the rôle of special transactions in the concept of world market. As I have said before, all these clarifications do not go beyond what is strictly necessary to make Article 10 operative.

5. These are only preliminary comments. It is not possible for me to summarize, in a short statement, all the intellectual input that, over months and months, went into this proposal. I perfectly understand that, at first glance, some solutions proposed here may appear too simplistic or too complicated, that some people may wish to go, as I have done, through alternative solutions, but I think that finally we shall all come to the same conclusion, namely that as long as we have to stay within the existing framework of the Code rights and obligations, this proposal is simple, logical and effective for rendering the Code operative again. I should also add that one should not look at the proposed solutions from an immediate tactical viewpoint but from a long perspective one. The real question is: do we want to preserve the basic philosophy of this Code and of the relevant GATT provisions or do we prefer to sacrifice it for short-term, subjective interests.

4.g Non-violation Complaints under GATT Article XXIII:2. Note by the Secretariat for the Uruguay Round Negotiating Group on Dispute Settlement

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

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4.g Non-violation Complaints under GATT Article XXIII:2. Note by the Secretariat for the Uruguay Round Negotiating Group on Dispute Settlement (*continued*)

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(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" or as being based on "the well-established principle of non-violation nullification or impairment".¹ 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

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

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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
	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

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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 though 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

³Monetary 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.

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

⁵Memorandum 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

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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." 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

⁶EPCT/TAC/PV/13 (1947), at 41

⁷EPCT/A/PV/5 (1947), at 14

⁸Reports 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.

⁹EPCT/A/PV/12 (1947), at 7

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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

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

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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 Reports¹⁴, 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 Charter¹⁵;
- 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:

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).

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(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;

¹⁸CP.2/43 (1948)

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

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(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

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

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

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

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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 1990. 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 on²⁴ the continuation of the same treatment for the two products."

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

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)

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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

(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

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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

²⁸ ISD Tenth Supplement (1962), at 209, paragraph 28

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

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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

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)

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(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.

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

³⁵Idem (note 34), at 78

³⁶Idem (note 34), at 78

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(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 1963³⁸, 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

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

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"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

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

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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

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

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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

⁵²L/5778, paragraph 76

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

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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

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

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- "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;

⁵⁹L/5776, paragraphs 4.21 and 4.22

⁶⁰L/5776, paragraph 4.25

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- (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

⁶¹L/5776, paragraph 4.26

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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

⁶²L/5776, paragraph 5.1

⁶³L/5776, paragraph 5.1

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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 Panel 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

⁶⁴L/5776, paragraph 5.3

⁶⁵GATT doc. L/5479 (1983)

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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

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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

⁶⁶ L/6053 (1986), paragraph 4.8

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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

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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

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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

⁶⁷ GATT doc. L/6129 (1987)

⁶⁸ L/6309 (1988), paragraph 97

⁶⁹ L/6309, paragraph 131

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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-violation 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 ...

⁷⁰ L/6328 (1988)

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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

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

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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

⁷²See: MTN.GNG/NG13/W/32

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"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

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)

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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?

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

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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.

* See Preface to BISD Vol. IV

4.g Non-violation Complaints under GATT Article XXIII:2. Note by the Secretariat for the Uruguay Round Negotiating Group on Dispute Settlement (*continued*)

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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.

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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.

4.g Non-violation Complaints under GATT Article XXIII:2. Note by the Secretariat for the Uruguay Round Negotiating Group on Dispute Settlement (*continued*)

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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

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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.