

## ARTICLE XXIII

### NULLIFICATION OR IMPAIRMENT

---

I.	TEXT OF ARTICLE XXIII AND DECISIONS INTERPRETING ARTICLE XXIII.....	632
A.	ARTICLE XXIII .....	632
B.	UNDERSTANDING ON NOTIFICATION, CONSULTATION, DISPUTE SETTLEMENT AND SURVEILLANCE OF 28 NOVEMBER 1979.....	632
C.	MINISTERIAL DECLARATION OF 29 NOVEMBER 1982, DECISION ON DISPUTE SETTLEMENT.....	636
D.	DECISION ON DISPUTE SETTLEMENT OF 30 NOVEMBER 1984 .....	637
E.	DECISION OF 12 APRIL 1989 ON IMPROVEMENTS TO THE GATT DISPUTE SETTLEMENT RULES AND PROCEDURES .....	638
F.	DECISION OF 22 FEBRUARY 1994 ON EXTENSION OF THE APRIL 1989 DECISION ON IMPROVEMENTS TO THE GATT DISPUTE SETTLEMENT RULES AND PROCEDURES (L/7416).....	641
G.	DECISION OF 5 APRIL 1966 ON PROCEDURES UNDER ARTICLE XXIII (14S/18).....	641
II.	INTERPRETATION AND APPLICATION OF ARTICLE XXIII.....	643
A.	SCOPE AND APPLICATION OF ARTICLE XXIII .....	643
1.	Scope of Article XXIII .....	643
(1)	<i>Matters not within the competence of the GATT.</i> .....	643
(2)	<i>Disputes involving countries or territories which are not contracting parties.</i> .....	644
(3)	<i>Discretionary legislation.</i> .....	645
(4)	<i>Measures not yet in effect.</i> .....	648
(5)	<i>Measures no longer in effect.</i> .....	649
(6)	<i>Acts of private parties.</i> .....	650
(7)	<i>Applicability of Article XXIII procedures to requests for rulings.</i> .....	653
2.	Paragraph 1 .....	653
(1)	<i>“any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired”</i> .....	653
(a)	<i>“obligations under this Agreement” and positions taken in trade negotiations</i> .....	653
(2)	<i>“or that the attainment of any objective of the Agreement is being impeded”</i> .....	654
(3)	<i>Paragraph 1(a): “as the result of the failure of another contracting party to carry out its obligations under this Agreement”</i> .....	655
(a)	<i>Prima facie nullification or impairment</i> .....	655
(b)	<i>Relevance of trade effects</i> .....	655
(4)	<i>Paragraph 1(b): “as the result of the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement”</i> .....	657
(a)	<i>Definition of “non-violation nullification or impairment”: “reasonable expectations” and “upsetting the competitive relationship”</i> .....	657
(b)	<i>Relevance of concessions</i> .....	660
(c)	<i>Non-violation nullification or impairment not relating to concessions</i> .....	661
(d)	<i>“Reasonable expectations” in relation to measures formally approved by the CONTRACTING PARTIES</i> .....	662
(e)	<i>Date of relevant concession in relation to the measures at issue</i> .....	663
(f)	<i>Relevance of initial negotiating rights with regard to concessions</i> .....	665
(g)	<i>Relevance of statistics on trade flows</i> .....	665
(h)	<i>Relevance of other agreements</i> .....	666
(i)	<i>Procedural requirements</i> .....	666
(j)	<i>Procedural relationship between findings of “violation” and findings regarding “non-violation nullification or impairment”</i> .....	667
(5)	<i>Paragraph 1(c): “as the result of the existence of any other situation”</i> .....	668
(a)	<i>Situations involving macroeconomic or employment factors</i> .....	668
(b)	<i>Situations involving other factors</i> .....	669
(6)	<i>“any contracting party ... may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned”</i> .....	671
(a)	<i>Notification of consultation requests; requirements concerning requests</i> .....	671
(b)	<i>Consultation requests by more than one contracting party</i> .....	671
(7)	<i>“Any contracting party thus approached shall give sympathetic consideration”</i> .....	671
3.	Paragraph 2 .....	672
(1)	<i>“If no satisfactory adjustment is effected”</i> .....	672
(a)	<i>Prerequisite of consultations</i> .....	672
(b)	<i>Failure to reach a satisfactory adjustment</i> .....	673
(c)	<i>Recourse to Article XXIII:2 on the basis of consultations under Article XXII:1 or Article XXXVII</i> .....	673
(2)	<i>“the matter may be referred”</i> .....	674
(a)	<i>“the matter”</i> .....	674
(b)	<i>Requests for the establishment of a panel</i> .....	675
(3)	<i>“The CONTRACTING PARTIES shall promptly investigate”</i> .....	675
(4)	<i>“the CONTRACTING PARTIES ... shall make appropriate recommendations ... or give a ruling”</i> .....	675

	(a)	Objective of recommendations or rulings .....	676
	(b)	Recommendations with regard to "violation" complaints under Article XXIII:1(a) .....	677
	(c)	Recommendations with respect to "non-violation" complaints under Article XXIII:1(b) .....	680
	(d)	Recommendations in the absence of a finding of either violation or non-violation nullification or impairment .....	684
	(e)	Time frame for implementation of recommendations or rulings .....	684
	(f)	Implementation and other obligations under the General Agreement .....	685
	(g)	Compensation as a temporary measure pending implementation of recommendations or rulings .....	686
	(h)	Multilateral surveillance of implementation .....	686
	(i)	Proceedings to examine implementation of particular panel reports .....	687
	(5)	<b>"may consult with ... the Economic and Social Council of the United Nations and with any appropriate intergovernmental organization ... where ... necessary"</b> .....	689
	(6)	<b>"serious enough"</b> .....	690
	(7)	<b>"may authorize ... to suspend"</b> .....	692
	(a)	Suspension of concessions under Article XXIII:2 and proposals therefor .....	692
	(b)	Procedures for decision on suspension under Article XXIII:2 .....	695
	(8)	<b>"such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances"</b> .....	696
	(a)	Basis of suspension under Article XXIII:2 .....	696
	(b)	Determination of extent of suspension under Article XXIII:2 .....	696
<b>B.</b>		<b>RELATIONSHIP BETWEEN ARTICLE XXIII AND OTHER GATT ARTICLES</b> .....	700
	1.	General .....	700
	2.	Article VI .....	700
	3.	Articles XII and XVIII:B .....	702
	4.	Article XV .....	704
	5.	Article XVIII:C .....	704
	6.	Article XIX .....	704
	7.	Article XX .....	704
	8.	Article XXI .....	705
	9.	Article XXIV:4-9 .....	706
	10.	Article XXIV:12 .....	708
	11.	Article XXV:1 .....	709
	12.	Article XXV:5 .....	709
	13.	Article XXVIII .....	712
	14.	Article XXXVII .....	712
<b>C.</b>		<b>RELATIONSHIP BETWEEN ARTICLE XXIII AND OTHER AGREEMENTS</b> .....	713
	1.	WTO Agreement .....	713
	2.	Tokyo Round Agreements .....	713
	(1)	Use of Article XXIII procedures in disputes under the Tokyo Round agreements regarding obligations under those agreements .....	714
	(2)	Assignment of priority to dispute settlement under the Tokyo Round Agreements relative to recourse to Article XXIII .....	714
	(3)	Interpretation of Tokyo Round agreements in disputes under the General Agreement .....	715
	(4)	Relationship between suspension authorized under Article XXIII:2 and measures authorized under Tokyo Round agreements .....	716
	3.	Arrangements on textile trade .....	717
	4.	Other multilateral agreements .....	718
	5.	General international law .....	718
	6.	Referral of matters to the International Court of Justice .....	719
	7.	Bilateral agreements .....	719
<b>D.</b>		<b>PANEL PRACTICE UNDER ARTICLE XXIII</b> .....	721
	1.	Choice between working parties or panels .....	721
	2.	Establishment of working parties and panels .....	721
	3.	Composition of panels .....	723
	(1)	Membership of panels .....	723
	(2)	Roster of non-governmental panelists .....	724
	(3)	Completion of panel composition by the Director-General .....	725
	(4)	Changes in panel composition .....	725
	(5)	Reconvening of a panel or working party .....	726
	4.	Determination of terms of reference .....	727
	(1)	Standard terms of reference .....	727
	(2)	Special terms of reference .....	728
	5.	Procedures for multiple complainants .....	728
	6.	Scope of panel proceeding .....	730
	(1)	Scope of "the relevant GATT provisions" .....	730
	(a)	Provisions of Protocol of Provisional Application .....	730
	(b)	Provisions in Protocols of accession .....	730
	(c)	Provisions of decisions of the CONTRACTING PARTIES under Article XXV:1 or Article XXV:5 .....	730
	(d)	Past panel reports .....	731
	(e)	Provisions of bilateral agreements .....	731

	(f) Provisions of general international law other than the General Agreement; estoppel.....	731
	(g) Elements other than “the relevant GATT provisions”.....	732
	<b>(2) Measures as applied versus measures as such</b> .....	733
	<b>(3) Matters not raised in consultations, panel request and/or terms of reference</b> .....	734
	<b>(4) Change in the subject matter of a proceeding</b> .....	738
	(a) Change in measures.....	738
	(b) Change in legal basis for measures under the General Agreement.....	739
	(c) Use of updated information concerning the same measures.....	740
	<b>(5) Claims not raised by the applicant contracting party</b> .....	740
	<b>(6) Defences not raised by the respondent contracting party</b> .....	742
	<b>(7) Treatment of proceedings and panel report in the event of a mutually agreed solution</b> .....	743
	(a) Treatment of proceedings and report.....	743
	(b) Transparency concerning settlements.....	745
7.	<b>Panel procedure</b> .....	745
	<b>(1) Time deadlines for panels</b> .....	746
	<b>(2) Urgent cases</b> .....	747
	<b>(3) Confidentiality and privacy of proceedings</b> .....	747
	<b>(4) Role of Secretariat</b> .....	748
8.	<b>Sources and treatment of information</b> .....	748
	<b>(1) Right of panel to seek information</b> .....	748
	<b>(2) Use of experts</b> .....	748
	<b>(3) Presumptions and burden of proof</b> .....	749
	(a) Burden of production of information regarding consistency with the General Agreement.....	749
	(b) Presumption of prima facie nullification or impairment.....	749
	(c) Burden of proof regarding exceptions and narrow interpretation of exceptions.....	750
	(d) Arguments in the alternative.....	751
	<b>(4) Protection of confidential information</b> .....	752
9.	<b>Participation by third contracting parties not party to the dispute</b> .....	752
10.	<b>Panel reports</b> .....	754
	<b>(1) Dissenting opinions</b> .....	755
	<b>(2) Precedential effect of findings in panel reports with regard to later consideration of the same measures</b> .....	755
	<b>(3) Legal nature of panel reports and precedential nature of panel interpretation of GATT provisions</b> .....	758
	<b>(4) Consideration and action on panel reports</b> .....	759
	(a) Consideration of panel reports.....	759
	(b) Procedure for adoption of panel reports.....	761
	(c) Adoption of panel reports subject to conditions.....	762
	(d) Action on a panel report other than adoption.....	762
11.	<b>Disputes involving developing contracting parties</b> .....	763
E.	<b>SPECIAL PROCEDURES FOR SETTLEMENT OF DISPUTES UNDER THE GATT</b> .....	764
	<b>1. 1966 Decision on Procedures to be followed in consultations between a less-developed and a developed contracting party</b> .....	764
	(1) <i>Background and interpretation</i> .....	764
	(2) <i>Invocations of good offices under 1966 Procedures</i> .....	765
	(3) <i>Application of paragraphs 4 and 5 of the 1966 Procedures</i> .....	766
	<b>2. Good offices and conciliation</b> .....	766
	<b>3. Arbitration</b> .....	768
III.	<b>PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS</b> .....	768
IV.	<b>RELEVANT DOCUMENTS</b> .....	770
V.	<b>TABLE OF DISPUTES</b> .....	771

## I. TEXT OF ARTICLE XXIII AND DECISIONS INTERPRETING ARTICLE XXIII

### A. ARTICLE XXIII

#### Article XXIII

##### *Nullification or Impairment*

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

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

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

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

### B. UNDERSTANDING ON NOTIFICATION, CONSULTATION, DISPUTE SETTLEMENT AND SURVEILLANCE OF 28 NOVEMBER 1979 (26S/210)

1. The CONTRACTING PARTIES reaffirm their adherence to the basic GATT mechanism for the management of disputes based on Articles XXII and XXIII.<sup>1</sup> With a view to improving and refining the GATT mechanism, the CONTRACTING PARTIES agree as follows:

#### *Notification*

2. Contracting parties reaffirm their commitment to existing obligations under the General Agreement regarding publication and notification.<sup>2</sup>

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

*Consultations*

4. Contracting parties reaffirm their resolve to strengthen and improve the effectiveness of consultative procedures employed by contracting parties. In that connexion, they undertake to respond to requests for consultations promptly and to attempt to conclude consultations expeditiously, with a view to reaching mutually satisfactory conclusions. Any requests for consultations should include the reasons therefor.
5. During consultations, contracting parties should give special attention to the particular problems and interests of less- developed contracting parties.
6. Contracting parties should attempt to obtain satisfactory adjustment of the matter in accordance with the provisions of Article XXIII:1 before resorting to Article XXIII:2.

*Dispute settlement*

7. The CONTRACTING PARTIES agree that the customary practice of the GATT in the field of dispute settlement, described in the Annex, should be continued in the future, with the improvements set out below. They recognize that the efficient functioning of the system depends on their will to abide by the present understanding. The CONTRACTING PARTIES reaffirm that the customary practice includes the procedures for the settlement of disputes between developed and less-developed countries adopted by the CONTRACTING PARTIES in 1966 (BISD, fourteenth supplement, page 18) and that these remain available to less-developed contracting parties wishing to use them.
8. If a dispute is not resolved through consultations the contracting parties concerned may request an appropriate body or individual to use their good offices with a view to the conciliation of the outstanding differences between the parties. If the unresolved dispute is one in which a less-developed contracting party has brought a complaint against a developed contracting party, the less-developed contracting party may request the good offices of the Director-General who, in carrying out his tasks, may consult with the Chairman of the CONTRACTING PARTIES and the Chairman of the Council.
9. It is understood that requests for conciliation and the use of the dispute settlement procedures of Article XXIII:2 should not be intended or considered as contentious acts and that, if disputes arise, all contracting parties will engage in these procedures in good faith in an effort to resolve the disputes. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.
10. It is agreed that if a contracting party invoking Article XXIII:2 requests the establishment of a panel to assist the CONTRACTING PARTIES to deal with the matter, the CONTRACTING PARTIES would decide on its establishment in accordance with standing practice. It is also agreed that the CONTRACTING PARTIES would similarly decide to establish a working party if this were requested by a contracting party invoking the Article. It is further agreed that such requests would be granted only after the contracting party concerned had had an opportunity to study the complaint and respond to it before the CONTRACTING PARTIES.
11. When a panel is set up, the Director-General, after securing the agreement of the contracting parties concerned, should propose the composition of the panel, of three or five members depending on the case, to the CONTRACTING PARTIES for approval. The members of a panel would preferably be governmental. It is understood that citizens of countries whose governments<sup>3</sup> are parties to the dispute would not be members of the panel concerned with that dispute. The panel should be constituted as promptly as possible and normally not later than thirty days from the decision by the CONTRACTING PARTIES.
12. The parties to the dispute would respond within a short period of time, i.e., seven working days, to nominations of panel members by the Director-General and would not oppose nominations except for compelling reasons.
13. In order to facilitate the constitution of panels, the Director- General should maintain an informal indicative list of governmental and non-governmental persons qualified in the fields of trade relations, economic development, and other matters covered by the General Agreement, and who could be available for serving on panels. For this purpose, each contracting party would be invited to indicate at the beginning of every year to the Director-General the name of one or two persons who would be available for such work.<sup>4</sup>
14. Panel members would serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments would therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and wide spectrum of experience.<sup>5</sup>
15. Any contracting party having a substantial interest in the matter before a panel, and having notified this to the Council, should have an opportunity to be heard by the panel. Each panel should have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a State it shall inform the government of that State. Any contracting party should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided should not be revealed without formal authorization from the contracting party providing the information.
16. The function of panels is to assist the CONTRACTING PARTIES in discharging their responsibilities under Article XXIII:2. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the General Agreement and, if so requested by the CONTRACTING PARTIES, make such other findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2. In this connexion, panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.
17. Where the parties have failed to develop a mutually satisfactory solution, the panel should submit its findings in a written form. The report of a panel should normally set out the rationale behind any findings and recommendations that it makes. Where a bilateral settlement of

the matter has been found, the report of the panel may be confined to a brief description of the case and to reporting that a solution has been reached.

18. To encourage development of mutually satisfactory solutions between the parties and with a view to obtaining their comments, each panel should first submit the descriptive part of its report to the parties concerned, and should subsequently submit to the parties to the dispute its conclusions, or an outline thereof, a reasonable period of time before they are circulated to the CONTRACTING PARTIES.

19. If a mutually satisfactory solution is developed by the parties to a dispute before a panel, any contracting party with an interest in the matter has a right to enquire about and be given appropriate information about that solution in so far as it relates to trade matters.

20. The time required by panels will vary with the particular case.<sup>6</sup> However, panels should aim to deliver their findings without undue delay, taking into account the obligation of the CONTRACTING PARTIES to ensure prompt settlement. In cases of urgency the panel would be called upon to deliver its findings within a period normally of three months from the time the panel was established.

21. Reports of panels and working parties should be given prompt consideration by the CONTRACTING PARTIES. The CONTRACTING PARTIES should take appropriate action on reports of panels and working parties within a reasonable period of time. If the case is one brought by a less-developed contracting party, such action should be taken in a specially convened meeting, if necessary. In such cases, in considering what appropriate action might be taken the CONTRACTING PARTIES shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of less-developed contracting parties concerned.

22. The CONTRACTING PARTIES shall keep under surveillance any matter on which they have made recommendations or given rulings. If the CONTRACTING PARTIES' recommendations are not implemented within a reasonable period of time, the contracting party bringing the case may ask the CONTRACTING PARTIES to make suitable efforts with a view to finding an appropriate solution.

23. If the matter is one which has been raised by a less-developed contracting party, the CONTRACTING PARTIES shall consider what further action they might take which would be appropriate to the circumstances.

#### *Surveillance*

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

#### *Technical assistance*

25. The technical assistance service of the GATT secretariat shall, at the request of a less-developed contracting party, assist it in connexion with matters dealt with in this understanding.

#### *Notes:*

<sup>1</sup>It is noted that Article XXV may, as recognized by the CONTRACTING PARTIES, inter alia, when they adopted the report of the Working Party on particular difficulties connected with trade in primary products (L/930), also afford an appropriate avenue for consultation and dispute settlement in certain circumstances.

<sup>2</sup>See Secretariat Note, Notifications required from contracting parties (MTN/FR/W/17, dated 1 August 1978).

<sup>3</sup>In the case customs unions or common markets are parties to a dispute, this provision applies to citizens of all member countries of the customs unions or common markets.

<sup>4</sup>The coverage of travel expenses should be considered within the limits of budgetary possibilities.

<sup>5</sup>A statement is included in the Annex describing the current practice with respect to inclusion on panels of persons from developing countries.

<sup>6</sup>An explanation is included in the Annex that "in most cases the proceedings of the panels have been completed with a reasonable period of time, extending from three to nine months".

## ANNEX

### *Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII:2)*

1. Any dispute which has not been settled bilaterally under the relevant provisions of the General Agreement may be referred to the CONTRACTING PARTIES<sup>1</sup> which are obliged, pursuant to Article XXIII:2, to investigate matters submitted to them and make appropriate recommendations or give a ruling on the matter as appropriate. Article XXIII:2 does not indicate whether disputes should be handled by a working party or by a panel.<sup>2</sup>

2. The CONTRACTING PARTIES adopted in 1966 a decision establishing the procedure to be followed for Article XXIII consultations between developed and less-developed contracting parties (BISD, 14th Supplement, page 18). This procedure provides, inter alia, for the Director-General to employ his good offices with a view to facilitating a solution, for setting up a panel with the task of examining the problem in order to recommend appropriate solutions, and for time-limits for the execution of the different parts of this procedure.

3. The function of a panel has normally been to review the facts of a case and the applicability of GATT provisions and to arrive at an objective assessment of these matters. In this connexion, panels have consulted regularly with the parties to the dispute and have given them

adequate opportunity to develop a mutually satisfactory solution. Panels have taken appropriate account of the particular interests of developing countries. In cases of failure of the parties to reach a mutually satisfactory settlement, panels have normally given assistance to the CONTRACTING PARTIES in making recommendations or in giving rulings as envisaged in Article XXIII:2.

4. Before bringing a case, contracting parties have exercised their judgement as to whether action under Article XXIII:2 would be fruitful. Those cases which have come before the CONTRACTING PARTIES under this provision have, with few exceptions, been brought to a satisfactory conclusion. The aim of the CONTRACTING PARTIES has always been to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the CONTRACTING PARTIES is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the General Agreement. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement. The last resort which Article XXIII provides to the country invoking this procedure is the possibility of suspending the application of concessions or other obligations on a discriminatory basis vis-a-vis the other contracting party, subject to authorization by the CONTRACTING PARTIES of such measures. Such action has only rarely been contemplated and cases taken under Article XXIII:2 have led to such action in only one case.

5. In practice, contracting parties have had recourse to Article XXIII only when in their view a benefit accruing to them under the General Agreement was being nullified or impaired. In cases where there is an infringement of the obligations assumed under the General Agreement, the action is considered prima facie to constitute a case of nullification or impairment. A prima facie case of nullification or impairment would ipso facto require consideration of whether the circumstances are serious enough to justify the authorization of suspension of concessions or obligations, if the contracting party bringing the complaint so requests. This means that there is normally a presumption that a breach of the rules has an adverse impact on other contracting parties, and in such cases, it is up to the contracting parties against whom the complaint has been brought to rebut the charge. Paragraph 1(b) permits recourse to Article XXIII if nullification or impairment results from measures taken by other contracting parties whether or not these conflict with the provisions of the General Agreement, and paragraph 1(c) if any other situation exists. If a contracting party bringing an Article XXIII case claims that measures which do not conflict with the provisions of the General Agreement have nullified or impaired benefits accruing to it under the General Agreement, it would be called upon to provide a detailed justification.

6. Concerning the customary elements of the procedures regarding working parties and panels, the following elements have to be noted:

- (i) working parties are instituted by the Council upon the request of one or several contracting parties. The terms of reference of working parties are generally "to examine the matter in the light of the relevant provisions of the General Agreement and to report to the Council". Working parties set up their own working procedures. The practice for working parties has been to hold one or two meetings to examine the matter and a final meeting to discuss conclusions. Working parties are open to participation of any contracting party which has an interest in the matter. Generally working parties consist of a number of delegations varying from about five to twenty according to the importance of the question and the interests involved. The countries who are parties to the dispute are always members of the Working Party and have the same status as other delegations. The report of the Working Party represents the views of all its members and therefore records different views if necessary. Since the tendency is to strive for consensus, there is generally some measure of negotiation and compromise in the formulation of the Working Party's report. The Council adopts the report. The reports of working parties are advisory opinions on the basis of which the CONTRACTING PARTIES may take a final decision.
- (ii) In the case of disputes, the CONTRACTING PARTIES have established panels (which have been called by different names) or working parties in order to assist them in examining questions raised under Article XXIII:2. Since 1952, panels have become the usual procedure. However, the Council has taken such decisions only after the party concerned has had an occasion to study the complaint and prepare its response before the Council. The terms of reference are discussed and approved by the Council. Normally, these terms of reference are "to examine the matter and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or rulings provided for in paragraph 2 of Article XXIII". When a contracting party having recourse to Article XXIII:2 raised questions relating to the suspension of concessions or other obligations, the terms of reference were to examine the matter in accordance with the provisions of Article XXIII:2. Members of the panel are usually selected from permanent delegations or, less frequently, from the national administrations in the capitals amongst delegates who participate in GATT activities on a regular basis. The practice has been to appoint a member or members from developing countries when a dispute is between a developing and a developed country.
- (iii) Members of panels are expected to act impartially without instructions from their governments. In a few cases, in view of the nature and complexity of the matter, the parties concerned have agreed to designate non-government experts. Nominations are proposed to the parties concerned by the GATT secretariat. The composition of panels (three or five members depending on the case) has been agreed upon by the parties concerned and approved by the GATT Council. It is recognized that a broad spectrum of opinion has been beneficial in difficult cases, but that the number of panel members has sometimes delayed the composition of panels, and therefore the process of dispute settlement.
- (iv) Panels set up their own working procedures. The practice for the panels has been to hold two or three formal meetings with the parties concerned. The panel invited the parties to present their views either in writing and/or orally in the presence of each other. The panel can question both parties on any matter which it considers relevant to the dispute. Panels have also heard the views of any contracting party having a substantial interest in the matter, which is not directly party to the dispute, but which has expressed in the Council a desire to present its views. Written memoranda submitted to the panel have been considered confidential, but are made available to the parties to the dispute. Panels often consult with and seek information from any relevant source they deem appropriate and they sometimes consult experts to obtain their technical opinion on certain aspects of the matter. Panels may seek advice or assistance from the secretariat in its capacity as guardian of the General Agreement, especially on historical or procedural aspects. The secretariat provides the secretary and technical services for panels.

- (v) Where the parties have failed to develop a mutually satisfactory solution, the panel has submitted its findings in a written form. Panel reports have normally set out findings of fact, the applicability of relevant provisions, and the basic rationale behind any findings and recommendations that it has made. Where a bilateral settlement of the matter has been found, the report of the panel has been confined to a brief description of the case and to reporting that a solution has been reached.
- (vi) The reports of panels have been drafted in the absence of the parties in the light of the information and the statements made.
- (vii) To encourage development of mutually satisfactory solutions between the parties and with a view to obtaining their comments, each panel has normally first submitted the descriptive part of its report to the parties concerned, and also their conclusions, or an outline thereof, a reasonable period of time before they have been circulated to the CONTRACTING PARTIES.
- (viii) In accordance with their terms of reference established by the CONTRACTING PARTIES panels have expressed their views on whether an infringement of certain rules of the General Agreement arises out of the measure examined. Panels have also, if so requested by the CONTRACTING PARTIES, formulated draft recommendations addressed to the parties. In yet other cases panels were invited to give a technical opinion on some precise aspect of the matter (e.g. on the modalities of a withdrawal or suspension in regard to the volume of trade involved). The opinions expressed by the panel members on the matter are anonymous and the panel deliberations are secret.
- (ix) Although the CONTRACTING PARTIES have never established precise deadlines for the different phases of the procedure, probably because the matters submitted to panels differ as to their complexity and their urgency, in most cases the proceedings of the panels have been completed within a reasonable period of time, extending from three to nine months.

The 1966 decision by the CONTRACTING PARTIES referred to in paragraph 2 above lays down in its paragraph 7 that the Panel shall report within a period of sixty days from the date the matter was referred to it.

#### Notes

<sup>1</sup> The Council is empowered to act for the CONTRACTING PARTIES, in accordance with normal GATT practice.

<sup>2</sup> At the Review Session (1955) the proposal to institutionalize the procedures of panels was not adopted by CONTRACTING PARTIES mainly because they preferred to preserve the existing situation and not to establish judicial procedures which might put excessive strain on the GATT.

### C. MINISTERIAL DECLARATION OF 29 NOVEMBER 1982, DECISION ON DISPUTE SETTLEMENT (29S/13)

The CONTRACTING PARTIES:

Agree that the Understanding on Notification, Consultation, Dispute Settlement and Surveillance negotiated during the Tokyo Round (hereinafter referred to as the "Understanding") provides the essential framework of procedures for the settlement of disputes among contracting parties and that no major change is required in this framework, but that there is scope for more effective use of the existing mechanism and for specific improvements in procedures to this end;

And agree further that:

- (i) With reference to paragraph 8 of the Understanding, if a dispute is not resolved through consultations, any party to a dispute may, with the agreement of the other party, seek the good offices of the Director-General or of an individual or group of persons nominated by the Director-General. This conciliatory process would be carried out expeditiously, and the Director-General would inform the Council of the outcome of the conciliatory process. Conciliation proceedings, and in particular positions taken by the parties to the dispute during consultations, shall be confidential, and without prejudice to the rights of either party in any further proceedings under Article XXIII:2. It would remain open at any time during any conciliatory process for either party to the dispute to refer the matter to the CONTRACTING PARTIES.
- (ii) In order to ensure more effective compliance with the provisions of paragraphs 11 and 12 of the Understanding, the Director-General shall inform the Council of any case in which it has not been found possible to meet the time-limits for the establishment of a panel.
- (iii) With reference to paragraph 13 of the Understanding, contracting parties will co-operate effectively with the Director-General in making suitably qualified experts available to serve on panels. Where experts are not drawn from Geneva, any expenses, including travel and subsistence allowance, shall be met from the GATT budget.
- (iv) The secretariat of GATT has the responsibility of assisting the panel, especially on the legal, historical and procedural aspects of the matters dealt with.
- (v) The terms of reference of a panel should be formulated so as to permit a clear finding with respect to any contravention of GATT provisions and/or on the question of nullification and impairment of benefits. In terms of paragraph 16 of the Understanding, and after reviewing the facts of the case, the applicability of GATT provisions and the arguments advanced, the panel should come to such a finding. Where a finding establishing a contravention of GATT provisions or nullification or impairment is made, the panel should make such suggestions as appropriate for dealing with the matter as would assist the CONTRACTING PARTIES in making recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate.

- (vi) Panels would aim to deliver their findings without undue delay, as provided in paragraph 20 of the Understanding. If a complete report cannot be made within the period foreseen in that paragraph, panels would be expected to so advise the Council and the report should be submitted as soon as possible thereafter.
- (vii) Reports of panels should be given prompt consideration by the CONTRACTING PARTIES. Where a decision on the findings contained in a report calls for a ruling or a recommendation by the Council, the Council may allow the contracting party concerned a reasonable specified time to indicate what action it proposes to take with a view to a satisfactory settlement of the matter, before making any recommendation or ruling on the basis of the report.
- (viii) The recommendation or ruling made by the CONTRACTING PARTIES shall be aimed at achieving a satisfactory settlement of the matter in accordance with GATT obligations. In furtherance of the provisions of paragraph 22 of the Understanding the Council shall periodically review the action taken pursuant to such recommendations. The contracting party to which such a recommendation has been addressed, shall report within a reasonable specified period on action taken or on its reasons for not implementing the recommendation or ruling by the CONTRACTING PARTIES. The contracting party bringing the case may also ask the CONTRACTING PARTIES to make suitable efforts with a view to finding an appropriate solution as provided in paragraph 22 of the Understanding.
- (ix) The further action taken by the CONTRACTING PARTIES in the above circumstances might include a recommendation for compensatory adjustment with respect to other products or authorization for the suspension of such concessions or other obligations as foreseen in Article XXIII:2, as the CONTRACTING PARTIES may determine to be appropriate in the circumstances.
- (x) The Parties to a dispute would fully participate in the consideration of the matter by the CONTRACTING PARTIES under paragraph (viii) above, including the consideration of any rulings or recommendations the CONTRACTING PARTIES might make pursuant to Article XXIII:2 of the General Agreement, and their views would be fully recorded. They would likewise participate and have their views recorded in the considerations of the further actions provided for under paragraphs (viii) and (ix) above. The CONTRACTING PARTIES reaffirmed that consensus will continue to be the traditional method of resolving disputes; however, they agreed that obstruction in the process of dispute settlement shall be avoided.<sup>1</sup> It is understood that decisions in this process cannot add to or diminish the rights and obligations provided in the General Agreement.

Footnote 1 to paragraph (x) provides: This does not prejudice the provisions on decision making in the General Agreement.

#### **D. DECISION ON DISPUTE SETTLEMENT OF 30 NOVEMBER 1984 (31S/9)**

##### *Formation of panels*

1. Contracting parties should indicate to the Director-General the names of persons they think qualified to serve as panelists, who are not presently affiliated with national administrations but who have a high degree of knowledge of international trade and experience of the GATT. These names should be used to develop a short roster of non-governmental panelists to be agreed upon by the CONTRACTING PARTIES in consultation with the Director-General. The roster should be as representative as possible of contracting parties.
2. The Director-General should continue the practice of proposing panels composed preferably of governmental representatives but may also draw as necessary on persons on the approved roster. The parties should retain the ability to respond to the Director-General's proposal, but shall not oppose nominations except for compelling reasons.
3. In the event that panel composition cannot be agreed within thirty days after a matter is referred by the CONTRACTING PARTIES, the Director-General shall, at the request of either party and in consultation with the Chairman of the Council, complete the panel by appointing persons from the roster of non-governmental panelists to resolve the deadlock, after consulting both parties.

##### *Completion of panel work*

1. Panels should continue to set their own working procedures and, where possible, panels should provide the parties to the dispute at the outset with a proposed calendar for the panel's work.
2. Where written submissions are requested from the parties, panels should set precise deadlines, and parties to a dispute should respect those deadlines.

## **E. DECISION OF 12 APRIL 1989 ON IMPROVEMENTS TO THE GATT DISPUTE SETTLEMENT RULES AND PROCEDURES (36S/61)**

Following the meetings of the Trade Negotiations Committee at Ministerial level in December 1988 and at the level of high officials in April 1989, the CONTRACTING PARTIES to the General Agreement on Tariffs and Trade

*Approve* the improvements of the GATT dispute settlement rules and procedures set out below and their application on the basis set out in this Decision:

### *A. General Provisions*

1. Contracting parties recognize that the dispute settlement system of GATT serves to preserve the rights and obligations of contracting parties under the General Agreement and to clarify the existing provisions of the General Agreement. It is a central element in providing security and predictability to the multilateral trading system.

2. Contracting parties agree that all solutions to matters formally raised under the GATT dispute settlement system under Articles XXII, XXIII and arbitration awards shall be consistent with the General Agreement and shall not nullify or impair benefits accruing to any contracting party under the General Agreement, nor impede the attainment of any objective of the General Agreement.

3. Contracting parties agree that the existing rules and procedures of the GATT in the field of dispute settlement shall continue. It is further agreed that the improvements set out below, which aim to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, shall be applied on a trial basis from 1 May 1989 to the end of the Uruguay Round in respect of complaints brought during that period under Article XXII or XXIII; it is also agreed to keep the application of these improvements under review during the remainder of the Round and to decide on their adoption before the end of the Round; to continue negotiations with the aim of further improving and strengthening the GATT dispute settlement system taking into account the experience gained in the application of these improvements.

4. All the points set out in this Decision shall be applied without prejudice to any provision on special and differential treatment for developing contracting parties in the existing instruments on dispute settlement including the CONTRACTING PARTIES' Decision of 5 April 1966 (BISD 14S/18).

### *B. Notification*

Mutually agreed solutions to matters formally raised under GATT Articles XXII and XXIII, as well as arbitration awards within GATT, must be notified to the Council where any contracting party may raise any point relating thereto.

### *C. Consultations*

1. If a request is made under Article XXII:1 or XXIII:1, the contracting party to which the request is made shall, unless otherwise mutually agreed, reply to the request within ten days after its receipt and shall enter into consultations in good faith within a period of no more than thirty days from the date of the request, with a view to reaching a mutually satisfactory solution. If the contracting party does not respond within ten days, or does not enter into consultations within a period of no more than thirty days, or a period otherwise mutually agreed, from the date of the request, then the contracting party that requested the holding of consultations may proceed directly to request the establishment of a panel or a working party.

2. If the consultations under Article XXII:1 or XXIII:1 fail to settle a dispute within sixty days after the request for consultations, the complaining party may request the establishment of a panel or a working party under Article XXIII:2. The complaining party may request a panel or a working party during the sixty-day period if the parties jointly consider that consultations have failed to settle the dispute.

3. Requests for consultations under Article XXII:1 or XXIII:1 shall be notified to the Council by the party which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request.

4. In cases of urgency, including those which concern perishable goods en route, parties shall enter into consultations within a period of no more than ten days from the date of the request. If the consultations have failed to settle the dispute within a period of thirty days after the request, the complaining party may request the establishment of a panel or a working party.

### *D. Good Offices, Conciliation, Mediation*

1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree. They may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once terminated, the complaining party can then proceed with a request for the establishment of a panel or a working party under Article XXIII:2. When good offices, conciliation or mediation are entered into within sixty days of a request for consultations, the complaining party must allow a period of sixty days from the date of the request for consultations before requesting the establishment of a panel or working party. The complaining party may request a panel or a working party during the sixty days if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.

2. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel or working party process proceeds.

3. The Director-General may, acting in an *ex officio* capacity, offer his good offices, conciliation or mediation with the view to assisting contracting parties to settle a dispute.

E. *Arbitration*

1. Expedient arbitration within GATT as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.

2. Resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all contracting parties sufficiently in advance of the actual commencement of the arbitration process.

3. Other contracting parties may become party to an arbitration proceeding upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award.

F. *Panel and Working Party Procedures*

(a) *Establishment of a Panel or a Working Party*

The request for a panel or a working party shall be made in writing. It shall indicate whether consultations were held, and provide a brief summary of the factual and legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel or a working party with other than standard terms of reference, the written request shall include the proposed text of special terms of reference. If the complaining party so requests, a decision to establish a panel or working party shall be taken at the latest at the Council meeting following that at which the request first appeared as an item on the Council's regular agenda, unless at that meeting the Council decides otherwise.\*

(b) *Standard Terms of Reference*

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within twenty days from the establishment of the panel:

"To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by (name of contracting party) in document L/... and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2".

2. In establishing a panel, the Council may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties subject to the provisions of the preceding paragraph. The terms of reference thus drawn up shall be circulated to all contracting parties. If other than standard terms of reference are agreed upon, any contracting party may raise any point relating thereto in the Council.

(c) *Composition of Panels*

1. Contracting parties shall undertake, as a general rule, to permit their representatives to serve as panel members.

2. Panels shall be composed of well-qualified governmental and/or non-governmental individuals.

3. The roster of non-governmental panelists shall be expanded and improved. To this end, contracting parties may nominate individuals to serve on panels and shall provide relevant information on their nominee's knowledge of international trade and of the GATT.

4. Panels shall be composed of three members unless the parties to the dispute agree, within ten days from the establishment of the panel, to a panel composed of five members.

5. If there is no agreement on the members within twenty days from the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the Council, shall form the panel by appointing the panelists whom he considers most appropriate, after consulting both parties. The Director-General shall inform the contracting parties of the composition of the panel thus formed no later than ten days from the date he receives such a request.

(d) *Procedures for Multiple Complainants*

1. Where more than one contracting party requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all parties concerned. A single panel should be established to examine such complaints whenever feasible.

2. The single panel will organize its examination and present its findings to the Council so that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel will submit separate reports on the dispute concerned. The written submissions by each of the complainants will be made available to the other complainants, and each complainant will have the right to be present when one of the other complainants presents its view to the panel.

3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

(e) *Third Contracting Parties*

1. The interests of the parties to a dispute and those of other contracting parties shall be fully taken into account during the panel process.

2. Any third contracting party having a substantial interest in a matter before a panel, and having notified this to the Council, shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

3. At the request of the third contracting party, the panel may grant the third contracting party access to the written submissions to the panel by those parties to the dispute which have agreed to the disclosure of their respective submission to the third contracting party.

(f) *Time Devoted to Various Phases of a Panel*

1. Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.

2. Panels shall follow the Suggested Working Procedures found in the July 1985 note of the Office of Legal Affairs unless the members of the panel agree otherwise after consulting the parties to the dispute. After consulting the parties, the panel members shall, as soon as practicable and whenever possible within one week after the composition and terms of reference of the panel have been agreed upon, fix the timetable for the panel process at least until its first substantive meeting.

3. In determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions.

4. Each party to the dispute shall deposit its written submissions with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute. The complaining party shall submit its first submission in advance of the responding party's first submission unless the panel decides, in fixing the timetable referred to in the second paragraph of this section and after consultations with the parties to the dispute, that the parties should submit their first submissions simultaneously. When there are sequential arrangements for the deposit of first submissions, the panel shall establish a firm time period for receipt of the responding party's submission. Any subsequent written submissions shall be submitted simultaneously.

5. In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the time the composition and terms of reference of the panel have been agreed upon to the time when the final report is provided to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to provide its report to the parties within three months.

6. When the panel considers that it cannot provide its report within six months, or within three months in cases of urgency, it shall inform the Council in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case should the period from the establishment of the panel to the submission of the report to the contracting parties exceed nine months.

7. In the context of consultations involving a measure taken by a developing contracting party, the parties may agree to extend the periods established in paragraphs 2 and 4 of Section C. If, after the relevant period has elapsed, the parties cannot agree that the consultations have concluded, the Chairman of the Council shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing contracting party, the panel shall accord sufficient time for the developing contracting party to prepare and present its argumentation. The provisions of paragraph 4 of Section G are not affected by any action pursuant to this paragraph.

G. *Adoption of Panel Reports*

1. In order to provide sufficient time for the members of the Council to consider panel reports, the reports shall not be considered for adoption by the Council until thirty days after they have been issued to the contracting parties.

2. Contracting parties having objections to panel reports shall give written reasons to explain their objections for circulation at least ten days prior to the Council meeting at which the panel report will be considered.

3. The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the Council, and their views shall be fully recorded. The practice of adopting panel reports by consensus shall be continued, without prejudice to the GATT provisions on decision-making which remain applicable. However, the delaying of the process of dispute settlement shall be avoided.

4. The period from the request under Article XXII:1 or Article XXIII:1 until the Council takes a decision on the panel report shall not, unless agreed to by the parties, exceed fifteen months. The provisions of this paragraph shall not affect the provisions of paragraph 6 of Section F(f).

H. *Technical Assistance*

1. While the Secretariat assists contracting parties in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing contracting parties. To this end, the Secretariat shall make available a qualified legal expert within the Technical Co-operation Division to any developing contracting party which so requests. This expert shall assist the developing contracting party in a manner ensuring the continued impartiality of the Secretariat.

2. The Secretariat shall conduct special training courses for interested contracting parties concerning GATT dispute settlement procedures and practices so as to enable contracting parties' experts to be better informed in this regard.

I. *Surveillance of Implementation of Recommendations and Rulings*

1. Prompt compliance with recommendations or rulings of the CONTRACTING PARTIES under Article XXIII is essential in order to ensure effective resolution of disputes to the benefit of all contracting parties.

2. The contracting party concerned shall inform the Council of its intentions in respect of implementation of the recommendations or rulings. If it is impracticable to comply immediately with the recommendations or rulings, the contracting party concerned shall have a reasonable period of time in which to do so.

3. The Council shall monitor the implementation of recommendations or rulings adopted under Article XXIII:2. The issue of implementation of the recommendations or rulings may be raised at the Council by any contracting party at any time following their adoption. Unless the Council decides otherwise, the issue of implementation of the recommendations or rulings shall be on the agenda of the Council meeting after six months following their adoption and shall remain on the Council's agenda until the issue is resolved. At least ten days prior to each such Council meeting, the contracting party concerned shall provide the Council with a status report in writing of its progress in the implementation of the panel recommendations or rulings.

4. In cases brought by developing contracting parties, the Council shall consider what further action it might take which would be appropriate to the circumstances, in conformity with paragraphs 21 and 23 of the 1979 Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance (BISD 26S/214).

The footnote to paragraph F(a) provides: References to the Council, made in this paragraph as well as in the following paragraphs, are without prejudice to the competence of the CONTRACTING PARTIES, for which the Council is empowered to act in accordance with normal GATT practice (BISD 26S/215).

**F. DECISION OF 22 FEBRUARY 1994 ON EXTENSION OF THE APRIL 1989 DECISION ON IMPROVEMENTS TO THE GATT DISPUTE SETTLEMENT RULES AND PROCEDURES (L/7416)**

The CONTRACTING PARTIES,

*Recalling* their Decision of 12 April 1989 (BISD 36S/61),

*Noting* that the improvements to the GATT dispute settlement rules and procedures are being applied on a trial basis until the end of the Uruguay Round and that a decision on their adoption should be taken before the end of the Round,

*Considering* that the continuation of the improved rules and procedures is necessary for the effectiveness of the dispute settlement mechanism,

*Decide,*

To keep the above-mentioned improvements in effect until the entry into force of the Understanding on Rules and Procedures Governing the Settlement of Disputes contained in Annex 2 of the Agreement Establishing the World Trade Organization (MTN/FA, II).

NOTE: The April 1989 Decision was not extended before the WTO Agreement entered into force on 1 January 1995, and therefore expired as of that date.

**G. DECISION OF 5 APRIL 1966 ON PROCEDURES UNDER ARTICLE XXIII (14S/18)**

The CONTRACTING PARTIES,

*Recognizing* that the prompt settlement of situations in which a contracting party considers that any benefits accruing to it directly or indirectly from the General Agreement are being impaired by measures taken by another contracting party, is essential to the effective functioning of the General Agreement and the maintenance of a proper balance between the rights and obligations of all contracting parties;

*Recognizing further* that the existence of such a situation can cause severe damage to the trade and economic development of the less-developed contracting parties; and

*Affirming* their resolve to facilitate the solution of such situations while taking fully into account the need for safeguarding both the present and potential trade of less-developed contracting parties affected by such measures;

Decide that:

1. If consultations between a less-developed contracting party and a developed contracting party in regard to any matter falling under paragraph 1 of Article XXIII do not lead to a satisfactory settlement, the less-developed contracting party complaining of the measures may refer the matter which is the subject of consultations to the Director-General so that, acting in an *ex officio* capacity, he may use his good offices with a view to facilitating a solution.
  2. To this effect the contracting parties concerned shall, at the request of the Director-General, promptly furnish all relevant information.
  3. On receipt of this information, the Director-General shall consult with the contracting parties concerned and with such other contracting parties or inter-governmental organizations as he considers appropriate with a view to promoting a mutually acceptable solution.
  4. After a period of two months from the commencement of the consultations referred to in paragraph 3 above, if no mutually satisfactory solution has been reached, the Director-General shall, at the request of one of the contracting parties concerned, bring the matter to the attention of the CONTRACTING PARTIES or the Council, to whom he shall submit a report on the action taken by him, together with all background information.
  5. Upon receipt of the report, the CONTRACTING PARTIES or the Council shall forthwith appoint a panel of experts to examine the matter with a view to recommending appropriate solution. The members of the panel shall act on a personal capacity and shall be appointed in consultation with, and with the approval of, the contracting parties concerned.
  6. In conducting its examination and having before it all the background information, the panel shall take due account of all the circumstances and considerations relating to the application of the measures complained of, and their impact on the trade and economic development of affected contracting parties.
  7. The panel shall, within a period of sixty days from the date the matter was referred to it, submit its findings and recommendations to the CONTRACTING PARTIES or to the Council, for consideration and decision. Where the matter is referred to the Council, it may, in accordance with Rule 8 of the Intersessional Procedures adopted by the CONTRACTING PARTIES at their thirteenth session<sup>1</sup>, address its recommendations directly to the interested contracting parties and concurrently report to the CONTRACTING PARTIES.
  8. Within a period of ninety days from the date of the decision of the CONTRACTING PARTIES, or the Council, the contracting party to which a recommendation is directed shall report to the CONTRACTING PARTIES or the Council on the action taken by it in pursuance of the decision.
  9. If on examination of this report it is found that a contracting party to which a recommendation has been directed has not complied in full with the relevant recommendation of the CONTRACTING PARTIES or the Council, and that any benefit accruing directly or indirectly under the General Agreement continues in consequence to be nullified or impaired, and that the circumstances are serious enough to justify such action, the CONTRACTING PARTIES may authorize the affected contracting party or parties to suspend, in regard to the contracting party causing the damage, application of any concession or any other obligation under the General Agreement whose suspension is considered warranted, taking account of the circumstances.
  10. In the event that a recommendation to a developed country by the CONTRACTING PARTIES is not applied within the time-limit prescribed in paragraph 8, the CONTRACTING PARTIES shall consider what measures, further to those undertaken under paragraph 9, should be taken to resolve the matter.
  11. If consultations, held under paragraph 2 of Article XXXVII, relate to restrictions for which there is no authority under any provisions to the General Agreement, any of the parties to the consultations may, in the absence of a satisfactory solution, request that consultations be carried out by the CONTRACTING PARTIES pursuant to paragraph 2 of Article XXIII and in accordance with the procedures set out in the present decision, it being understood that a consultation held under paragraph 2 of Article XXXVII in respect of such restrictions will be considered by the CONTRACTING PARTIES as fulfilling the conditions of paragraph 1 of Article XXIII if the parties to the consultations so agree.
- 

<sup>1</sup>TS/7.

## II. INTERPRETATION AND APPLICATION OF ARTICLE XXIII

### A. SCOPE AND APPLICATION OF ARTICLE XXIII

The provisions of Article XXIII are essentially the same as those agreed in Geneva in 1947. However, these provisions have been supplemented by a number of decisions and understandings agreed by the CONTRACTING PARTIES, the texts of which are provided above:

- the “Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance” of 28 November 1979 and its annexed “Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement” (referred to below as the “1979 Understanding” and its “Annex on customary practice”), which were agreed in the Tokyo Round.<sup>2</sup> Paragraph 7 of the 1979 Understanding provides, *inter alia*, “that the customary practice of the GATT in the field of dispute settlement, described in the Annex, should be continued in the future with the improvements set out below”;
- the Decision on “Dispute Settlement Procedures” of 29 November 1982 (“1982 Decision”), adopted at the Thirty-eighth Session which was held at Ministerial level in November 1982;<sup>3</sup>
- the Decision on “Dispute Settlement Procedures” of 30 November 1984 (“1984 Decision”), adopted at the Fortieth Session;<sup>4</sup>
- the Decision on “Improvements to the GATT Dispute Settlement Rules and Procedures” (“1989 Improvements”), negotiated at the December 1988 Meeting of the Trade Negotiations Committee of the Uruguay Round and adopted on 12 April 1989; and
- the Decision of 5 April 1966 on “Procedures under Article XXIII” (“1966 Procedures”) applying to disputes between a developing contracting party and a developed contracting party;
- The Understanding on Rules and Procedures Governing the Settlement of Disputes (“Dispute Settlement Understanding”), agreed in the Uruguay Round, and included as Annex 2 of the WTO Agreement.

On 22 February 1994 the CONTRACTING PARTIES decided to keep the 1989 Improvements in effect until the entry into force of WTO Agreement. The 1989 Improvements were not extended before the WTO Agreement entered into force on 1 January 1995, and have expired.

This chapter cites decisions, examples and precedents with regard to dispute settlement practice under the General Agreement and the Tokyo Round Agreements, but does not discuss the Dispute Settlement Understanding.

#### 1. Scope of Article XXIII

See also the material below in Section B under “Scope of panel proceeding”.

##### *(1) Matters not within the competence of the GATT*

The Report of the Panel on “Canada - Administration of the Foreign Investment Review Act” notes that in discussion of the request by the United States for a panel in this case, “At the Council meeting, a number of delegations expressed doubts whether the dispute between the United States and Canada was one for which the GATT had competence since it involved investment legislation, a subject not covered by the GATT. ... The representative of the United States said that his government was not calling into question the Canadian investment legislation as such but was complaining about the two specific trade-related issues mentioned in the terms of reference. The representative of Canada said that ... the terms of reference ensured that the examination would touch only on trade matters within the purview of GATT. The Chairman suggested, and the Council so decided,

<sup>2</sup>L/4907, adopted on 28 November 1979, 26S/210.

<sup>3</sup>L/5424, adopted on 29 November 1982, 29S/9, 13-16.

<sup>4</sup>L/5752, adopted on 30 November 1984, 31S/9-10.

that the terms of reference remain as they stood, and that the reservations and statements made be placed on the record and that it be presumed that the panel would be limited in its activities and findings to within the four corners of GATT".<sup>5</sup> The Panel findings note that "In view of the fact that the General Agreement does not prevent Canada from exercising its sovereign right to regulate foreign direct investments, the Panel examined the purchase and export undertakings by investors subject to the Foreign Investment Review Act of Canada solely in the light of Canada's trade obligations under the General Agreement".<sup>6</sup>

See also the material below at page 730 on the related but separate issue of interpretation of the standard provision in terms of reference concerning panel examination of matters "in the light of the relevant GATT provisions".

**(2) Disputes involving countries or territories which are not contracting parties**

A Secretariat Note describing GATT practice relating to *de facto* application of the General Agreement notes as follows:

"The CONTRACTING PARTIES do not assist in the resolution of disputes on the interpretation or application of the General Agreement that might arise between contracting parties and countries applying the General Agreement on a *de facto* basis. Article XXIII:2 is not applied to such disputes (cf. VAL/M/8, page 2, for a legal opinion on this issue by the Secretariat)".<sup>7</sup>

The Minutes referred to, of the November 1983 meeting of the Committee on Customs Valuation, note:

"Responding to a query regarding the significance of the reference to GATT Article XXIII in Article 20.11 of the Code, the Director of the Office of Legal Affairs said that this Article stipulated that Parties should use the dispute settlement procedures under the Agreement before availing themselves of any rights which they had under the GATT. It was thus recognized in the provision that there might not be invocable rights under the GATT; this would apply in the case of a dispute involving a country which, like Botswana, was neither a GATT contracting party nor had provisionally acceded to the GATT".<sup>8</sup>

At its March 1992 meeting, the Council agreed to the request of Yugoslavia for establishment of a panel on "EEC - Trade Measures for Non-economic Reasons".<sup>9</sup> At the April 1992 Council meeting, in discussion of the notification of the transformation of the Socialist Federal Republic of Yugoslavia into the Federal Republic of Yugoslavia consisting of the Republics of Serbia and Montenegro, the EC representative said that until the question of succession to Yugoslavia's contracting party status had been resolved, the Panel process which had been initiated between the former SFRY and the EC no longer had any foundation and could not proceed.<sup>10</sup> See also the material on the status of Yugoslavia under Articles XXV and XXXII.

On the other hand, disputes have been brought by contracting parties on behalf of territories for which they had international responsibility at the time, and in respect of which they had agreed to apply provisionally the General Agreement under the Protocol of Provisional Application: for instance, the disputes on "Norway - Restrictions on Imports of Certain Textile Products" and "EEC - Quantitative Restrictions against Imports of Certain Products from Hong Kong", which were brought by the United Kingdom on behalf of Hong Kong, and the dispute on "United States - Import Restrictions on Tuna" which was brought by the Netherlands on behalf of the Netherlands Antilles.<sup>11</sup>

See also the material at page 719 on bilateral agreements and the material under Article XXV on competence of the CONTRACTING PARTIES.

---

<sup>5</sup>L/5504, adopted on 7 February 1984, 30S/140, 141, para. 1.4, referring to C/M/162, p. 25-26.

<sup>6</sup>*Ibid.*, 30S/157, para. 5.1.

<sup>7</sup>C/130, p. 4.

<sup>8</sup>VAL/M/8, p. 2, para. 8.

<sup>9</sup>DS27/2; C/M/255, p. 14-18.

<sup>10</sup>C/M/256, p. 32.

<sup>11</sup>L/4959, adopted on 18 June 1980, 27S/119; L/5511, adopted on 12 July 1983, 30S/129; and DS33/1, respectively.

### (3) *Discretionary legislation*

The 1957 Report on “The European Economic Community” notes, concerning the EEC Treaty provisions relating to quantitative restrictions, that “the Sub-Group noted that these provisions were not mandatory and imposed on the Members of the Community no obligation to take action which would be inconsistent with the General Agreement. On the other hand because of the very general scope and competence conferred on the institutions of the Community, it could be within their powers to take measures which could be inconsistent with the GATT whatever the interpretation given to the provisions of Article XXIV. The Six pointed out that many contracting parties had permissive legislation of a general character which, if implemented in full, would enable them to impose restrictions in a manner contrary to Article XI. These countries were not, however, required to consult with the CONTRACTING PARTIES about their possible intentions as regards the implementation of such legislation”.<sup>12</sup>

The 1987 Panel Report on “United States - Taxes on Petroleum and Certain Imported Substances” examined excise taxes on imported petroleum and certain imported chemical substances (“Superfund taxes”), which had been enacted as a revenue source for the US “Superfund” hazardous-waste cleanup program. The tax on certain imported substances, enacted in October 1986, provided that it would not enter into effect until 1 January 1989, and regulations implementing it had not been drafted or put into effect. The Panel Report examined, with respect to the tax on certain imported substances, a requirement that importers supply sufficient information regarding the chemical inputs of taxable substances to enable the tax authorities to determine the amount of tax to be imposed; otherwise a penalty tax would be imposed in the amount of five percent *ad valorem*, or a different rate to be prescribed by the U.S. Secretary of the Treasury which would equal the amount that would be imposed if the substance were produced using the predominant method of production. The Panel noted concerning the penalty rate:

“... the Superfund Act permits the Secretary of the Treasury to prescribe by regulation, in lieu of the 5 per cent rate, a rate which would equal the amount that would be imposed if the substance were produced using the predominant method of production. ... These regulations have not yet been issued. Thus, whether they will eliminate the need to impose the penalty tax and whether they will establish complete equivalence between domestic and imported products, as required by Article III:2, first sentence, remain open questions. From the perspective of the overall objectives of the General Agreement it is regrettable that the Superfund Act explicitly directs the United States tax authorities to impose a tax inconsistent with the national treatment principle but, since the Superfund Act also gives them the possibility to avoid the need to impose that tax by issuing regulations, the existence of the penalty rate provisions as such does not constitute a violation of the United States obligations under the General Agreement. The Panel noted with satisfaction the statement of the United States that, given the tax authorities’ regulatory authority under the Act, ‘in all probability the 5 per cent penalty rate would never be applied’ ...”.<sup>13</sup>

In the 1990 Panel Report on “EEC - Regulation on Imports of Parts and Components” the Panel examined an argument of Japan concerning the anti-circumvention provision in the EEC anti-dumping legislation:

“Japan considers not only the measures taken under the anti-circumvention provision but also the provision itself to be violating the EEC’s obligations under the General Agreement. Japan therefore asked the Panel to recommend to the CONTRACTING PARTIES that they request the EEC not only to revoke the measures taken under the provision but also to withdraw the provision itself. The Panel therefore examined whether the mere existence of the anti-circumvention provision is inconsistent with the General Agreement. The Panel noted that the anti-circumvention provision does not mandate the imposition of duties or other measures by the EEC Commission and Council; it merely authorizes the Commission and the Council to take certain actions. Under the provisions of the General Agreement which Japan claims to have been violated by the EEC contracting parties are to avoid certain measures; but these provisions do not establish the obligation to avoid legislation under which the executive authorities may possibly impose such measures ... .

“In the light of the above the Panel found that the mere existence of the anti-circumvention provision in the EEC’s anti-dumping Regulation is not inconsistent with the EEC’s obligations under the General Agreement. Although it would, from the perspective of the overall objectives of the General

<sup>12</sup>L/778, adopted on 29 November 1957, 6S/70, 80, para.10.

<sup>13</sup>L/6175, adopted on 17 June 1987, 34S/136, 163-164, para. 5.2.9.

Agreement, be desirable if the EEC were to withdraw the anti-circumvention provision, the EEC would meet its obligations under the General Agreement if it were to cease to apply the provision in respect of contracting parties".<sup>14</sup>

The 1990 Panel Report on "Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes" examined, *inter alia*, whether excise taxes which could be levied by Thai authorities on foreign cigarettes, as well as the exemption from Thai business and municipal taxes accorded in respect of cigarettes made from domestic leaf, were consistent with Article III. While the ceiling tax rates permitted under law were higher for imported than for domestic cigarettes, and the tax rate applied until 11 July 1990 varied in proportion to foreign tobacco content, the Thai Ministry of Finance had issued a regulation on 11 July 1990 to provide a uniform excise tax rate for all cigarettes. On 18 August 1990 Thailand modified its regulations to exempt all cigarettes from business and municipal taxes.

"... The United States argued that it was not sufficient under Article III for the rates effectively levied to be the same; the maximum rates that could be levied under the legislation also had to be non-discriminatory. The Panel noted that previous panels had found that legislation mandatorily requiring the executive authority to impose internal taxes discriminating against imported products was inconsistent with Article III:2, whether or not an occasion for its actual application had as yet arisen; legislation merely giving the executive the possibility to act inconsistently with Article III:2 could not, by itself, constitute a violation of that provision.<sup>15</sup> The Panel agreed with the above reasoning and found that the possibility that the Tobacco Act might be applied contrary to Article III:2 was not sufficient to make it inconsistent with the General Agreement.<sup>16</sup>

"... The Panel observed that the new Thai measure, by eliminating business and municipal taxes on cigarettes, removed the internal taxes imposed on imported cigarettes in excess of those applied to domestic cigarettes. The Panel noted that, as in the case of the excise tax, the Tobacco Act continued to enable the executive authorities to levy the discriminatory taxes. However, the Panel, recalling its findings on the issue of excise taxes, found that the possibility that the Tobacco Act might be applied contrary to Article III:2 was, by itself, not sufficient to make it inconsistent with the General Agreement."<sup>17</sup>

The Panel concluded that "The current regulations relating to the excise, business and municipal taxes on cigarettes are consistent with Thailand's obligations under Article III of the General Agreement".<sup>18</sup>

The 1991 Panel Report on "United States - Restrictions on Imports of Tuna", which has not been adopted, examined *inter alia* the application in connection with the US Marine Mammal Protection Act (MMPA) of Section 8 of the Fishermen's Protective Act, which provided discretionary authority for the President to order a prohibition of imports of fish products "for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade".

"The Panel recalled that Mexico had also argued that the *possible* extension of import prohibitions to all fish products of Mexico under Section 101(a)(2)(D) of the MMPA and Section 8 of the Fishermen's Protective Act (the Pelly Amendment) was inconsistent with Article XI. The Panel noted that the Pelly Amendment authorised such an embargo, but gave the United States authorities discretion to refrain from taking any trade measures at all. Such an embargo was not now in effect, and might not be imposed by the United States authorities. In the Panel's view, therefore, the question presented to it was whether a statutory provision that authorises but does not require a measure inconsistent with the General Agreement constituted in itself a measure in conflict with the General Agreement.

"The Panel recalled that it had been recognised by the CONTRACTING PARTIES in previous cases that legislation mandatorily requiring the executive authority of a contracting party to act inconsistently with the

---

<sup>14</sup>L/6657, adopted on 16 May 1990, 37S/132, 198-199, para. 5.25-5.26.

<sup>15</sup>The footnote to this paragraph refers to the Panel Reports on "EEC - Regulation on Imports of Parts and Components", L/6657, adopted on 16 May 1990, 37S/132, at para. 5.25; and "United States - Taxes on Petroleum and Certain Imported Substances", L/6175, adopted on 17 June 1987, 34S/160, 164.

<sup>16</sup>DS10/R, adopted on 7 November 1990, 37S/200, 227, para. 84.

<sup>17</sup>*Ibid.*, 37S/227 para. 86.

<sup>18</sup>*Ibid.*, 37S/228 para. 88.

General Agreement may be found to be inconsistent with that contracting party's obligations under the General Agreement, whether or not an occasion for its actual application has yet arisen, but on the other hand, legislation merely giving those executive authorities the power to act inconsistently with the General Agreement is not, in itself, inconsistent with the General Agreement.<sup>19</sup> Accordingly, the Panel found that, because the Pelly Amendment did not require trade measures to be taken, this provision as such was not inconsistent with the General Agreement.<sup>20</sup>

See also in this connection the unadopted 1992 panel report on "United States - Restrictions on Imports of Tuna".<sup>21</sup>

In the 1994 Panel Report on "United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco",

"The Panel first noted that Article VIII:1(a) prohibits the imposition of fees imposed on or in connection with importation which are in excess of the cost of services rendered. In view of the fact that USDA had as yet not amended its inspection fee structure in line with the statutory amendment of Section 1106(c), the main question that arose for the Panel's analysis was whether this section of the 1993 Budget Act mandated action inconsistent with Article VIII or whether it merely gave the U.S. Government the discretion to act inconsistently with Article VIII. In this regard, the Panel recalled that panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge.<sup>22</sup>

...

"The Panel considered that if USDA had the discretion to lower its fees for inspection of domestic tobacco to a level *comparable* to the cost of services rendered for inspection of imported tobacco or to otherwise determine that the fees for inspecting imported and domestic tobacco were *comparable*, such action would permit the U.S. Government to avoid inconsistency with Article VIII:1(a).

...

"Considering these various arguments and the evidence of record, the Panel noted that there was no clear interpretation on the meaning of the term 'comparable' as used in the 1993 legislative amendment. It appeared to the Panel that the term 'comparable', including the ordinary meaning thereof, was susceptible of a range of meanings. The Panel considered that this range of meanings could encompass the interpretation advanced by the United States in this proceeding, an interpretation which would potentially enable USDA to comply with the obligation of Article VIII:1(a) not to impose fees in excess of the cost of services rendered, while at the same time meeting the comparability requirement of Section 1106(c) of the 1993 Budget Act. This being the case, and given that the United States had as yet neither changed the fee structure nor promulgated rules implementing Section 1106(c), the Panel found that it was not demonstrated that Section 1106(c) could not be applied in a manner ensuring that the fees charged for inspecting imported tobacco were not in excess of the cost of services rendered".<sup>23</sup>

<sup>19</sup>The footnote to this sentence refers to the Panel Reports on "United States - Taxes on Petroleum and Certain Imported Substances", L/6175, adopted 17 June 1987, 34S/136, 160, 163-4, paras. 5.2.2, 5.2.9-10; and "EEC - Regulation on Imports of Parts and Components", L/6657, adopted 16 May 1990, 37S/132, paras. 5.25-5.26.

<sup>20</sup>DS21/R (unadopted), dated 3 September 1991, 39S/155, 196-197, paras. 5.20-5.21; see also parallel finding at 39S/202, para. 5.37.

<sup>21</sup>DS29/R, dated 16 June 1994, para. 5.6.

<sup>22</sup>The footnote to this paragraph states: See, e.g., report of the panel on United States - Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/136, 160; report of the panel on EEC - Regulation on Import of Parts and Components, adopted on 16 May 1990, BISD 37S/132, 198-199; report of the panel on Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, adopted on 7 November 1990, BISD 37S/200, 227-228; report of the panel on United States - Measures Affecting Alcoholic and Malt Beverages, adopted on 19 June 1992, BISD 39S/206, 281-282, 289-290; report of the panel on United States - Denial of MFN Treatment as to Non-Rubber Footwear from Brazil, adopted on 19 June 1992, BISD 39S/128, 152.

<sup>23</sup>DS44/R, adopted on 4 October 1994, para. 118, 121, 123.

See also the discussion of non-binding “administrative guidance” by the government under the authority of discretionary legislation in the 1988 Panel Report on “Japan - Trade in Semi-conductors”,<sup>24</sup> and the conclusion in the Report on “Japan - Restrictions on Imports of Certain Agricultural Products” that “administrative guidance” utilized for the purposes of supply management is a “governmental measure” operating to restrict supply of agricultural products for the purposes of Article XI:2(c).<sup>25</sup> See also related material under Articles III and XI.

#### **(4) Measures not yet in effect**

The Panel on “United States - Definition of Industry Concerning Wine and Grape Products” examined a dispute concerning 1984 legislation which amended the definition of industry for the purposes of antidumping and countervailing duty investigations of wine and grape products. The Panel was established in February 1985. In September 1985, a preliminary countervailing duty investigation of certain wine imports was instituted in response to a petition by grape growers. On 28 October 1985, the US International Trade Commission (USITC) found that there was no reasonable indication of material injury, threat of material injury or material retardation of establishment, to the US industry as defined in this legislation; the investigation was terminated and no countervailing duty was levied. In November 1985 this determination was appealed in US domestic courts; if the appeal had been successful a court decision could have required resumption of the investigation. The Panel findings note as follows:

“The first question which the Panel considered in the course of its work was the request made by the US delegation that the Panel suspend the proceedings until such time, if any, as a countervailing-duty investigation under the law at issue were resumed. The Panel noted that the decision by the Committee to establish the Panel was taken at a time (i.e. on 15 February 1985) when neither such an investigation had been initiated nor even a complaint had been lodged. The Panel noted that it had been called upon, in its terms of reference, to review the facts of the matter referred to the Committee by the EEC in document SCM/54, and that the issue raised in this document was the conformity of the US law in question (i.e. Section 612(a)(1) of the Trade and Tariff Act of 1984) as such with the provisions of the Code, as required by its Article 19:5(a). The Panel had thus no option but to proceed with its work, as provided for in its terms of reference, irrespective of whether any concrete countervailing duty investigation was under way or whether any countervailing duties based on the above-noted provision were being or had been levied. The Panel was aware of the understanding of the Committee Chairman that it would, in its work, take into account any actual implementation of the legislation in question by the competent authorities of the United States ... The Panel noted in this connection that the USITC in its decision of 28 October 1985 had in fact applied this legislation by stating that in that particular case the US industry was composed of the wineries producing the like product and the grape-growers whose grapes were used in the like product. The Panel therefore proceeded to the examination of the conformity of the law in question with the provisions of the Code”.<sup>26</sup>

When this Panel Report was adopted on 28 April 1992, the United States representative noted that “in accepting this Panel report, the United States reserved its position of opposition to the Panel’s view that it was ripe for the Panel to consider a matter that did not involve an actual initiation of an action, but rather an abstract question of whether a proceeding, if initiated, would have been consistent with the Subsidies Code”.<sup>27</sup>

The 1987 Panel Report on “United States - Taxes on Petroleum and Certain Imported Substances” examined excise taxes on imported petroleum and certain imported chemical substances (“Superfund taxes”), which had been enacted as a revenue source for the US “Superfund” hazardous-waste cleanup program. The tax on certain imported substances, enacted in October 1986, provided that it would not enter into effect until 1 January 1989, and regulations implementing it had not been drafted or put into effect.

“The Panel noted that the United States objected to an examination of this tax because it did not go into effect before 1 January 1989, and - having no immediate effect on trade and therefore not causing

<sup>24</sup>L/6309, adopted on 4 May 1988, 35S/116, 157-158, para. 117. See further under Article XI:1 in this Index.

<sup>25</sup>L/6253, adopted on 22 March 1988, 35S/163, 242, para. 5.4.1.4.

<sup>26</sup>SCM/71, adopted on 28 April 1992, 39S/436, 445, para. 4.1.

<sup>27</sup>SCM/M/59, p. 31.

nullification or impairment - fell outside the framework of Article XXIII. The Panel examined this point and concluded the following.

“... The general prohibition of quantitative restrictions under Article XI ... and the national treatment obligation of Article III ... have essentially the same rationale, namely to protect expectations of the contracting parties as to the competitive relationship between their products and those of the other contracting parties. Both articles are not only to protect current trade but also to create the predictability needed to plan future trade. That objective could not be attained if contracting parties could not challenge existing legislation mandating actions at variance with the General Agreement until the administrative acts implementing it had actually been applied to their trade. Just as the very existence of a regulation providing for a quota, without it restricting particular imports, has been recognized to constitute a violation of Article XI:1, the very existence of mandatory legislation providing for an internal tax, without it being applied to a particular imported product, should be regarded as falling within the scope of Article III:2, first sentence. The Panel noted that the tax on certain imported substances had been enacted, that the legislation was mandatory and that the tax authorities had to apply it after the end of next year and hence within a time frame within which the trade and investment decisions that could be influenced by the tax are taken. The Panel therefore concluded that Canada and the EEC were entitled to an investigation of their claim that this tax did not meet the criteria of Article III:2, first sentence.”<sup>28</sup>

In June 1992, Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela requested consultations with the EC under Article XXII:1 concerning, *inter alia*, a proposal for a unified import regime for bananas adopted by the EC Commission. The EC responded that “the future common import regime for bananas is presently under preparation ... The present preparatory work can therefore not be considered as a measure under Articles XXII:1 or XXIII:1 of the General Agreement allowing for formal consultations under one of these provisions”.<sup>29</sup>

See also the discussion below at page 733 of “measures as applied versus measures as such”.

##### **(5) Measures no longer in effect**

The Panel on “EEC - Measures on Animal Feed Proteins” was established on 17 September 1976 to examine EEC measures providing for import deposits and purchasing requirements affecting non-fat dry milk and certain animal feed proteins. These measures came into force on 19 March 1976 for imported products and were terminated on 25 October 1976. The Council was informed of the panel composition on 2 March 1977. The Panel Report included a complete examination of the measures and was adopted on 14 March 1978.<sup>30</sup>

The 1982 Panel Report on “United States - Prohibition of Imports of Tuna and Tuna Products from Canada” examined an embargo imposed by the United States on 31 August 1979. The embargo was lifted effective 4 September 1980, during the Panel’s work. The Report notes as follows:

“... the Panel noted that according to prevailing GATT practice when a bilateral settlement to a dispute had been found, panels had usually confined their reports to a brief description of the case indicating that a solution had been reached.<sup>31</sup> However, it also noted that in the past, panels had on occasion presented a complete report even if the measure giving rise to the dispute had been disinvoked.<sup>32</sup> It furthermore noted that the representative of Canada did not accept that the results obtained bilaterally constituted a satisfactory solution or settlement in terms of paragraph 17 of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, and that he argued that the damage caused by the action which gave rise to the dispute had not been satisfactorily repaired, and that the threat of the United States taking action under Section 205 of the Fishery Conservation and Management Act of 1976

<sup>28</sup>L/6175, adopted on 17 June 1987, 34S/136, 160, paras. 5.2.1-5.2.2.

<sup>29</sup>DS32/1 (request), DS32/2 (response).

<sup>30</sup>L/4599, adopted on 14 March 1978, 25S/49.

<sup>31</sup>The footnote to this sentence refers to the Panel Reports on “Japan - Measures on Imports of Thrown Silk Yarn”, 25S/107; “Japanese Measures on Imports of Leather”, 26S/320; “Japanese Restraints on Imports of Manufactured Tobacco from the United States”, L/5140, 28S/100; “EC - United Kingdom Application of EEC Directives to Imports of Poultry from the United States”, L/5155, 28S/90; “Panel on United States Countervailing Duties”, L/5192, 28S/113.

<sup>32</sup>The footnote to this sentence refers to L/4599, the Panel Report on “EEC - Measures on Animal Feed Proteins”, adopted on 14 March 1978, 25S/49.

continued to exist. He therefore requested the Panel to present a substantial report on the case. The Panel noted that the Canadian Embassy, in a diplomatic note to the Department of State of the United States ... indicated that the arrangements concerning fisheries for albacore tuna off the Pacific coasts of Canada and the United States were without prejudice to action brought before the GATT regarding import prohibition on tuna and tuna products. The Panel also noted that the representative of the United States, although expressing serious doubts about the usefulness of establishing a comprehensive report when a conciliation on the dispute had been achieved, nevertheless declared himself willing and ready to provide his full cooperation if the Panel wanted to establish a comprehensive report. The Panel subsequently felt that in this particular case it had to consider itself what type of report it should present to the Council and decided to proceed with its work and establish a complete report".<sup>33</sup>

The 1980 Panel Report on "EEC - Restrictions on Imports of Apples from Chile"<sup>34</sup> concerned restrictions imposed by the EEC from April through August 1979. The Panel was established on 25 July 1979 in principle; on 6 November 1979 the Council agreed to terms of reference referring to "restrictions which were applied by the EEC on imports of apples from Chile" and the Council was informed of the Panel members on 29 January 1980.

The 1989 Panel Report on "EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile"<sup>35</sup> concerned restrictions imposed by the EEC from April through August 1988. The Panel was established on 4 May 1988 and its first meeting was held in October 1988. See below at page 682 concerning Chile's request in this connection for a recommendation of compensation against the EEC.

See also the material below starting at page 738 on changes in the subject matter, and the material starting at page 743 on treatment of the proceedings and the panel report in the event of a settlement.

#### **(6) Acts of private parties**

In 1958 the CONTRACTING PARTIES decided to appoint a group of experts "to study and make recommendations with regard to whether, to what extent if at all, and how the CONTRACTING PARTIES should undertake to deal with restrictive business practices in international trade."<sup>36</sup> The 1960 Report of the Group of Experts on "Restrictive Business Practices - Arrangements for Consultations" notes that

"... Members agreed that the CONTRACTING PARTIES should now be regarded as an appropriate and competent body to initiate action in this field.

"... the Group agreed to recommend that the CONTRACTING PARTIES should encourage direct consultations between contracting parties with a view to the elimination of the harmful effects of particular restrictive practices".<sup>37</sup>

The Group was divided on the nature of further measures to be recommended and on the applicability of Article XXIII.

"The majority felt that, as experts on restrictive business practices rather than on the legal aspects of GATT, the Group were not competent to judge whether restrictive business practices were a matter that could be deemed to fall under any specific provisions of GATT - for example, whether the provisions of Article XXIII would be applicable. However, the majority were convinced that, regardless of the question whether Article XXIII could legally be applied, they should recommend to the CONTRACTING PARTIES that they take no action under this Article. Such action would involve the grave risk of retaliatory measures under the provisions of paragraph 2 of that Article, which would be taken on the basis of judgments which

<sup>33</sup>L/5198, adopted on 22 February 1982, 29S/91, 106, para. 4.3.

<sup>34</sup>L/5047, adopted on 10 November 1980, 27S/98.

<sup>35</sup>L/6491, adopted on 22 June 1989, 36S/93.

<sup>36</sup>Resolution of 5 November 1958 on "Restrictive Business Practices - Appointment of Group of Experts", 7S/29.

<sup>37</sup>L/1015, adopted on 2 June 1960, 9S/170, 171, paras. 4-5.

would have to be made without adequate factual information about the restrictive business practice in question ...”<sup>38</sup>

“... The minority hold the view that [when consultations fail to lead to voluntary settlements] the provisions of paragraph 2 of Article XXIII are applicable. According to the first part of this paragraph the CONTRACTING PARTIES shall, when matters are referred to them, make appropriate recommendations to the contracting parties concerned. While referring to these provisions, the minority advise against the use by the CONTRACTING PARTIES of the authority conferred upon them under the second part of paragraph 2.”<sup>39</sup>

The Report of the Group of Experts also notes the disagreement within the Group regarding the minority proposal that where bilateral consultations on eliminating harmful effects of particular restrictive business practices failed to reach a mutually satisfactory conclusion, the dispute be referred to a standing group of five experts appointed by the CONTRACTING PARTIES, which would examine the matter, consult with the parties and submit a report to the secretariat on the outcome. The majority stated that

“... The complexities of the subject, and the impossibility of obtaining accurate and complete information on private commercial activities in international trade and of enforcing decisions without adequate powers of investigation and control, precluded the possibility of an effective control agreement which was not based upon [adoption by countries of powers to act against international restrictive business practices, or a supra-national body with broad powers of investigation and control]. Therefore, it was at this stage impracticable to set up any procedures for investigating or passing judgment on individual cases within the framework of GATT. ...

“... Even if sufficient information is available in some cases there are no internationally agreed standards or guidelines upon which judgment could be based. No such standards or guidelines are contained either in the Resolution of the CONTRACTING PARTIES, which is the basis of the work of the present Group, or in the definition of restrictive practices which is proposed by the minority, since neither provides an answer to the question, in what circumstances specific business practices in international trade should be deemed harmful. In making their judgments, experts would therefore have to rely on their personal views ... The majority did not consider that any useful purpose would be served by the intervention of experts in the consultations, and, moreover, could not agree that in present circumstances governments should be obliged to accept such intervention”.

On 18 November 1960 the CONTRACTING PARTIES adopted a Decision on Arrangements for Consultations on Restrictive Business Practices, which did not include provision for participation by a group of experts and which did not refer to Article XXIII.<sup>40</sup>

In the 1984 Panel Report on “Canada - Administration of the Foreign Investment Review Act”, the Panel examined, *inter alia*, written undertakings submitted by foreign investors to the Canadian government concerning the conduct of the business that an investor was proposing to acquire or establish.

“The panel carefully examined the Canadian view that the purchase undertakings should be considered as private contractual obligations of particular foreign investors vis-à-vis the Canadian government. The Panel recognized that investors might have an economic advantage in assuming purchase undertakings, taking into account the other conditions under which the investment was permitted. The Panel felt, however, that even if this was so, private contractual obligations entered into by investors should not adversely affect the rights which contracting parties, including contracting parties not involved in the dispute, possess under Article III:4 of the General Agreement and which they can exercise on behalf of their exporters. This applies in particular to the rights deriving from the national treatment principle, which - as stated in Article III:1 - is aimed at preventing the use of internal measures ‘so as to afford protection to domestic production.’”<sup>41</sup>

---

<sup>38</sup>*Ibid.*, 9S/172, para. 8.

<sup>39</sup>*Ibid.*, 9S/177, para. 18.

<sup>40</sup>9S/28.

<sup>41</sup>L/5504, adopted on 7 February 1984, 30S/140, 159, para. 5.6.

During discussion in the Council in 1986 concerning the EEC request for a working party under Article XXII:2 on “Japan - Measures Affecting the World Market for Copper Ores and Concentrates”, the representative of Japan stated that “the difficulties which [the EEC] claimed to have encountered resulted from commercial transactions or from legitimate tariff protection. Neither of these two reasons warranted the invocation of GATT’s dispute settlement mechanism ... The sale prices of refined copper and the purchase prices of copper concentrates were decided on a strictly commercial basis in business negotiations between private, independent parties. Such negotiations, whatever their consequences, were alien to GATT, which was an intergovernmental legal framework”.<sup>42</sup> The 1988 Good Offices Report of the Personal Representative of the Director-General on the dispute between the EC and Japan concerning certain pricing and trading practices for copper in Japan notes that

“... The EC has maintained that their copper smelting and refining industry has suffered from serious difficulties in obtaining adequate supplies of copper concentrates on acceptable terms. These difficulties were seen as stemming from market distortions resulting from the Japanese smelters often offering higher prices for concentrates than what the EC smelters believe ‘normal market conditions’ justify, thus enabling them to obtain inequitably large shares of concentrates. The EC smelters and refiners have alleged that the high internal price of refined copper in Japan, which made it possible for Japanese smelters to offer such high prices for concentrates, is a result of ‘questionable practices’, including high Japanese tariffs on imports of refined copper, concealed import restrictions, possibly hidden subsidies, and a price cartel operated by the Japanese producers. The Japanese authorities have insisted that the Japanese import duties are consistent with their GATT obligations, that there are no hidden restrictions on imports, that there is no producers’ cartel in Japan, and that the purchasing terms for copper concentrate are a purely commercial matter and so are completely outside the purview of the GATT.

“From the evidence submitted I reach the following conclusions:

“... Japan has not violated any of its GATT obligations. Nor was any evidence presented of the existence of a producers’ cartel in Japan. Although certain kinds of government assistance (research funds, aid for stockpiling, unemployment aids etc.) have been extended in both Japan and the EEC, these do not appear to be of the sorts or amounts that have had any significant impact on the competitive position of the industry in either Japan or the EEC.”<sup>43</sup>

The Personal Representative also noted that a major element in creating the situation was the Japanese tariff on cathodes and wire bar, and rendered the advisory opinion that the parties resolve the dispute by entering into reciprocal and mutually advantageous negotiations with a view to reduction or elimination of this tariff on an m.f.n. basis, in the context of the Uruguay Round.<sup>44</sup>

In the panel proceeding on “Japan - Trade in Semi-conductors”, “Japan contended that there were no governmental measures limiting the right of Japanese producers and exporters to export semi-conductors at any price they wished ... Exports were limited by private enterprises in their own self-interest and such private action was outside the scope of Article XI:1.”<sup>45</sup> The Panel found that “... an administrative structure had been created by the Government of Japan which operated to exert maximum possible pressure on the private sector to cease exporting at prices below company-specific costs ... the Panel considered that the complex of measures exhibited the rationale as well as the essential elements of a formal system of export control”.<sup>46</sup>

See also the discussion of whether measures were “governmental” measures under Article XI:2(c) in the 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” and the 1989 Panel Reports on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile” and “EEC - Restrictions on Imports of Apples - Complaint by the United States”.<sup>47</sup> See also the 1960 Panel Report on “Review Pursuant to

---

<sup>42</sup>C/M/198, p. 5-6.

<sup>43</sup>L/6456, Note by the Director-General dated 31 January 1989, including Report dated 16 December 1988, 36S/199, 200-201, paras. 1 and 4.

<sup>44</sup>*Ibid.*, 36S/201-202, para. 5.

<sup>45</sup>L/6309, adopted on 4 May 1988, 35S/116, 153, para. 102.

<sup>46</sup>*Ibid.*, 35S/157-158, para. 117. See further under Article XI.

<sup>47</sup>L/6491 and L/6513, both adopted on 22 June 1989, 36S/93 and 36S/135, at 36S/126-127 and 36S/161-162, paras. 12.8-12.9 and 5.8-

Article XVI:5” which, examining the question of whether subsidies financed by a non-governmental levy were notifiable under Article XVI, expressed the view that “The GATT does not concern itself with such action by private persons acting independently of their governments except insofar as it allows importing countries to take action under other provisions of the Agreement. ... the question ... depends upon the source of the funds and the extent of government action, if any, in their collection. Therefore, rather than attempt to formulate a precisely worded recommendation designed to cover all contingencies, the Panel feels that the CONTRACTING PARTIES should ask governments to notify all levy/subsidy schemes affecting imports or exports which are dependent for their enforcement on some form of government action”.<sup>48</sup>

See also the material below on “benefits under the General Agreement” and the material on “any other situation” starting at page 668.

**(7) *Applicability of Article XXIII procedures to requests for rulings***

During the Second Session, in discussion of a request by Pakistan for a ruling on the applicability of Article I to rebates of internal taxes in connection with exports, the Chairman stated that the Article XXIII requirements of written representations and consultations did not apply when a delegate was asking only for a ruling on a general point of law and was not submitting the concrete dispute itself.<sup>49</sup>

**2. Paragraph 1**

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

The 1962 Panel Report on “Uruguayan Recourse to Article XXIII” notes that

“... The Panel thought it essential to have a clear idea as to what would constitute a nullification or impairment. In its view impairment and nullification in the sense of Article XXIII does not arise merely because of the existence of any measures; the nullification or impairment must relate to benefits accruing to the contracting party ‘under the General Agreement’”.<sup>50</sup>

See also the material below at page 730 on the interpretation of the phrase “the relevant GATT provisions” used in terms of reference for panels.

**(a) *“obligations under this Agreement” and positions taken in trade negotiations***

In the panel proceeding on “Japan - Restrictions on Imports of Certain Agricultural Products” the terms of reference indicated that “in examining the matter, the Panel may take into account all pertinent elements”. The Panel thus considered the Council minutes as well as Japan’s arguments regarding the practices of other countries, the status of the multilateral negotiations and the special characteristics of Japanese agriculture.

“The Panel ... noted that a modification of Article XI:2 has been proposed in the Uruguay Round and that in the Ministerial Declaration of 1986 participants in the Uruguay Round had undertaken the commitment to phase out or bring into conformity all trade restrictive or distorting measures inconsistent with the provisions of the General Agreement or instruments negotiated within the framework of GATT. The Panel noted that it was generally understood that neither this commitment nor the possible modification of provisions of the General Agreement in the course of the negotiations curtailed the rights and obligations of contracting parties under Article XXIII of the General Agreement.

“The Panel recalled that the purpose of GATT panels is to assist the CONTRACTING PARTIES in taking a decision under Article XXIII:2 and that according to the Ministerial Declaration of 1982, ‘it is understood that decisions [in the dispute settlement process] cannot add or diminish the rights or obligations provided in the General Agreement’. What was pertinent, therefore, in a panel’s conclusions were findings regarding

5.9 respectively.

<sup>48</sup>L/1160, adopted on 24 May 1960, BISD 9S/188, 192, para. 12.

<sup>49</sup>GATT/CP.2/SR.11, p. 4.

<sup>50</sup>L/1923, adopted on 16 November 1962, 11S/95, 99, para. 14.

the conformity of the measures with the General Agreement, and their effects on the benefits accruing from the General Agreement. These benefits arose, in part, from the obligations assumed by Japan under the General Agreement. Consequently, the Panel found that Japan's actions could be judged only against its obligations under the General Agreement and not against the practices of others, nor did the Panel consider it appropriate to prejudge the outcome of the negotiations."<sup>51</sup>

The 1989 Panel report on "EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile" notes that in this proceeding, Chile argued that the EEC restrictions in question were inconsistent with the standstill commitment in the Punta del Este Declaration.

"The Panel regarded the Standstill Commitment of the Punta del Este Declaration as outside its mandate. The Punta del Este Declaration contained commitments in the context of a plan for continuing negotiations whose outcome was yet to be decided. The Punta del Este Standstill commitments had their own special forum - the Surveillance Body established by the Committee on Trade Negotiations - to which any complaint concerning them should be taken. These commitments could therefore not be considered to be obligations within the meaning of Article XXIII:1(a)."<sup>52</sup>

**(2) "or that the attainment of any objective of the Agreement is being impeded"**

Although the text of Article XXIII:1 dates from the 30 October 1947 text of the General Agreement, and was largely identical to Article 89 of the Geneva Draft Charter, Article 89 referred to "Members" of the ITO, benefits under the Charter, and attainment of the objectives in Article 1 of the Charter.

References to "the objectives of this Agreement" appear in Articles XV:7(a), XVI:2, XVI:5, XVIII:1, XXIII:1, XVIII:2, XXV:1, XXVIII*bis*:1, XXXVI:1(a), XXXVII:2(b)(iii), and the Notes *Ad* Articles XXIV:11 and XXXVI:1. The Preamble to the General Agreement also refers to "these objectives". At the 1954-55 Review Session, it was agreed to incorporate the Preamble, with some additions, into the text of the General Agreement as a new Article I in Part I entitled "Objectives". For the text of this proposed Article I, see the material on the Preamble at pages 21-22. However, the instrument which would have effected this amendment was the Protocol Amending Part I and Articles XXIX and XXX, which did not enter into force, due to lack of the requisite unanimous approval, and was abandoned; as a result the amended Article I did not go into effect.<sup>53</sup>

The 1979 Panel Report on "European Communities - Refunds on Exports of Sugar" dealt, *inter alia*, with the claim by Australia that the EC system of sugar export subsidies "had impeded the attainment of the objectives of the General Agreement."<sup>54</sup> The Panel did not consider this question since "no detailed submission had been made as to exactly ... which objective of the General Agreement had been impeded."<sup>55</sup>

In a complaint against Japan in 1983, the European Community, basing its request on Article XXIII:1(c), requested establishment of a working party under Article XXIII:2, on the basis that "benefits of successive GATT negotiations with Japan have not been realized owing to a series of factors peculiar to the Japanese economy which have resulted in a lower level of imports, especially of manufactured products, as compared with other industrial countries. ... The European Community is of the view that the present situation constitutes a nullification or impairment by Japan, of the benefits otherwise accruing to the European Community under the GATT, and an impediment to the attainment of GATT's objectives. In particular the general GATT objective of 'reciprocal and mutually advantageous arrangements' has not been achieved."<sup>56</sup> In discussion of this complaint in the Council, one delegation commented that "the EEC had not based its case on particular provisions of the General Agreement but instead referred to one of its objectives. This was unprecedented ... problems and precedents could arise if such loose terms for a working party were accepted. He therefore urged extreme caution, and reiterated that while not opposing the setting up of a working party he would first like to know from

<sup>51</sup>L/6253, adopted on 22 March 1988, 35S/163, 241, paras. 5.4.1.2-5.4.1.3.

<sup>52</sup>L/6491, adopted on 22 June 1989, 36S/93, 134, para. 12.33.

<sup>53</sup>See 15S/65, decision to abandon the Protocol; see the Note *Ad* Article XXXVI:1.

<sup>54</sup>L/4833, adopted on 6 November 1979, 26S/290, 291, para. 2.1 (e).

<sup>55</sup>*Ibid.*, 26S/319, para. V(i).

<sup>56</sup>L/5479.

the EEC what specific measures and policies it was asking to be examined”.<sup>57</sup> The complaint was ultimately not pursued.

In a complaint concerning “EEC - Operation of Beef and Veal Régime” in 1984, Australia claimed that “the operation of the Community’s beef and veal régime had nullified and impaired Australia’s benefits under the General Agreement and had also impeded the attainment of the objectives of the GATT as envisaged in Article XXIII:1(b)”.<sup>58</sup> The complaint was not pursued.

**(3) Paragraph 1(a): “as the result of the failure of another contracting party to carry out its obligations under this Agreement”**

**(a) Prima facie nullification or impairment**

The 1962 Panel Report on “Uruguayan Recourse to Article XXIII” notes that

“... In cases where there is a clear infringement of the provisions of the General Agreement, or in other words, where measures are applied in conflict with the provisions of GATT and are not permitted under the terms of the relevant protocol under which the GATT is applied by the contracting party, the action would, prima facie, constitute a case of nullification or impairment and would ipso facto require consideration of whether the circumstances are serious enough to justify the authorization of suspension of concessions or obligations”.<sup>59</sup>

This statement concerning “prima facie nullification or impairment”, or the following statement from the 1979 Understanding, has been referred to in many subsequent panel reports as established GATT practice.<sup>60</sup> The Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement annexed to the 1979 Understanding provides as follows:

“In practice, contracting parties have had recourse to Article XXIII only when in their view a benefit accruing to them under the General Agreement was being nullified or impaired. In cases where there is an infringement of the obligations assumed under the General Agreement, the action is considered prima facie to constitute a case of nullification or impairment. A prima facie case of nullification or impairment would ipso facto require consideration of whether the circumstances are serious enough to justify the authorization of suspension of concessions or obligations, if the contracting party bringing the complaint so requests. This means that there is normally a presumption that a breach of the rules has an adverse impact on other contracting parties, and in such cases, it is up to the contracting parties against whom the complaint has been brought to rebut the charge”.<sup>61</sup>

**(b) Relevance of trade effects**

The 1984 “Panel on Japanese Measures on Imports of Leather” found that restrictions on imports of leather constituted a *prima facie* case of nullification or impairment:

“The Panel noted that its terms of reference explicitly required it ‘to make findings on the question of nullification or impairment’. It noted that since a *prima facie* case had been established, according to established GATT practice it was up to Japan to rebut the presumption that nullification or impairment had actually occurred.

<sup>57</sup>C/M/167, p. 9-10.

<sup>58</sup>C/M/183, p. 68, L/5715.

<sup>59</sup>L/1923, adopted on 16 November 1962, 11S/95, 99-100, para. 15.

<sup>60</sup>See, e.g., Panel Reports on “EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables”, 25S/106, para. 4.20; “EEC - Restrictions on Imports of Apples from Chile”, L/5047, adopted on 10 November 1980, 27S/98, 117, para. 4.24; “Japanese Measures on Imports of Leather”, L/5623, adopted on 15/16 May 1984, 31S/94, 111, para. 47; “Japan - Trade in Semi-Conductors”, L/6309, adopted on 4 May 1988, 35S/116, 161, para. 130.

<sup>61</sup>26S/216, para.5.

“Against this background the Panel considered Japan’s argument that the existence of the quotas themselves did not necessarily mean that nullification or impairment of benefits accruing to the United States had actually been caused, but that this depended solely upon whether or not the allocation system and its implementation functioned so as to hinder United States’ trade. ...

“... the Panel could not escape the conclusion that the import restrictions were maintained in order to restrict imports ...

“In any event, the Panel wished to stress that the existence of a quantitative restriction should be presumed to cause nullification or impairment not only because of any effect it had had on the volume of trade but also for other reasons e.g., it would lead to increased transaction costs and would create uncertainties which could affect investment plans.

“The Panel therefore found that the arguments advanced by Japan were not sufficient to rebut the presumption that the quantitative restrictions on imports of leather had nullified or impaired benefits accruing to the United States under Article XI of the General Agreement”.<sup>62</sup>

The 1987 Panel Report on “United States - Taxes on Petroleum and Certain Imported Substances” examined (*inter alia*) an excise tax levied on imported petroleum at a higher rate than on the like domestic product, which the Panel found was inconsistent with US obligations under Article III:2, first sentence. The major contention of the United States was that the tax differential was so small that its trade effects were minimal or nil and that the tax differential did not nullify or impair benefits accruing to the applicant parties Canada, Mexico and the EEC under the General Agreement. The Panel considered that “The question raised by the case before the Panel is whether the presumption that a measure inconsistent with the General Agreement causes a nullification or impairment of benefits accruing under that Agreement is an absolute or a rebuttable presumption and, if rebuttable, whether a demonstration that a measure inconsistent with Article III:2, first sentence, has no or insignificant effects on trade is a sufficient rebuttal”.<sup>63</sup> The Panel Report notes as follows:

“... the practice of the CONTRACTING PARTIES is to make recommendations or rulings on measures found to be inconsistent with the General Agreement independent of the impact of such measures ... .

[Citing paragraph 5 of the Annex to the 1979 Understanding:] “Thus, the 1979 Understanding does not refer to the adverse impact of a measure, and the possibility of a rebuttal, in connection with the power of the CONTRACTING PARTIES to make recommendations or give rulings on measures inconsistent with the General Agreement; it does so only in connection with the authorization of compensatory action. This, in the view of the Panel, supports the conclusion that the impact of a measure inconsistent with the General Agreement is not relevant for a determination of nullification or impairment by the CONTRACTING PARTIES.

“The Panel examined how the CONTRACTING PARTIES have reacted in previous cases to claims that a measure inconsistent with the General Agreement had no adverse impact and therefore did not nullify or impair benefits accruing under the General Agreement to the contracting party that had brought the complaint. The Panel noted such claims had been made in a number of cases but that there was no case in the history of the GATT in which a contracting party had successfully rebutted the presumption that a measure infringing obligations causes nullification and impairment ... ”.<sup>64</sup>

<sup>62</sup>L/5623, adopted on 15/16 May 1984, 31S/94, 112-113, paras. 47-48, 53, 55-56.

<sup>63</sup>L/6175, adopted on 17 June 1987, 34S/136, 155, para. 5.1.3.

<sup>64</sup>*Ibid.*, 34S/156-157, paras. 5.1.4-5.1.6.

After reviewing some other cases,<sup>65</sup>

“The Panel concluded from its review of the above and other cases that, while the CONTRACTING PARTIES had not explicitly decided whether the presumption that illegal measures cause nullification or impairment could be rebutted, the presumption had in practice operated as an irrefutable presumption”.<sup>66</sup>

**(4) Paragraph 1(b): “as the result of the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement”**

**(a) Definition of “non-violation nullification or impairment”: “reasonable expectations” and “upsetting the competitive relationship”**

The first case in which “non-violation nullification or impairment”<sup>67</sup> was examined in the GATT was the complaint on “Cuban Import Restrictions on Textiles”, where the US delegate stated that “whether or not it is in conflict with the letter of these provisions, there can be no question, in the view of my Government, that this measure is a clear nullification of the benefits which the General Agreement seeks to provide.”<sup>68</sup> However, the first report containing a finding concerning Article XXIII:1(b) was the 1950 Report of the Working Party on “The Australian Subsidy on Ammonium Sulphate”. The Working Party first found that the measure taken by the Australian government, in withdrawing a wartime subsidy on sodium nitrate fertilizer while maintaining a subsidy on ammonium sulphate fertilizer, was not inconsistent with Australia’s obligations under the General Agreement.

“The working party next considered whether the injury that the Government of Chile said it had suffered represented a nullification or impairment ... It was agreed that such impairment would exist if the action of the Australian Government which resulted in upsetting the competitive relationship between sodium nitrate and ammonium sulphate could not reasonably have been anticipated by the Chilean Government, taking into consideration all pertinent circumstances and the provisions of the General Agreement, at the time it negotiated for the duty-free binding on sodium nitrate. The working party concluded that the Government of Chile had reason to assume, during these negotiations, that the war-time fertilizer subsidy would not be removed from sodium nitrate before it was removed from ammonium sulphate. In reaching this conclusion, the working party was influenced in particular by the combination of the circumstances that:

“(a) The two types of fertilizer were closely related;

“(b) Both had been subsidized and distributed through the same agency and sold at the same price;

“(c) Neither had been subsidized before the war, and the war-time system of subsidization and distribution had been introduced in respect of both at the same time and under the same war powers of the Australian Government;

“(d) This system was still maintained in respect of both fertilizers at the time of the 1947 tariff negotiations.

“For these reasons, the working party also concluded that the Australian action should be considered as relating to a benefit accruing to Chile under the Agreement, and that it was therefore subject to the provisions of Article XXIII. ... The inequality created and the treatment Chile could have expected at the time of the negotiation, after taking into consideration all pertinent circumstances, including the circumstances mentioned above, and the provisions of the General Agreement, were important elements in the working party’s conclusions.

---

<sup>65</sup>Panel Reports on “Italian Discrimination against Imported Agricultural Machinery”, at 7S/66-67; “Canada - Administration of the Foreign Investment Review Act, at 30S/167; “Panel on Japanese Measures on Imports of Leather”, at 31S/113.

<sup>66</sup>34S/157,158, para.5.1.7.

<sup>67</sup>While the term “non-violation nullification or impairment” does not appear in the negotiating history or early GATT usage, it appears to have been added to the GATT vocabulary through the writings of GATT legal scholars. It is used here to refer to nullification or impairment under Article XXIII:1 in the absence of a “violation”, that is, under Article XXIII:1(b) or (c).

<sup>68</sup>GATT/CP.2/W/13 at p. 1.

“The situation in this case is different from that which would have arisen from the granting of a new subsidy on one of the two competing products. In such a case, given the freedom under the General Agreement of the Australian Government to impose subsidies and to select the products on which a subsidy would be granted, it would be more difficult to say that the Chilean Government had reasonably relied on the continuation of the same treatment for the two products. In the present case, however, the Australian Government, in granting a subsidy on account of the war-time fertilizer shortage and continuing it in the post-war period, had grouped the two fertilizers together and treated them uniformly. In such circumstances it would seem that the Chilean Government could reasonably assume that the subsidy would remain applicable to both fertilizers so long as there remained a local nitrogenous fertilizer shortage.”<sup>69</sup>

The 1952 Panel Report on “Treatment by Germany of Imports of Sardines” which examined a complaint by Norway that the new German tariff schedule treated imports of sprats and herrings differently from sardines, did not find a breach of Articles I or XIII; however,

“The Panel ... agreed that ... impairment [of a benefit under Article XXIII] would exist if the action of the German Government, which resulted in upsetting the competitive relationship between preparations of *clupea pilchardus* and preparations of the other varieties of the clupeoid family could not reasonably have been anticipated by the Norwegian Government at the time it negotiated for tariff reductions on preparations of *clupea sprattus* and *clupea harengus*. The Panel concluded that the Government of Norway had reason to assume, during these negotiations that preparations of the type of *clupeae* in which they were interested would not be less favourably treated than other preparations of the same family and that this situation would not be modified by unilateral action of the German Government.”<sup>70</sup>

See also the similar case examined in 1955 on “German Import Duties on Starch and Potato Flour”.<sup>71</sup>

During the 1954-55 Review Session, the Review Working Party on “Other Barriers to Trade” considered a number of proposals for strengthening the provisions of the General Agreement on subsidies, including proposals regarding the negotiability of subsidies and the relationship between subsidies and concessions. The Report of the Working Party notes, *inter alia*:

“So far as domestic subsidies are concerned, it was agreed that a contracting party which has negotiated a concession under Article II may be assumed, for the purpose of Article XXIII, to have a reasonable expectation, failing evidence to the contrary, that the value of the concession will not be nullified or impaired by the contracting party which granted the concession by the subsequent introduction or increase of a domestic subsidy on the product concerned.”<sup>72</sup>

The 1961 Report of the Panel on “Subsidies”, citing this paragraph, provides:

“In this connexion it was noted that the expression ‘reasonable expectation’ was qualified by the words ‘failing evidence to the contrary’. By this the Panel understands that the presumption is that unless such pertinent facts were available at the time the tariff concession was negotiated, it was then reasonably to be expected that the concession would not be nullified or impaired by the introduction or increase of a domestic subsidy.”<sup>73</sup>

In the 1985 Panel Report on “EEC - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes”, which has not been adopted, the Panel found as follows on the basis of the panel reports referred to directly above:

<sup>69</sup>GATT/CP.4/39, adopted on 3 April 1950, II/188, 193-194, para. 12.

<sup>70</sup>G/26, adopted on 31 October 1952, 1S/53, 58, para. 16.

<sup>71</sup>W.9/178, noted by the CONTRACTING PARTIES on 16 February 1955, 3S/77.

<sup>72</sup>L/334 and Addendum, adopted on 3 March 1955, 3S/222, 224, para. 13. The 1961 Report of the Panel on “Subsidies” notes that the words “or increase” appear in the English text of the Review Working Party report, but not in the French text; their insertion was approved at the meeting when the report was adopted in 1955: see SR.9/41 p. 5.

<sup>73</sup>L/1442 & Add.1-2, adopted on 21 November 1961, 10S/201, 209, para. 28.

“The Panel recalled its earlier finding ... that in past GATT practice it had been established that the upsetting of the competitive position of an imported product as a result of a subsequent domestic measure, which could not have reasonably been anticipated by the party bringing the complaint at the time of negotiation of a tariff concession on the imported product, would constitute nullification or impairment of the tariff concessions. ...

“The Panel considered whether the aid systems for each product upset the competitive relationship between EEC products and those imported from the United States. With regard to canned peaches, canned pears, and canned fruit mixtures the Panel *concluded* that the minimum price granted to growers of fresh peaches and pears did not adversely affect the competitive relationship between EEC and imported canned peaches, pears or fruit cocktail. With regard to the production aids granted on canned peaches, canned pears and canned fruit mixtures the Panel *concluded* that:

- “since the production aids made up any differences between the prices of Community products and those of products from non-member countries, foreign product could never improve its competitiveness in the EEC;
- “whenever EEC fresh fruit prices and processing costs for peaches and pears were higher than those in non-EEC countries, EEC processors of peaches and pears were compensated for the differences in fresh fruit prices and processing costs. To this extent, the EEC production aids more than merely compensated EEC processors for the costs resulting from the granting of a minimum price to growers. The Panel noted that, since their introduction, the production aids had always exceeded that amount necessary to compensate for any increased costs resulting from the minimum grower prices for fresh fruit;
- “since the production aid is calculated as the difference between the computed EEC price and the duty-free price of imported product, the bound rates of tariff duty had become an absolute margin of protection for EEC products cancelling any cost and price advantages of foreign competitors.

“The Panel *concluded*, therefore, that the production aids granted to processors upset the competitive relationship between EEC and imported canned peaches, canned pears and canned fruit cocktail.”<sup>74</sup>

The 1990 Panel Report on “EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins” examined, *inter alia*, the argument of the United States that EC production subsidies paid since 1966 nullified or impaired the value of duty-free tariff bindings for oilseeds and oilcakes.

“... The Panel examined whether it was reasonable for the United States to expect that the Community would not introduce subsidy schemes systematically counteracting the price effect of the tariff concessions. ... The essential argument of the Community in this respect was that it is not legitimate to expect the absence of production subsidies even after the grant of a tariff concession because Articles III:8(b) and XVI:1 explicitly recognize the right of contracting parties to grant production subsidies. This right would be effectively eliminated if its exercise were assumed to impair tariff concessions.

“The Panel ... found the following: ... At issue in the case before it are product-specific subsidies that protect producers completely from the movement of prices for imports and thereby prevent tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds. The Panel considered that the main value of a tariff concession is that it provides an assurance of better market access through improved price competition. Contracting parties negotiate tariff concessions primarily to obtain that advantage. They must therefore be assumed to base their tariff negotiations on the expectation that the price effect of the tariff concessions will not be systematically offset. If no right of redress were given to them in such a case they would be reluctant to make tariff concessions and the General Agreement would no longer be useful as a legal framework for incorporating the results of trade negotiations. The Panel does not share the view of the Community that the recognition of the legitimacy of such expectations would amount to a re-writing of the rules of the General Agreement. The contracting parties have decided that a finding of

<sup>74</sup>L/5778, paras. 55, 80.

impairment does not authorize them to request the impairing contracting party to remove a measure not inconsistent with the General Agreement; such a finding merely allows the contracting party frustrated in its expectation to request, in accordance with Article XXIII:2, an authorization to suspend the application of concessions or other obligations under the General Agreement. The recognition of the legitimacy of an expectation thus essentially means the recognition of the legitimacy of such a request. The recognition of the legitimacy of an expectation relating to the use of production subsidies therefore in no way prevents a contracting party from using production subsidies consistently with the General Agreement; it merely delineates the scope of the protection of a negotiated balance of concessions. For these reasons the Panel found that the United States may be assumed not to have anticipated the introduction of subsidies which protect Community producers of oilseeds completely from the movement of prices for imports and thereby prevent tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds, and which have as one consequence that all domestically-produced oilseeds are disposed of in the internal market notwithstanding the availability of imports.”<sup>75</sup>

The 1992 Report of the Members of the Original Oilseeds Panel on “Follow-up on the Panel Report ‘EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins’” notes in this connection:

“There was ... nothing in the reasoning of the original Panel that indicated that the impairment of tariff concessions through a production subsidy could only take place through a subsidy which *completely* protected producers from the price movements of imports. Applying this finding to the present situation, the Panel considered that the assurance of better market access through improved price competition would be meaningless if the effect of the general movement of prices on the production level of the product subject to the concession were to be systematically counteracted. The Panel considered that the original Panel’s finding with respect to impairment had not been based on the specific method of delivering production subsidies, but rather on the Community’s systematic denial, through substantially offsetting the effect of the general movement of import prices on the allocation of resources to production, of the benefits reasonably to be expected from the reciprocal exchange of tariff concessions. ...

“... The Panel considered that, in these circumstances, the new system of regionalized, direct, yield-based per hectare payments, effectively offsets the general movement of import prices and renders the level of Community production substantially insensitive to the general movement of world market prices, and thereby continues to impair the benefits the United States could reasonably expect to accrue to it under the tariff concessions in question.

“The Panel noted in this context that under the system of Maximum Guaranteed Areas the level of Community production of oilseeds that had been achieved as a result of the impairment of the tariff concessions would be maintained or at least not discouraged. The Panel also noted that the Community had aligned the support for oilseeds under the new system with the support or returns for producers of alternative crops protected by variable levies which completely insulate Community producers from world market prices; the Panel noted that this alignment as such would appear to be difficult to reconcile with the reasonable expectations of the United States at the time the zero tariff bindings were negotiated.”<sup>76</sup>

(b) *Relevance of concessions*

All panel reports which have dealt with claims of non-violation nullification or impairment, except for one, have concerned nullification or impairment of tariff concessions. The exception is the 1985 Panel Report on “EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region”, cited below.

The 1990 Panel Report on “EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins” discussed the relationship between a non-violation complaint based on

<sup>75</sup>L/6627, adopted on 25 January 1990, 37S/86, 128-129, paras. 147-148.

<sup>76</sup>DS28/R, dated 31 March 1992, 39S/91, 116-117, paras. 81, 83-84.

Article XXIII:1(b) and tariff concessions, and “the purpose of the provisions of Article XXIII relating to the impairment of benefits accruing under the General Agreement”.

“... The Panel noted that these provisions, as conceived by the drafters and applied by the contracting parties, serve mainly to protect the balance of tariff concessions. The idea underlying them is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement.”<sup>77</sup>

The 1990 Panel Report on “United States - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariffs Concessions” notes that the EEC had claimed that restrictions on imports of sugar-containing products under the 1955 waiver in question nullified or impaired benefits accruing to the EEC under the General Agreement and that the United States therefore owed compensation to the EEC. The Panel found, *inter alia*:

“According to the 1979 Understanding on dispute settlement, a contracting party bringing a complaint under Article XXIII:1(b) is ‘called upon to provide a detailed justification’ ... The Panel noted that Article XXIII:1(b), as conceived by the drafters and applied by the CONTRACTING PARTIES, serves mainly to protect the balance of tariff concessions ... The party bringing a complaint under that provision would therefore normally be expected to explain in detail that benefits accruing to it under a tariff concession have been nullified or impaired. ...”<sup>78</sup>

See also the references to tariff concessions in the two Panel Reports on “Treatment by Germany of Imports of Sardines”<sup>79</sup> and “German Import Duties on Starch and Potato Flour”.<sup>80</sup>

(c) *Non-violation nullification or impairment not relating to concessions*

The only instance in which a panel has found that a “benefit accruing ... under this Agreement” other than a concession was nullified or impaired under Article XXIII:1(b) is the 1985 Panel Report on “EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region”, which has not been adopted. In this case, the United States challenged the conformity with Article I:1 of tariff preferences on certain citrus products extended under agreements between the EC and certain Mediterranean countries. The examinations of these agreements conducted under Article XXIV had not resulted in adoption of any conclusions under Article XXIV:7. The US had not made a specific claim of non-violation nullification or impairment in consultations or in its request for a panel, and stated its claim under Article XXIII:1(b) in response to a question by the Panel.<sup>81</sup> The Panel found that, given the undetermined legal status of the preferences with respect to Article XXIV, there could not be said to be a clear case of infringement which would constitute *prima facie* nullification or impairment under Article XXIII:1(a) (see at page 707 below). It then examined the application of Article XXIII:1(b). The Panel found that

“Given that the tariffs on some of the products covered by the complaint of the United States were not bound, that the preferences were already being granted by the EC to certain Mediterranean countries on certain fresh citrus before the negotiation of concessions by the Community of the Nine in 1973, and that it could be expected that these preferences would be deepened and extended thereafter, *prima facie* nullification or impairment of benefits accruing under Article II in the sense of Article XXIII:1(b) could not be concluded on the basis of past precedents ...”<sup>82</sup>

<sup>77</sup>L/6627, adopted on 25 January 1990, 37S/86, 126-127, para. 144.

<sup>78</sup>L/6631, adopted on 7 November 1990, 37S/228, 261, para. 5.21 (referring also to EPCT/A/PV/6, page 5; II/188; 1S/53; 10S/209).

<sup>79</sup>G/26, adopted on 31 October 1952, 1S/53.

<sup>80</sup>W.9/178, noted by the CONTRACTING PARTIES on 16 February 1955, 3S/77.

<sup>81</sup>L/5776, dated 7 February 1985 (unadopted), para. 3.33.

<sup>82</sup>*Ibid.*, para. 5.1(f).

However, the Panel then went on as follows:

“... the Panel considered that although complaints brought previously under Article XXIII:1(b) had related to benefits arising from Article II, it believed that this did not signify that Article XXIII:1(b) was limited only to those benefits. The drafting history of Article XXIII confirmed that this Article, including paragraph 1(b) thereof, protected any benefit under the General Agreement ...<sup>83</sup> This would include then the benefits accruing to the United States under Article I:1 which applied to bound and unbound tariff items alike ...

“The Panel noted that the basic purpose of Article XXIII:1(b) was to provide for offsetting or compensatory adjustment in situations in which the balance of rights and obligations of the contracting parties had been disturbed.<sup>84</sup> One of the fundamental benefits accruing to the contracting parties under the General Agreement, therefore, was the right to such adjustment in situations in which the balance of their rights and obligations had been upset to their disadvantage. ...”<sup>85</sup>

The Panel reached the conclusion that “in this particular situation the balance of obligations underlying Articles I and XXIV of the General Agreement had been upset to the disadvantage of the contracting parties not party to these agreements and that the United States was therefore entitled to offsetting or compensatory adjustment to the extent that the grant of the preferences had caused substantial adverse effects to its actual trade or its trade opportunities”.<sup>86</sup> In Council discussion of this Panel Report the EC representative stated: “Regarding Article XXIII:1(b) non-violation nullification and impairment, this provision had been applied only to cases in which tariff bindings were at stake; it would be a dangerous precedent to extend its application to situations in which no such commitment had been infringed”.<sup>87</sup>

In the 1990 Panel Report referred to directly above on “United States - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions”, the Panel found that the tariff on the imports in question was not subject to a concession, noting that

“... The EEC has not claimed that benefits accruing to it under a tariff concession made by the United States in accordance with Article II have been nullified or impaired as a result of measures taken under the Waiver. The main justification for its claim of nullification or impairment that the EEC presented to the Panel was that the restrictions, in spite of the Waiver, have remained inconsistent with the General Agreement. The Panel recognized that Article XXIII:1(b) does not exclude claims of nullification or impairment based on provisions of the General Agreement other than Article II. However, the Panel noted that Article XXIII:1(b) applies whether or not the measure at issue conflicts with the General Agreement and that, therefore, the question of whether a measure inconsistent with Article XI:1 remains inconsistent with the General Agreement even if covered by a waiver cannot, by itself, determine whether it nullifies or impairs benefits accruing under the General Agreement within the meaning of that provision. A complaint under Article XXIII:1(b) must therefore be supported by a justification that goes beyond a mere characterization of the measure at issue as inconsistent with the General Agreement”.<sup>88</sup>

The Panel found that such a justification had not been supplied.

(d) *“Reasonable expectations” in relation to measures formally approved by the CONTRACTING PARTIES*

During the Review Session of 1954-55, the Review Working Party on Quantitative Restrictions, in the process of redrafting Article XVIII, examined the extent to which claims could be brought under Article XXIII concerning measures under Article XVIII:C with respect to which the concurrence of the CONTRACTING PARTIES

<sup>83</sup>A footnote to this sentence refers to page 7 of EPCT/A/PV/12.

<sup>84</sup>A footnote to this sentence refers to page 5 of EPCT/A/PV/6.

<sup>85</sup>*Ibid.*, paras. 4-36-4.37.

<sup>86</sup>*Ibid.*, para. 4.37.

<sup>87</sup>C/M/186, p. 17.

<sup>88</sup>L/6631, adopted on 7 November 1990, 37S/228, 261-262, para. 5.21.

had been obtained. After examining the case referred to above regarding ammonium sulphate, the Working Party agreed on the following conclusions:

“... the question was raised whether and to what extent the concurrence by the CONTRACTING PARTIES in a measure proposed under Article XVIII would affect the right of a contracting party to resort to Article XXIII. The Working Party agreed on the following interpretation which would apply to paragraph 21 of Article XVIII, but would not in any way prejudice the interpretation of Article XXIII in other cases; although it is understood that the concurrence of the CONTRACTING PARTIES in a measure under paragraphs 16, 19 or 22, or the fact that the CONTRACTING PARTIES, as envisaged in paragraph 15 did not request a contracting party to consult, would not deprive a contracting party affected by the measure in question of its right to lodge a complaint under Article XXIII, the CONTRACTING PARTIES, in assessing the extent of the impairment of benefits, would have to take into consideration all the facts of the case and, in particular, the terms under which the benefit was obtained, including the provisions embodied in Article XVIII. It is therefore recognized that the CONTRACTING PARTIES would not be in a position to allow a contracting party to resort to the withdrawal of concessions or suspension of obligations under paragraph 2 of Article XXIII, unless the effects of the measure concurred in proved to be substantially different from what could reasonably have been foreseen at the time the measure was considered by the CONTRACTING PARTIES”.<sup>89</sup>

See also the material below on the relationship between Article XXIII and Article XXV:5.

(e) *Date of relevant concession in relation to the measures at issue*

The 1985 Panel Report on “EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region”, which has not been adopted, examined the application of Article XXIII:1(b) in relation to the EEC’s application of tariff preferences on citrus products from certain Mediterranean countries. See paragraphs 4.27-4.34 of the Panel Report concerning the Panel’s examination of the date of the tariff concessions, the effect of events which were public knowledge as of that date, and the “reasonable expectations” of the United States at the time it negotiated the concessions in question.<sup>90</sup>

The 1985 Panel Report on “EEC - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes”, which has not been adopted, includes the following findings.

“The Panel first considered the question of whether and to what extent the United States could claim ‘any benefit accruing to it directly or indirectly under this Agreement’ (Article XXIII:1) in respect of the tariff concessions invoked ... [The Panel noted that the EEC had not contested] the US submission that the EEC tariff bindings on canned peaches, canned pears, fruit mixtures and dried grapes had been given ‘as part of a balance of concessions’. The Panel also noted that, pursuant to Article I and II of the General Agreement, tariff concessions, and the benefits deriving therefrom, have to be accorded on a most favoured nation basis independent of the existence of initial negotiating rights in respect of the tariff concessions concerned. The Panel found, therefore, that the tariff bindings granted by the EEC in 1974/79 on the four product categories concerned had created for the United States ‘benefits accruing to it directly or indirectly under this Agreement’ in terms of Article XXIII:1 of the General Agreement ...”.<sup>91</sup>

“... nullification or impairment of the tariff concessions would exist if the introduction or increase of the EEC production aids could not have been reasonably anticipated by the United States at the time of the negotiations for the tariff concessions on those products and the aid systems had upset the competitive position of imported canned peaches, canned pears, canned fruit cocktail and dried grapes on the EC market.

“The Panel observed ... that the EC production aids for canned peaches had been introduced prior to the conclusion of the Geneva (1979) Tariff Protocol on 30 June 1979. In the Panel’s view, therefore, the United States should have been aware of the existence of this subsidy and have taken due account of it in the negotiation of the tariff concessions for canned peaches in 1978/79. Since peaches are a principal

<sup>89</sup>L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 188, para. 63; see also W.9/129 (discussing non-violation nullification or impairment relative to the draft text of Article XVIII:C).

<sup>90</sup>L/5776 (unadopted), dated 7 February 1986.

<sup>91</sup>L/5778 (unadopted) dated 20 February 1985, para. 49.

component of canned fruit cocktail, the Panel found that the United States should also have been aware of any possible effects of these production aids on the economic benefit of the tariff concessions for fruit mixtures negotiated in 1978/79. As regards the EC tariff concessions of 1979 for canned pears, the Panel noted that the production aids had been introduced subsequent to the conclusion of the Geneva (1979) Tariff Protocol and that neither party to the dispute had contended that the EEC Regulation No. 1639/79 of 24 July 1979 could have reasonably been foreseen by the United States at the time it negotiated these tariff concessions.”<sup>92</sup>

The 1990 Panel Report on “EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins” also discussed the date of the relevant concession.

“The Panel noted that the tariff concessions for oilseeds were originally made in 1962 following negotiations with the United States and other contracting parties in the Dillon Round and under Article XXIV:6 after the Community had established a common external tariff. The United States bases its case on expectations it claims to have had in 1962 when the concessions for oilseeds were first incorporated into the Community Schedule. The Community argues that the United States can base its claim only on expectations it could reasonably have had when the Schedule of Concessions currently in force was negotiated, namely in 1986 when the production subsidies had already been introduced.

“The first issue the Panel examined in this context was therefore whether the benefits accruing to the United States under the tariff concessions on oilseeds presently in force include the protection of expectations that prevailed in 1962 when the tariff concessions on oilseeds were originally incorporated in the Schedule of Concessions of the Community. The Panel, noting that there is no explicit rule nor a precedent to guide it in this matter, considered the issue in the light of the purpose of the provisions of Article XXIII relating to the impairment of benefits accruing under the General Agreement. The Panel noted that these provisions, as conceived by the drafters and applied by the CONTRACTING PARTIES, serve mainly to protect the balance of tariff concessions.”<sup>93</sup>...

“The Panel concluded from the above that the answer to the question of whether the expectations of 1962 continue to be protected depends on whether the concessions on oilseeds resulting from the subsequent renegotiations under Article XXIV:6 were part of a new balance of concessions or whether the reinstatement of the concessions at the same rate after the successive enlargements of the Community meant that the balance of concessions originally negotiated in 1962 was to be continued. The Panel noted that the result of the initial Article XXIV:6 negotiations of the Community in 1962 was the creation of a Schedule of Concessions for its common external tariff that had replaced the tariffs of the six founding member States. In these negotiations, the trading partners of the Community compared the benefits accruing to them under the previous tariff concessions of the individual member States with the benefits accruing to them under the common external tariff in the whole territory of the Community. The result of the Article XXIV:6 negotiations following the successive enlargements of the Community was not the creation of a new common external tariff but the extension of the existing tariff concessions of the Community to the new member States.<sup>94</sup> On the occasion of these negotiations pre-existing concessions of the Community were renegotiated as well but such modifications remained exceptional. Except where such modifications were specifically renegotiated, the partners of the Community could confine themselves to comparing the benefits accruing to them under the previous tariff concessions of the new member States with the benefits accruing to them as a result of the application of the Community's tariff concessions by the new member States. They had no reason to proceed to a global reassessment of the value of all the Community's concessions in the whole of the Community's territory.

<sup>92</sup>*Ibid.*, paras. 51-52.

<sup>93</sup>The footnote to this sentence refers to EPCT/A/PV/6, page 5 and Panel Reports on “The Australian Subsidy on Ammonium Sulphate”, adopted on 3 April 1950 (II/188, 194-5); “Treatment by Germany of Imports of Sardines”, adopted on 31 October 1952 (IS/53, 58-59); “Operation of the Provisions of Article XVI”, adopted on 21 November 1961 (IOS/201, 209).

<sup>94</sup>The footnote to this sentence refers to “Article XXIV:6 Negotiations: Communication from the Commission of the European Communities”, L/3807 dated 11 January 1973; “Negotiations Under the Provisions of Article XXIV:6: Communication from the Commission of the European Communities”, TAR/16 dated 20 May 1961; “Enlargement of the European Economic Community: Accession of Portugal and Spain”, L/5936, Add.2 and Third Geneva (1987) Protocol, Schedule LXXX.

“In these circumstances, the partners of the Community in the successive renegotiations under Article XXIV:6 could legitimately assume, in the absence of any indications to the contrary, that the offer to continue a tariff commitment by the Community was an offer not to change the balance of concessions previously attained. The Panel noted that nothing in the material submitted to it indicated that the Community had made it clear to its negotiating partners that the withdrawal and reinstatement of the tariff concessions for oilseeds as part of the withdrawal of the whole of the Community Schedule meant that the Community was seeking a new balance of concessions with respect to these items. There is in particular no evidence that the Community, in the context of these negotiations, offered to compensate its negotiating partners for any impairment of the tariff concessions through production subsidies or that it accepted compensatory tariff withdrawals by its negotiating partners to take into account any such impairment. The balance of concessions negotiated in 1962 in respect of oilseeds was thus not altered in the successive Article XXIV:6 negotiations. The Panel therefore found that the benefits accruing to the United States under the oilseed tariff concessions resulting from the Article XXIV:6 negotiations of 1986/87 include the protection of reasonable expectations the United States had when these concessions were initially negotiated in 1962.”<sup>95</sup>

(f) *Relevance of initial negotiating rights with regard to concessions*

Concerning the concept of “initial negotiating rights,” see Article XXVIII.

The 1985 Panel Report on “EEC - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes”, which has not been adopted, includes the following findings.

“The Panel ... considered whether there was any legal basis in the General Agreement for limiting the rights of contracting parties to bring a ‘nonviolation complaint’ under Article XXIII to contracting parties having initial negotiating rights. The Panel found no legal justification in either Article XXIII or past GATT practice for limiting the right of contracting parties to challenge under Article XXIII an alleged nullification or impairment of tariff concessions which have to be applied on a most-favoured-nation basis. The Panel noted that neither past Panel proceedings concerning ‘nonviolation complaints’ in respect of tariff concessions ... nor the parties to this dispute had suggested any such limitation of the rights of contracting parties under Article XXIII. The Panel also noted that the United States had in fact claimed to have initial negotiating rights or substantial interests in the tariff concessions invoked.”<sup>96</sup>

(g) *Relevance of statistics on trade flows*

The 1952 Panel Report on “Treatment by Germany of Imports of Sardines” notes that “the Panel did not feel that an analysis of the recent trade statistics would lead to definite conclusions as regards the existence of any causal relationship between the measures taken by the German Government and the reduction in the volume of Norwegian exports of fish products to Germany. Nor did the Panel feel that it was necessary for a finding of nullification or impairment under Article XXIII first to establish statistical evidence of damage.”<sup>97</sup>

The 1985 Panel Report on “EEC - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes”, which has not been adopted, includes the finding that

“The Panel was of the view that it was not necessary to establish statistical evidence of damage in order to make a finding of nullification and impairment under Article XXIII. It noted that this view had also been adopted in the Panel report on Treatment by Germany of Imports of Sardines ... . Benefits accruing from bound tariff concessions under Article II also encompass future trading opportunities. Consequently, complaints by contracting parties regarding nullification and impairment should be admissible even if there was not yet statistical evidence of trade damage ...”<sup>98</sup>

<sup>95</sup>L/6627, adopted on 25 January 1990, 37S/86, 126-127, paras. 143-146.

<sup>96</sup>L/5778 (unadopted) dated 20 February 1985, para. 50, referring to cases at II/188, 1S/53, 11S/95 (cases on Australian fertilizer subsidies, German treatment of imports of sardines, and Uruguayan recourse to Article XXIII).

<sup>97</sup>G/26, adopted on 31 October 1952, 1S/53, 56, para. 9.

<sup>98</sup>L/5778 (unadopted), dated 20 February 1985, para. 77.

In the 1990 Panel Report on “European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins” the Panel noted that

“... one [past Article XXIII:1(b)] case ... specifically rejected the relevance of statistics on trade flows for a finding on nullification and impairment.<sup>99</sup> It is of course true that, in the tariff negotiations in the framework of GATT, contracting parties seek tariff concessions in the hope of expanding their exports, but the commitments they exchange in such negotiations are commitments on conditions of competition for trade, not on volumes of trade”.<sup>100</sup>

See also the Panel Report, which has not been adopted, on “United States - Trade Measures Affecting Nicaragua”.<sup>101</sup>

(h) *Relevance of other agreements*

In the panel proceeding on “EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins” the EEC argued that as between the parties that signed it, the Agreement on Interpretation and Application of Articles VI, XVI and XXIII created an expectation as to the criteria that would be used to judge a complaint of non-violation nullification or impairment of tariff concessions. The Panel Report adopted in 1990 provides:

“The Panel was established to make findings ‘in the light of the relevant GATT provisions’; it therefore does not have the mandate to propose interpretations of the provisions of the Subsidies Code which the Community invokes to justify its position. However, the following may be noted in this respect. The Subsidies Code states in Article 8:4 that a nullification or impairment may arise through ‘the effects of the subsidy in displacing or impeding imports of like products into the market of the subsidizing country’. The Community takes the position that its production subsidies for oilseeds were followed by a rise in imports of oilseeds; they therefore neither displaced nor impeded imports and consequently did not cause nullification or impairment. The Community’s position implies that Article 8:4 redefines the benefit accruing under a tariff concession as being no longer the protection of expectations on conditions of competition but the protection of expectations on the level of trade volumes even though the CONTRACTING PARTIES have consistently decided otherwise. It is to be recalled that the CONTRACTING PARTIES considered in 1960 that ‘it is fair to assume that a subsidy which provides an incentive to increased production will, in the absence of offsetting measures, e.g., a consumption subsidy, either increase exports or reduce imports’.<sup>102</sup> The implication of the Community’s position is that, under the Subsidies Code, this assumption could no longer be made. The Panel noted that the purpose of the Subsidies Code is, according to its preamble, ‘to apply fully and interpret’ provisions of the General Agreement. In the view of the Panel this speaks in favour of interpreting Article 8:4 in conformity with the decisions of the CONTRACTING PARTIES rather than, as the Community suggests, revising these decisions in the light of a particular interpretation of a Code accepted by a portion of the contracting parties”.<sup>103</sup>

(i) *Procedural requirements*

The 1962 Panel Report on “Uruguayan Recourse to Article XXIII” notes:

“While it is not precluded that a *prima facie* case of nullification or impairment could arise even if there is no infringement of GATT provisions, it would be in such cases incumbent on the country invoking Article XXIII to demonstrate the grounds and reasons for its invocation. Detailed submissions on the part of that contracting party on these points were therefore essential for a judgement to be made under this Article”.<sup>104</sup>

<sup>99</sup>The footnote to this sentence refers to the Panel Report on “Treatment by Germany of Imports of Sardines”, adopted on 31 October 1952, 1S/53, 56.

<sup>100</sup>L/6627, adopted on 25 January 1990, 37S/86, 130, para. 150.

<sup>101</sup>L/6053 (unadopted), dated 13 October 1985.

<sup>102</sup>The footnote to this sentence refers to “Review Pursuant to Article XVI:5”, report adopted on 24 May 1960, 9S/188, 191.

<sup>103</sup>L/6627, adopted on 25 January 1990, 37S/86, 131-132, para. 154.

<sup>104</sup>L/1923, adopted on 16 November 1962, 11S/95, 100, para. 15.

Paragraph 5 of the 1979 Understanding Annex on customary practice provides that "... If a contracting party bringing an Article XXIII case claims that measures which do not conflict with the provisions of the General Agreement have nullified or impaired benefits accruing to it under the General Agreement, it would be called upon to provide a detailed justification".

The 1988 Panel Report on "Japan - Trade in Semi-Conductors" referred to this paragraph in examining a subsidiary claim of non-violation nullification and impairment:

"The Panel had not found that the measures relating to the access to the Japanese market were inconsistent with the provisions of the General Agreement ... The Panel considered that the evidence submitted by the EEC relating to access to the Japanese market did not permit it to identify any measure by the Japanese Government that put EEC exporters of semi-conductors at a competitive disadvantage vis-à-vis those of the United States and that might therefore nullify or impair benefits accruing to the EEC under the General Agreement and impede the attainment of objectives of the General Agreement within the meaning of Article XXIII".<sup>105</sup>

The 1990 Panel Report on "United States - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions" notes that the EEC had claimed that restrictions on imports of sugar-containing products were inconsistent with Article XI even whether or not they met the terms of the waiver in question, that this waiver simply suspended the obligation to implement provisions of the General Agreement, that these restrictions nullified or impaired benefits accruing to the EEC under the General Agreement, and that the EEC was entitled to compensation from the US pending the withdrawal of these restrictions.

"... The Panel ... concluded that the fact that the restrictions found to be inconsistent with Article XI:1 conform to the terms of the Waiver does not prevent the EEC from bringing a complaint under Article XXIII:1(b) of the General Agreement but it is up to the EEC to demonstrate that a nullification or impairment of benefits accruing to it under the General Agreement has resulted from these restrictions.

"According to the 1979 Understanding on dispute settlement, a contracting party bringing a complaint under Article XXIII:1(b) is 'called upon to provide a detailed justification'... The Panel noted that Article XXIII:1(b), as conceived by the drafters and applied by the CONTRACTING PARTIES, serves mainly to protect the balance of tariff concessions ... The party bringing a complaint under that provision would therefore normally be expected to explain in detail that benefits accruing to it under a tariff concession have been nullified or impaired. ... the Panel noted that Article XXIII:1(b) applies whether or not the measure at issue conflicts with the General Agreement and that, therefore, the question of whether a measure inconsistent with Article XI:1 remains inconsistent with the General Agreement even if covered by a waiver cannot, by itself, determine whether it nullifies or impairs benefits accruing under the General Agreement within the meaning of that provision. A complaint under Article XXIII:1(b) must therefore be supported by a justification that goes beyond a mere characterization of the measure at issue as inconsistent with the General Agreement ... .

"For the reasons indicated in the preceding paragraphs, the Panel did not examine the case before it in the light of Article XXIII:1(b). The Panel would however like to stress that nothing in this report is meant to preclude the EEC from bringing a complaint under that provision with the required detailed justification."<sup>106</sup>

(j) *Procedural relationship between findings of "violation" and findings regarding "non-violation nullification or impairment"*

Although in a number of cases the submissions of applicant parties to panels have included arguments in the alternative concerning both violation of the provisions of the General Agreement and non-violation nullification or impairment, panels which have made a finding that a *prima facie* case of nullification or impairment exists under Article XXIII:1(a) have generally declined to make a ruling on non-violation nullification or impairment under

<sup>105</sup>L/6309, adopted on 4 May 1988, 35S/116, 161, para. 131.

<sup>106</sup>L/6631, adopted on 7 November 1990, 37S/228, 261-262, paras. 5.20-5.23 (referring also to EPCT/A/PV/6, page 5; II/188; 1S/53; 10S/209).

Article XXIII:1(b). The 1990 Panel on “EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins”, which found the measures examined were inconsistent with Article III:4, provides in this respect:

“... The Panel ... examined whether its finding that the payments to the processors are inconsistent with the General Agreement might make an examination of the question of the nullification or impairment of the tariff concessions unnecessary. The Panel noted that this would be the case if compliance by the Community with the finding on Article III:4 would necessarily remove the basis of the United States claim of nullification or impairment. The Panel noted that the subsidies the Community presently grants to producers of oilseeds result from the maintenance of producer prices at levels generally exceeding the price of competing imports through payments to processors conditional upon the purchase or transformation of domestic oilseeds. The finding of the Panel under Article III:4 does not relate to the benefits accruing to the Community producers under the Community subsidy schemes but only to the benefits accruing to processors. The Panel further noted that the Community could comply with the Panel’s finding on Article III and still make available in the Community market oilseeds produced with the benefit of producer prices maintained at levels exceeding the price of competing imports. Compliance with the finding on Article III thus could, but would not necessarily, eliminate the basis of the United States complaint that the benefits accruing to the Community producers of oilseeds impair the Community’s tariff concessions for oilseeds. The Panel therefore decided that it had to examine that complaint as well”.<sup>107</sup>

**(5) Paragraph 1(c): “as the result of the existence of any other situation”**

*(a) Situations involving macroeconomic or employment factors*

During the negotiation of the General Agreement in the Tariff Agreement Committee at the Geneva session of the Preparatory Committee, in discussion of whether to include in the General Agreement the second chapter of the Charter on “Employment and Economic Activity”, it was stated that “if a situation should arise in which considerations came up under Chapter [II of the Charter] which were not dealt with under the exceptions already provided for in Articles [XI through XV] a party could invoke” the Agreement “specifically under Article [XXIII]”. Reference was also made to chapter III on “Economic Development and Reconstruction” in the course of the discussion.<sup>108</sup>

It was also stated in discussions at Geneva of Article 89 of the Geneva Draft Charter (corresponding to Article XXIII:1) that it gave a country a right “to seek a modification of the undertakings it has given if, by the action of others, conditions are created in which it can no longer carry out those undertakings. In other words, if there is a world-wide collapse of demand; if a shortage of a particular currency places us all in balance-of-payment difficulties; if we become subject again to wide-spread fluctuations in the prices of primary products with devastating effects upon individual economies ...”.<sup>109</sup> Describing these discussions, the delegate of Australia later stated that at the Preparatory Committee, Australia “had proposed very positive obligations regarding employment. However, [Australia] had been persuaded to accept obligations relating to employment of a less positive character in return for provisions in Article 89 which would enable a Member to obtain without difficulty a review of its obligations under the Charter should the obligations regarding employment not serve to prevent such situations as the collapse of levels of employment and effective demand leading to worldwide depression”.<sup>110</sup>

Referring to Article 93 of the Havana Charter (corresponding to Article XXIII:1), a Havana Sub-Committee stated: “The Committee was of the opinion that, in case of widespread unemployment or a serious decline in demand in the territory of another Member, a Member might properly have recourse to Article 93, if the measures adopted by the other Member under the provisions of Article 3 [of the Charter, on employment] had not produced the effects which they were designed to achieve and thus did not result in such benefits as might reasonably be anticipated”.<sup>111</sup>

<sup>107</sup>L/6627, adopted on 25 January 1990, 37S/86, 126, para. 142.

<sup>108</sup>EPCT/TAC/PV/13, p. 41. See also the material on Article XII:3(d) in the chapter on Article XII.

<sup>109</sup>EPCT/A/PV/5, p. 14.

<sup>110</sup>E/CONF.2/C.6/W.19, p. 1.

<sup>111</sup>Havana Reports, p. 155.

During the Review Session of 1954-55 the Review Working Party on Quantitative Restrictions considered proposals to authorize joint action to prevent disequilibrium in world trade and payments from occurring through macroeconomic pressures, or to meet a situation of general scarcity of a particular currency resulting from an important country running a persistent payments surplus. It was agreed that adequate provision already existed in various provisions of the General Agreement.

“For example, if any contracting party considered that the pressure on its international reserves was resulting from the situation in some individual country, it could raise the question under Article XXIII with a view either to consultations directly with such other contracting parties as it might consider to be particularly concerned, or to reference to the CONTRACTING PARTIES, in order to obtain recommendations from them or, if need be, release from specific obligations in accordance with the terms of that Article.”<sup>112</sup>

Also during the Review Session, the Review Working Party on “Organizational and Functional Questions” considered a proposal to include in the General Agreement an article on full employment, including provision for initiating consultations in urgent cases to prevent the international spread of a decline in employment, production or demand.

“After discussion it was the opinion of the Working Party that, in view of the present provisions of the Agreement and of changes contained in amendments agreed upon during the Review Session, it was not necessary to include this new Article and that in fact its inclusion might cause some confusion in the application of other Articles of the Agreement. ...

“It was thought that the kind of action [proposed] was already provided for in existing or proposed new Articles of the Agreement. It was clear, for example, that Article XXIII contemplates that any country which considers that a situation had arisen which impeded the attainment of any objective of the Agreement, including, of course, all those enumerated in the new Article I, may refer the matter to the CONTRACTING PARTIES, which then would be obliged promptly to investigate the matter and to make appropriate recommendations. It was also clear that in such a case the CONTRACTING PARTIES would be free to enter into consultations with other interested international bodies which would be in a position to make a contribution to the problem presented.”<sup>113</sup>

This Report also repeated the point included in the report on “Quantitative Restrictions” concerning resort to Article XXIII in the event of pressure on a country’s reserves from deflationary influences abroad.<sup>114</sup>

(b) *Situations involving other factors*

In 1951, Haiti placed on the Sixth Session agenda an application under Article XXIII:1(c) regarding the withdrawal by the United States under Article XXVII of concessions on straw and sisal matting, which had been initially negotiated with China. The application was withdrawn in the light of agreement to consult on the items concerned.<sup>115</sup>

The February 1953 “Report on the Accession of Japan” by the *Ad Hoc* Committee on Agenda and Intersessional Business expressed the view that “violent disruption of trading conditions ... if remedial action consistent with the General Agreement would lead to a general raising of tariff levels and other barriers to world trade, would create a situation impeding the attainment of objectives of the Agreement. This would therefore be a situation falling under part (c) of paragraph 1 of Article XXIII. It was considered that, in the event of such a situation arising, contracting parties whose interests were seriously affected would avail themselves of the facilities of Article XXII, but that if consultations under that Article should prove unsuccessful they could thereafter refer the matter to the CONTRACTING PARTIES under paragraph 2 of Article XXIII” and the CONTRACTING PARTIES could authorize release from obligations on a discriminatory basis.<sup>116</sup> The Report of the Working Party on “Arrangements

<sup>112</sup>L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 175 para. 22. See also the material in this work on Article XII:5 and Article XIV.

<sup>113</sup>L/329, adopted on 28 February, 5 and 7 March 1955, 3S/231, 241, paras. 28-29.

<sup>114</sup>*Ibid.*, 3S/241-242, para. 30.

<sup>115</sup>GATT/CP/115/Add.2 (application by Haiti); GATT/CP.6/SR.9 (discussion); GATT/CP.6/42 (withdrawal).

<sup>116</sup>L/76, dated 13 February 1953, para. 8.

for Japanese Participation” adopted in November 1953 at the Eighth Session, which drew up the Declaration on Commercial Relations between Certain Contracting Parties and Japan,<sup>117</sup> noted that “most of the representatives of countries intending to accept the Declaration do not regard the approval of an interpretation of Article XXIII on the lines of that contained in the Report of the *Ad Hoc* Committee as necessary or desirable.” Other delegations disagreed.<sup>118</sup>

The statement made by Uruguay at the Nineteenth Session in November 1961 concerning the Uruguayan recourse to Article XXIII noted the view of Uruguay that “our case meets not just one, but all the requirements of Article XXIII:1, since it concerns not only the non-fulfilment of obligations, but also the application of other measures, which, taken together, constitute a state of affairs so generalized that it may well fall within the concept provided for in section (c) of that paragraph”.<sup>119</sup>

In June 1968, the government of France gave notice that it had instituted temporary import ceilings on certain products including automobiles, and had instituted subsidies for production and exports of products of France, in the wake of the events of spring 1968.<sup>120</sup> In Council discussion of these trade measures on 4 July 1968, the representative of France stated that “The French Government did not ... consider that it was necessary to invoke Articles XII and XIX of the General Agreement to justify the measures it was taking. Article XXIII of the General Agreement recognized that situations might arise that might be such as to impair the benefits that each contracting party was entitled to expect from its participation in the Agreement, and it authorized the protection of those benefits. The French Government was of the opinion that, taking into account the exceptional characteristics of the crisis with which it was faced, the benefits that it was entitled to expect from its participation in the General Agreement would have been seriously impaired unless it had taken interim protective measures”. The representative of the UK stated that “... a dangerous precedent could be set in the GATT if [this argument] were accepted outright. If the French action could not be fitted into any of the provisions of the GATT, the first presumption must be that they were in conflict with these provisions”.<sup>121</sup>

In 1974, when Article XXIV:6 negotiations between Canada and the European Communities did not produce a mutually satisfactory result, Canada referred the matter to the CONTRACTING PARTIES pursuant to paragraph 1(c) and 2 of Article XXIII and requested that a panel of experts be appointed to investigate whether the new Schedules LXXII and LXXIIbis maintained a general level of reciprocal and mutually advantageous concessions between Canada and the European Communities, not less favourable to trade than that provided for in Schedules XL, XLbis, XIX, XXII and LXI.<sup>122</sup> The representative of the European Communities recalled “that the negotiations that had led to this new Schedule covered practically the whole of the customs tariffs in question and a difficult assessment of both a quantitative and qualitative character was therefore called for. The Community could not accept the proposal. The conciliation procedures of the GATT had hitherto mostly been used in cases of violations of the General Agreement; in the present case, a number of factors made this procedure inappropriate. Such an exercise would involve highly sophisticated assessments in complex trade fields where the criteria for reaching judgements were exceedingly imprecise ...”.<sup>123</sup> 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”.<sup>124</sup> The panel was established but was not convened as the two parties reached a bilateral agreement in March 1975.<sup>125</sup>

In a complaint against Japan in 1983, the European Community requested establishment of a working party under Article XXIII:2, on the basis that “benefits of successive GATT negotiations with Japan have not been realized owing to a series of factors peculiar to the Japanese economy which have resulted in a lower level of

<sup>117</sup>Declaration of 24 October 1953, 2S/31.

<sup>118</sup>G/55/Rev.1, adopted on 23 October 1953, 2S/117, 119, para. 9. See also the material on early discussions of safeguards in the chapter on Article XIX.

<sup>119</sup>L/1679, statement of the representative of Uruguay of 8 December 1961 on “Recourse to Article XXIII by Uruguay.”

<sup>120</sup>See notification in L/3035+Add.1.

<sup>121</sup>C/M/48, p. 4 (French statement), 7 (UK statement); see also L/3047 and L/3081, first and second reports of the Working Party on “French Trade Measures”, 16S/57ff.

<sup>122</sup>C/M/101, p. 7.

<sup>123</sup>C/M/101, p. 8.

<sup>124</sup>C/M/102, p. 4.

<sup>125</sup>See material under Article XXVIII:3 in this Index.

imports, especially of manufactured products, as compared with other industrial countries. ... The European Community is of the view that the present situation constitutes a nullification or impairment by Japan, of the benefits otherwise accruing to the European Community under the GATT, and an impediment to the attainment of GATT's objectives. In particular the general GATT objective of 'reciprocal and mutually advantageous arrangements' has not been achieved".<sup>126</sup> The complaint was ultimately not pursued.

**(6) "any contracting party ... may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned"**

*(a) Notification of consultation requests; requirements concerning requests*

Paragraph C.3 of the 1989 Improvements provides: "Requests for consultations under Article ... XXIII:1 shall be notified to the Council by the party which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request".

Since entry into effect of the 1989 Improvements, all consultation requests notified in writing have been circulated in the DS/ series with a separate number assigned to each dispute. However, in a few instances requests for consultations have been announced in the Council, and are referred to in the Council minutes.<sup>127</sup>

*(b) Consultation requests by more than one contracting party*

In a "Joint Representation under Article XXIII:1" submitted in 1982, ten contracting parties requested joint consultations with the Member States of the European Communities on the European Communities' sugar régime and pointed out "that, although a joint request for Article XXIII consultations may be unusual, it is nevertheless perfectly legal under the GATT".<sup>128</sup> The European Communities replied, *inter alia*, that "according to the practices followed under the General Agreement, a consultation under Article XXIII is of a bilateral character" and that "the Community is prepared forthwith to enter into a set of ten bilateral consultations which would be held jointly. The Community underlines that the fact of acceding to your request on this basis in no way implies that it would be disposed to accept joint action at any later stage under paragraph 2 of the same Article".<sup>129</sup>

At the October 1993 Council meeting it was announced that consultations had been held under Article XXIII:1 by the United States jointly with Brazil, Argentina, Canada, Chile, Colombia, El Salvador, Guatemala, Thailand, Venezuela and Zimbabwe, concerning US legislation on the use of imported tobacco.<sup>130</sup>

See also the material below at page 728 on procedures in disputes where there are more than one applicant contracting party.

**(7) "Any contracting party thus approached shall give sympathetic consideration"**

Paragraph C.1 of the 1989 Improvements provides: "If a request is made under Article ... XXIII:1, the contracting party to which the request is made shall, unless otherwise mutually agreed, reply to the request within ten days after its receipt and shall enter into consultations in good faith within a period of no more than thirty days from the date of the request, with a view to reaching a mutually satisfactory solution". Paragraph C.4 provides: "In cases of urgency, including those which concern perishable goods en route, parties shall enter into consultations within a period of no more than ten days from the date of the request ...".

<sup>126</sup>L/5479; see also Council discussion of this complaint at C/M/167, p. 9-10.

<sup>127</sup>See, e.g., announcement by Mexico at the May 1993 Council meeting of request for Article XXIII:1 consultations with Venezuela concerning anti-dumping measures on cement from Mexico, C/M/263, p. 37. Documents circulated in connection with disputes under the WTO appear in the WT/DS series.

<sup>128</sup>L/5309 and Add. 1-5; Add. 3, 5.

<sup>129</sup>*Ibid.*, Add. 4.

<sup>130</sup>C/M/267, p. 10, referring to consultation requests at DS44/1, 2 and 4. A panel was established at the Forty-Ninth Session in January 1994 in response to the panel requests by Brazil, Canada, Chile, Colombia, El Salvador, Guatemala, Thailand and Zimbabwe (DS44/5 and 6). SR.49/1, p. 10-11.

### 3. Paragraph 2

#### (1) *“If no satisfactory adjustment is effected”*

##### (a) *Prerequisite of consultations*

The 1962 Panel Report on “Uruguayan Recourse to Article XXIII” notes that “Paragraph 2 of Article XXIII provides that the CONTRACTING PARTIES shall promptly investigate any matter referred to them under that paragraph. From the context it is obvious, however, that before a ‘matter’ can be so referred to the CONTRACTING PARTIES it must have been the subject of representations or proposals made pursuant to paragraph 1 of the Article which have not resulted in a ‘satisfactory adjustment’ (unless the difficulty is of the type referred to in paragraph 1(c) of the Article)”.<sup>131</sup> The Report of the same Panel on its work when it was reconvened in 1964 notes that the Panel “had been constituted ‘to examine cases referred to it by Uruguay, in accordance with the provisions of paragraph 2 of Article XXIII’ and that the procedures of Article XXIII:2 were, in general, not to be resorted to until possibilities of effecting ‘satisfactory adjustment’ through direct consultation (under Article XXII:1 or XXIII:1) had been exhausted ... . Hence, a contracting party could not be obliged to appear before the Panel unless and until the CONTRACTING PARTIES had referred the case to it on the advice of the contracting party invoking the provisions that no ‘satisfactory solution’ had been effected through direct representation or consultation”.<sup>132</sup>

Paragraph 6 of the 1979 Understanding provides that “Contracting parties should attempt to obtain satisfactory adjustment of the matter in accordance with the provisions of Article XXIII:1 before resorting to Article XXIII:2”.

In a communication dated 11 July 1985, Nicaragua requested the United States to hold bilateral consultations under Article XXII:1 concerning the United States’ prohibition imposed 7 May 1985 on all trade with Nicaragua. The United States did not agree to those consultations, stating that the measures could not be isolated from the broader security situation and that bilateral consultations would be useless. At the July 1985 Council meeting, Nicaragua then requested a panel, supported by a number of delegations. The United States opposed the establishment of a panel stating that there was no function for a panel to perform in this case and that “a panel had no power to address the validity of, or motivation for, invocation of Article XXI:(b)(iii)”.<sup>133</sup> At the following Council meeting, the Chairman reported that the United States would not oppose establishment of a panel provided that it was understood that the Panel could not examine or judge the validity of or motivation for the invocation of Article XXI:(b)(iii) by the United States in this matter. The Council agreed to establish a panel with terms of reference reflecting that understanding.<sup>134</sup>

In July 1988, New Zealand requested the establishment of a panel on Korean restrictions on imports of beef, stating that Korea had not responded to a request for consultations under Article XXIII:1 made three months earlier and the issue could not wait until the next Council meeting in September as the Council had established panels to consider the complaints of the United States and Australia concerning the same measures and New Zealand sought the establishment of a panel to ensure equitable treatment relative to them. The representative of New Zealand, supported by a number of other delegations, “reiterated that a careful reading of Article XXIII:2 made it clear that consultations under Article XXIII:1 were not a necessary prerequisite for the establishment of a panel ... The only test was that the CONTRACTING PARTIES collectively agree that no satisfactory adjustment had been effected between the parties concerned within a reasonable time”.<sup>135</sup> However, action on New Zealand’s request was deferred and the panel was established at the September Council meeting; its members were the same as the Panels in the US and Australian complaints (see below at page 728).

<sup>131</sup>L/1923, adopted on 16 November 1962, 11S/95, 98, para. 10. A footnote to this passage provides: “However, at least in respect of quantitative import restrictions applied inconsistently with the General Agreement, it has been agreed by the CONTRACTING PARTIES that the holding of a consultation under paragraph 1 of Article XXII would fulfil the conditions of paragraph 1 of Article XXIII (see BISD, Ninth Supplement, pages 19-20).”

<sup>132</sup>L/2278 (dated September 1964), adopted on 3 March 1965, 13S/45, 47-48, para. 11.

<sup>133</sup>L/5847 (Nicaraguan request), C/M/191, p. 41 (US statement), L/5803 (US notification of measures).

<sup>134</sup>C/M/192, p. 6.

<sup>135</sup>C/M/223, p. 6-10.

At the February 1989 Council meeting, the EC asked the Council to establish a panel under Article XXIII:2 concerning a US Presidential Proclamation of 24 December 1987 providing for increased rates of duty on certain EC products in response to an EC directive on hormones. In response to US objections that this would be procedurally premature, the EC representative stated that “there was no requirement in the General Agreement that formal consultations under Articles XXII or XXIII must be held prior to the establishment of a panel; Paragraph 6 of the 1979 Understanding said only that ‘contracting parties should attempt to obtain a satisfactory adjustment of a matter in accordance with the provisions of Article XXIII:1 before moving to Article XXIII:2’ or requesting a Council ruling or recommendation”.<sup>136</sup> Article XXIII:1 consultations were held at a later date.

Paragraph C.1 of the 1989 Improvements provides that “... If the contracting party does not respond within ten days, or does not enter into consultations within a period of no more than thirty days, or a period otherwise mutually agreed, from the date of the request, then the contracting party that requested the holding of consultations may proceed directly to request the establishment of a panel or a working party”.

On 23 December 1991, Yugoslavia requested consultations with the European Community under Article XXIII:1 concerning EEC trade measures taken for non-economic reasons against Yugoslavia.<sup>137</sup> In a communication dated 6 February 1992, Yugoslavia requested the establishment of a panel under Article XXIII:2 and paragraphs C.1 and F(a) of the 1989 Improvements, stating that the EC had not replied to the request and had not entered into consultations with a view to reaching a mutually satisfactory solution.<sup>138</sup> A panel was established at the March 1992 Council meeting.<sup>139</sup>

See also the material on “Establishment of working parties and panels” starting at page 721, and on “Matters not raised in consultations, panel request and/or terms of reference” starting at page 734.

*(b) Failure to reach a satisfactory adjustment*

In Council discussion of recourse to Article XXIII:2 by the EEC concerning “Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages” the representative of Japan stated that consultations under Article XXII:1 had not been exhausted and it was premature to proceed to Article XXIII:2. In response to a request by the representative of the European Communities for the Secretariat’s opinion on Japan’s statement that the two parties to a dispute should agree that the conditions of Article XXIII:1 had been fulfilled before moving to application of Article XXIII:2, the Legal Adviser to the Director-General “said that in his view it was not necessary that both parties so agree before moving to set up a panel under Article XXIII:2; such a condition would mean that one party could indefinitely block the procedures simply by saying that bilateral consultations had not yet been terminated”.<sup>140</sup>

Paragraph C.2 of the 1989 Improvements provides in this regard: “If the consultations under Article XXII:1 or XXIII:1 fail to settle a dispute within sixty days after the request for consultations, the complaining party may request the establishment of a panel or a working party under Article XXIII:2. The complaining party may request a panel or a working party during the sixty-day period if the parties jointly consider that consultations have failed to settle the dispute”. Paragraph C.4 provides: “In cases of urgency, including those which concern perishable goods en route ... If the consultations have failed to settle the dispute within a period of thirty days after the request, the complaining party may request the establishment of a panel or a working party”.

*(c) Recourse to Article XXIII:2 on the basis of consultations under Article XXII:1 or Article XXXVII*

As noted in Section III below, the Charter provisions corresponding to Article XXII (on consultations in respect of commercial policy measures) were located in the commercial policy chapter, Chapter IV, and the nullification and impairment provisions corresponding to Article XXIII applied to the entire Charter and were located in Chapter VIII. The Havana Reports record the following notification to other Committees of the Havana Conference by the Sixth Committee, which considered Chapter VIII:

---

<sup>136</sup>C/M/228, p. 30.

<sup>137</sup>DS27/1.

<sup>138</sup>DS27/2.

<sup>139</sup>C/M/255, p. 18.

<sup>140</sup>C/M/205, p. 10.

“The Sixth Committee has discussed the question of the relationship between Chapter VIII and other parts of the Charter. In the light of its discussion the Committee wishes to make known to other Committees of the Conference ... the view of the Committee that if consultation or investigation has taken place under the provisions of another article, the Organization may regard such consultation or investigation as fulfilling, either in whole or in part, any similar procedural requirement in Chapter VIII.”<sup>141</sup>

The practice of proceeding from consultations under Article XXII:1 to the establishment of a panel under Article XXIII:2 was an established one as of the 1950s. For instance, the Panel on “French Assistance to Exports of Wheat and Wheat Flour” was established by the Intersessional Committee at its April-May 1958 meeting after consultations under Article XXII:1 between the parties to the dispute, Australia and France.<sup>142</sup> Other examples of disputes where Article XXIII:2 proceedings were preceded by consultations under Article XXII:1 include the 1962 “Uruguayan Recourse to Article XXIII”<sup>143</sup>, the dispute brought by the United States in 1982 on “Canada - Administration of the Foreign Investment Review Act”<sup>144</sup>, the dispute brought by the EC in 1987 on “Japan - Trade in Semi-conductors”<sup>145</sup>, and the complaint brought by Australia in 1988 on “United States - Restrictions on Imports of Sugar”.<sup>146</sup>

The procedures agreed in 1960 for consultations on residual import restrictions provide in paragraph 9 that “If consultations held under paragraph 1 of Article XXII do not lead to a satisfactory solution, any of the parties to the consultations may request that consultations be carried out by the CONTRACTING PARTIES pursuant to paragraph 2 of Article XXII. Alternatively, a country whose interests are affected may resort to paragraph 2 of Article XXIII, it being understood that a consultation held under paragraph 1 of Article XXII would be considered by the CONTRACTING PARTIES as fulfilling the conditions of paragraph 1 of Article XXIII”.<sup>147</sup>

Paragraph 11 of the 1966 Procedures provides: “If consultations held under paragraph 2 of Article XXXVII, relate to restrictions for which there is no authority under any provisions for the General Agreement, any of the parties to the consultations may, in the absence of a satisfactory solution, request that consultations be carried out by the CONTRACTING PARTIES pursuant to paragraph 2 of Article XXIII and in accordance with the procedures set out in the present decision, it being understood that a consultation held under paragraph 2 of Article XXXVII in respect of such restrictions will be considered by the CONTRACTING PARTIES as fulfilling the conditions of paragraph 1 of Article XXIII if the parties to the consultations so agree”. No consultations have ever been held under Article XXXVII.

See also the chapter on Article XXII.

## (2) *“the matter may be referred”*

### (a) *“the matter”*

The Report of the Sixth Committee of the Havana Conference, which considered the Charter provisions on nullification or impairment, notes that “The Committee agreed that the word ‘matter’ as used in Article 93 [XXIII] ... refers to nullification or impairment of a benefit and not to the action, failure, measure or situation referred to in sub-paragraphs 1(a), (b) or (c)”.<sup>148</sup>

The 1994 Panel Report on “United States - Imposition of Anti-Dumping duties on Imports of Fresh and Chilled Atlantic Salmon from Norway” refers to the dispute settlement procedure under the Agreement on Implementation of Article VI as “a three-step process of settlement of a dispute between Parties concerning a

<sup>141</sup>E/CONF.2/C.6/63, Havana Reports, p. 159.

<sup>142</sup>IC.SR/38, p. 12.

<sup>143</sup>Consultations with France and Italy; see 11S/96 and Uruguayan panel request at L/1647.

<sup>144</sup>L/5504, Panel Report adopted on 7 February 1980, 36S/140, para. 1.1.

<sup>145</sup>L/6309, adopted on 4 May 1988, 35S/116.

<sup>146</sup>L/6514, Panel Report adopted on 22 June 1989, 36S/331, para. 1.

<sup>147</sup>“Procedures for dealing with new import restrictions applied for balance-of-payments reasons and residual import restrictions”, 9S/18, 19-20, para. 9.

<sup>148</sup>Havana Reports, p. 155.

single ‘matter’ and the individual claims of which a matter is composed, in which panel examination of a matter would be preceded by consultations concerning that same matter and conciliation concerning that same matter”.<sup>149</sup>

One “matter” does not include counter-complaints in regard to distinct matters. Paragraph 9 of the 1979 Understanding provides as follows: “It is ... understood that complaints and counter-complaints in regard to distinct matters should not be linked”.<sup>150</sup>

*(b) Requests for the establishment of a panel*

The 1989 Improvements provide in paragraph F(a) as follows:

“The request for a panel or a working party shall be made in writing. It shall indicate whether consultations were held, and provide a brief summary of the factual and legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel or a working party with other than standard terms of reference, the written request shall include the proposed text of special terms of reference. ...”.

**(3) “The CONTRACTING PARTIES shall promptly investigate”**

See the material in section D (pages 721-763) on panel procedures used to carry out the investigation by the CONTRACTING PARTIES.

At the November 1990 Council meeting, the Director-General noted that “the composition of two panels established in 1985 and 1987 was still not decided; these complaints should be either pursued or withdrawn. In the light of such instance, he wondered if a complaint should not be deemed to be withdrawn if it was not actively pursued for, say, more than one year”.<sup>151</sup>

**(4) “the CONTRACTING PARTIES ... shall make appropriate recommendations ... or give a ruling”**

The 1962 Panel Report on the “Uruguayan Recourse to Article XXIII” notes as follows:

“Paragraph 2 of Article XXIII provides, apart from promptly investigating any matter so referred to them, for two kinds of action by the CONTRACTING PARTIES, namely:

“(i) they shall make appropriate recommendations or give a ruling on the matter;

“(ii) they may authorize the suspension of concessions or obligations.

“The action stated under (i) is obligatory and must be taken in all cases where there can be an ‘appropriate’ recommendation or ruling. The action under (ii) is to be taken at the discretion of the CONTRACTING PARTIES in defined circumstances.

“The paragraph states that the CONTRACTING PARTIES ‘shall make appropriate recommendations to the contracting parties which they consider to be concerned or give a ruling on the matter, as appropriate’. Whilst a ‘ruling’ is called for only when there is a point of contention on fact or law, ‘recommendations’ should always be appropriate whenever, in the view of the CONTRACTING PARTIES, they would lead to a satisfactory adjustment of the matter”.<sup>152</sup>

<sup>149</sup>ADP/82, adopted on 27 April 1994, para. 332.

<sup>150</sup>26S/212, para. 9.

<sup>151</sup>C/M/246, p. 23.

<sup>152</sup>L/1923, adopted on 16 November 1962, 11S/95, 99, paras. 11-12.

Paragraphs 16 and 17 of the 1979 Understanding provide:

“The function of panels is to assist the CONTRACTING PARTIES in discharging their responsibilities under Article XXIII:2. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the General Agreement and, if so requested by the CONTRACTING PARTIES, make such other findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2 ...

“Where the parties have failed to develop a mutually satisfactory solution, the panel should submit its findings in a written form. The report of a panel should normally set out the rationale behind any findings and recommendations that it makes”.

Paragraph 3 of the 1979 Understanding Annex on customary practice provides: “... In cases of failure of the parties to reach a mutually satisfactory settlement, panels have normally given assistance to the CONTRACTING PARTIES in making recommendations or in giving rulings as envisaged in Article XXIII:2”. Paragraphs 6(v) and 6(viii) of this Annex also provide:

“Where the parties have failed to develop a mutually satisfactory solution, the panel has submitted its findings in a written form. Panel reports have normally set out findings of fact, the applicability of relevant provisions, and the basic rationale behind any findings and recommendations that it has made ... .”

“In accordance with their terms of reference established by the CONTRACTING PARTIES panels have expressed their views on whether an infringement of certain rules of the General Agreement arises out of the measure examined. Panels have also, if so requested by the CONTRACTING PARTIES, formulated draft recommendations addressed to the parties ...”.

Paragraphs (v) and (viii) of the 1982 Ministerial Decision provide:

“(v) The terms of reference of a panel should be formulated so as to permit a clear finding with respect to any contravention of GATT provisions and/or on the question of nullification and impairment of benefits. In terms of paragraph 16 of the Understanding, and after reviewing the facts of the case, the applicability of GATT provisions and the arguments advanced, the panel should come to such a finding. Where a finding establishing a contravention of GATT provisions or nullification or impairment is made, the panel should make such suggestions as appropriate for dealing with the matter as would assist the CONTRACTING PARTIES in making recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate.

“(viii) The recommendation or ruling made by the CONTRACTING PARTIES shall be aimed at achieving a satisfactory settlement of the matter in accordance with GATT obligations ...”.

See also the material on “Panel reports” at page 755.

a) *Objective of recommendations or rulings*

The Report of the Review Session Working Party on “Organizational and Functional Questions” noted that

“... any implication ... that the provision of appropriate compensation, on the one hand, and the removal of a measure inconsistent with the Agreement, on the other hand, are fully equivalent and satisfactory alternatives would not accord with the intent and spirit of the Article ... the first objective, if the CONTRACTING PARTIES decided, in the event of a complaint under Article XXIII, that certain measures were inconsistent with provisions of the Agreement, should be to secure the withdrawal of the measures. In such a case, the alternative of providing compensation for damage suffered should be resorted to only if the

immediate withdrawal of the measures was impracticable and only as a temporary measure pending the withdrawal of the measures which were inconsistent with the Agreement".<sup>153</sup>

This view was referred to by the Panel on "French Import Restrictions", in suggesting in its 1962 Report "that the CONTRACTING PARTIES could appropriately recommend to the French Government the withdrawal of restrictions inconsistent with Article XI," and in suggesting "that the CONTRACTING PARTIES recommend to the United States Government that it refrain, for a reasonable period, from exercising its right, under the procedures of paragraph 2 of Article XXIII, to propose suspension of the application of equivalent obligations or concessions".<sup>154</sup>

The 1962 Panel Report on "Uruguayan Recourse to Article XXIII" provides that

"Where a measure affecting imports is maintained clearly in contradiction with the provisions of the General Agreement (and is not covered by the 'existing legislation' clause of a Protocol), the Panel has in all cases recommended that the measure in question be removed".<sup>155</sup>

Paragraph 4 of the 1979 Understanding Annex on customary practice provides:

"... The aim of the CONTRACTING PARTIES has always been to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the CONTRACTING PARTIES is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the General Agreement. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement. The last resort which Article XXIII provides to the country invoking this procedure is the possibility of suspending the application of concessions or other obligations on a discriminatory basis vis-à-vis the other contracting party, subject to authorization by the CONTRACTING PARTIES of such measures. Such action has only rarely been contemplated and cases taken under Article XXIII:2 have led to such action in only one case".

See also paragraph (ix) of the 1982 Ministerial Declaration.

(b) *Recommendations with regard to "violation" complaints under Article XXIII:1(a)*

See paragraph 4 of the 1979 Understanding Annex on customary practice, directly above. In most instances where a panel has found that a measure was inconsistent with the General Agreement it has recommended that it be "brought into conformity with the General Agreement".

One panel report adopted by the CONTRACTING PARTIES has found that a measure was inconsistent with the General Agreement, and at the same time suggested that the CONTRACTING PARTIES grant a waiver. The 1971 Panel Report on "Jamaica - Margins of Preference" held that

"... The provision of Article I:4 establishing 10 April 1947 as the base date for permissible margins of preference was ... applicable to Jamaica.

"The Panel agreed, however, that it was important to find a solution which, on the one hand, would not lead to a strained interpretation of the General Agreement and which would leave the General Agreement intact, but which, on the other hand, would take into account the uniqueness of the Jamaican case ...

"The Panel therefore suggests that in the light of the exceptional circumstances the CONTRACTING PARTIES consider taking a decision in accordance with the provisions of paragraph 5 of Article XXV to change with

<sup>153</sup>L/327, adopted on 28 February, 5 and 7 March 1955, 3S/231, 251, para. 64.

<sup>154</sup>L/1921, adopted on 14 November 1962, 11S/94, 95, paras. 6 and 7.

<sup>155</sup>L/1923, adopted on 16 November 1962, 11S/95, 101, para. 20.

respect to Jamaica the base date referred to in paragraph 4 of Article 1 from 10 August 1947 to 1 August 1962".<sup>156</sup>

The Panel drew up a draft waiver decision. The waiver was agreed on 2 March 1971.

In three cases which have been adopted (two under Article XXIII and one under the Agreement on Interpretation and Application of Articles VI, XVI and XXIII), the recommendations of a panel have included a recommendation of specific actions to be taken. The 1985 Panel Report on "New Zealand - Imports of Electrical Transformers from Finland" found that "the imposition of anti-dumping duties on these imports was not consistent with the provision of Article VI:6(a) of the General Agreement" and concluded that "The Panel proposes to the Council that it addresses to New Zealand a recommendation to revoke the anti-dumping determination and to reimburse the anti-dumping duty paid".<sup>157</sup> The 1991 Panel Report on "United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada" concluded that "the United States countervailing duties on fresh, chilled and frozen pork from Canada are being levied inconsistently with Article VI:3 of the General Agreement because the United States' determination that the production of pork had benefited from subsidies was not made in accordance with the requirements of that provision" and recommended "that the CONTRACTING PARTIES request the United States to either reimburse the countervailing duties corresponding to the amount of the subsidies granted to producers of swine or to make a subsidy determination which meets the requirements of Article VI:3 and reimburse the duties to the extent that they exceed an amount equal to the subsidy so determined to have been granted to the production of pork". The 1993 Panel Report on "United States - Measures Affecting Imports of Softwood Lumber from Canada" discusses this subject as follows:

"... The Panel further noted that panels, having found a measure to be inconsistent with a signatory's obligation, generally recommended that the signatory be requested to bring its measure into conformity with the Agreement. The Panel considered that such a recommendation was especially appropriate in those cases where there were several options available to a signatory to bring itself into conformity with the Agreement. The Panel considered however that such multiple options were not available to the United States in the present case and that the only option open to the United States was, with respect to imports of softwood lumber from Canada, to terminate the bonding requirement, release any bonds, refund any cash deposits and terminate the suspension of liquidation of entries made during the period of application of the inconsistent interim measures imposed in October 1991 under the authority of Section 304 of the Trade Act of 1974.

"Moreover, the Panel noted that the CONTRACTING PARTIES of GATT had adopted two panel reports which had recommended the reimbursement of duties found to have been imposed in a manner inconsistent with GATT obligations, the first involving anti-dumping duties and the second involving countervailing duties. The Panel considered that such a recommendation was also appropriate in this case.

"The Panel therefore recommends to the Committee that it request the United States, with respect to imports of softwood lumber from Canada, to terminate the bonding requirement, release any bonds, refund any cash deposits and terminate the suspension of liquidation of entries made during the period of application of the inconsistent interim measures imposed in October 1991 under the authority of Section 304 of the Trade Act of 1974."<sup>158</sup>

The appropriateness of such recommendations has been discussed on a number of occasions in the Committee on Anti-Dumping Practices and the Committee on Subsidies and Countervailing Measures.<sup>159</sup>

In some cases where a measure was no longer in effect at the time of the panel report, the panel has found the measure to be inconsistent with the General Agreement and has not recommended that the measure be brought into conformity with the General Agreement; for instance, the 1978 Panel Report on "EEC - Measures on Animal Feed Proteins"<sup>160</sup>, the 1980 Panel Report on "EEC Restrictions on Imports of Apples from Chile"<sup>161</sup>,

<sup>156</sup>L/3485, Panel Report adopted on 2 February 1971, 18S/183, 187, para. 13-15; L/3503, waiver decision of 2 March 1971, 18S/33.

<sup>157</sup>L/5814, adopted on 18 July 1985, 32S/55, 70, paras. 4.9 (finding), 4.11 (recommendation).

<sup>158</sup>SCM/162, adopted on 26 October 1993, paras. 413-415.

<sup>159</sup>See minutes of discussions in ADP/M/30, ADP/M/32, ADP/M/35, ADP/M/37, ADP/M/39, ADP/M/40, SCM/M/65.

<sup>160</sup>L/4599, adopted on 14 March 1978, 25S/49.

the 1982 Panel Report on “United States - Prohibition of Imports of Tuna and Tuna Products from Canada”<sup>162</sup>, the 1989 Panel Reports on the complaints of Chile and the United States with respect to “EEC - Restrictions on Imports of Dessert Apples”<sup>163</sup> and the 1992 Panel Report on “United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear”.<sup>164</sup> See also above at page 649 concerning “Measures no longer in effect”.

The Panel Report under the Agreement on Government Procurement on “Norway - Procurement of Toll Collection Equipment for the City of Trondheim” discusses GATT practice with respect to recommendations in panel reports.

“The Panel ... turned its attention to the recommendations that the United States had requested it to make. In regard to the United States’ request that the Panel recommend that Norway take the necessary measures to bring its practices into compliance with the Agreement with regard to the Trondheim procurement, the Panel noted that all the acts of non-compliance alleged by the United States were acts that had taken place in the past. The only way mentioned during the Panel’s proceedings that Norway could bring the Trondheim procurement into line with its obligations under the Agreement would be by annulling the contract and recommencing the procurement process. The Panel did not consider it appropriate to make such a recommendation. Recommendations of this nature had not been within customary practice in dispute settlement under the GATT system and the drafters of the Agreement on Government Procurement had not made specific provision that such recommendations be within the task assigned to panels under standard terms of reference. Moreover, the Panel considered that in the case under examination such a recommendation might be disproportionate, involving waste of resources and possible damage to the interests of third parties.

“The United States had further requested the Panel to recommend that Norway negotiate a mutually satisfactory solution with the United States that took into account the lost opportunities in the procurement of United States’ companies, including Amtech. Finally, the United States had requested the Panel to recommend that, in the event that the proposed negotiation did not yield a mutually satisfactory result, the Committee be prepared to authorise the United States to withdraw benefits under the Agreement from Norway with respect to opportunities to bid of equal value to the Trondheim contract. Norway had argued that, even if the Panel were to find that the procurement had been conducted inconsistently with the Agreement, such requests should be rejected because they were outside the scope of the complaint referred to the Panel and outside the tasks assigned to dispute settlement panels under the Agreement.

“In examining these requests, the Panel first noted that, as instructed in its terms of reference, it had given Norway and the United States full opportunity to develop a mutually satisfactory solution. The Panel also noted that nothing prevented the two governments from negotiating at any time a mutually satisfactory solution that took into account the lost opportunities of United States’ suppliers, provided such solution was consistent with their obligations under this and other GATT agreements. The issue was whether the Panel should recommend this and further recommend that the Committee be prepared to authorise the withdrawal of benefits under the Agreement from Norway if such a solution were not negotiated.

“The Panel noted that the United States had indicated that it was not asking the Panel to recommend the negotiation of compensation for past losses. However, if this was not the case, it was not evident to the Panel what it was being asked to recommend that Norway negotiate with the United States. Clearly the ‘lost opportunities’ referred to were past opportunities and the remedial action that might be negotiated taking into account these lost opportunities would have to be in the future and therefore in all probability compensatory. The request concerning withdrawal of benefits also confirmed to the Panel that the practical effect of the recommendations sought by the United States would be to invite Norway to offer compensation, in one form or another, to the United States for past losses. Given that the United States had indicated that this was not what it was seeking, the Panel had some difficulty in responding to this request, despite having made efforts to explore its implications with the parties.

---

<sup>161</sup>L/5047, adopted on 10 November 1980, 27S/98.

<sup>162</sup>L/5198, adopted on 22 February 1982, 29S/91.

<sup>163</sup>L/6491 and L/6513, both adopted on 22 June 1989, 36S/93 and 36S/135.

<sup>164</sup>DS18/R, adopted on 19 June 1992, 39S/128, 154, paras. 7.1-7.2 (noting in para. 7.1 that “The Panel noted that Brazil requested a general ruling on the matter in dispute, but did not request the Panel to make a specific recommendation to the CONTRACTING PARTIES”).

“Moreover, the Panel observed that, under the GATT, it was customary for panels to make findings regarding conformity with the General Agreement and to recommend that any measures found inconsistent with the General Agreement be terminated or brought into conformity from the time that the recommendation was adopted. The provision of compensation had been resorted to only if the immediate withdrawal of the measure was impracticable and as a temporary measure pending the withdrawal of the measures which were inconsistent with the General Agreement ... Questions relating to compensation or withdrawal of benefits had been dealt with in a stage of the dispute settlement procedure subsequent to the adoption of panel reports.

“The Panel then considered whether there were reasons that would justify dispute settlement panels under the Agreement on Government Procurement differing from the above practice under the General Agreement. In this respect, the Panel noted the argument of the United States that, because benefits accruing under the Agreement were primarily in respect of events (the opportunity to bid), rather than in respect of trade flows, and because government procurement by its very nature left considerable latitude for entities to act inconsistently with obligations under the Agreement in respect of those events even without rules or procedures inconsistent with those required by the Agreement, standard panel recommendations requiring an offending Party to bring its rules and practices into conformity would, in many cases, not by themselves constitute a sufficient remedy and would not provide a sufficient deterrent effect.

“In considering this argument, the Panel was of the view that situations of the type described by the United States were not unique to government procurement. Considerable trade damage could be caused in other areas by an administrative decision without there necessarily being any GATT inconsistent legislation, for example in the areas of discretionary licensing, technical regulations, sanitary and phytosanitary measures and subsidies. Moreover, there had been cases where a temporary measure contested before the GATT had been lifted before a Panel had been able to report.

“The Panel also believed that, in cases concerning a particular past action, a panel finding of non-compliance would be of significance for the successful party: where the interpretation of the Agreement was in dispute, panel findings, once adopted by the Committee, would constitute guidance for future implementation of the Agreement by Parties.

“Moreover, the Panel was not aware of any basis in the Agreement on Government Procurement for panels to adopt with regard to the issues under consideration a practice different from that customary under the General Agreement, at least in the absence of special terms of reference from the Committee.

“In the light of the above, the Panel did not consider that it would be appropriate for it to recommend that Norway negotiate a mutually satisfactory solution with the United States that took into account the lost opportunities of United States companies in the procurement or that, in the event that such a negotiation did not yield a mutually satisfactory result, the Committee be prepared to authorise the United States to withdraw benefits under the Agreement from Norway with respect to opportunities to bid of equal value to the Trondheim contract. The Panel had recognised, however, that nothing prevented the United States from pursuing these matters further in the Committee or from seeking to negotiate with Norway a mutually satisfactory solution provided that it was consistent with the provisions of this and other GATT agreements.”<sup>165</sup>

See also the discussion of panel recommendations of compensation in the 1989 Panel Report on the complaint of Chile with respect to “EEC - Restrictions on Imports of Dessert Apples”, cited on page 682, and the Secretariat Notes on this subject cited on page 683.

(c) *Recommendations with respect to “non-violation” complaints under Article XXIII:1(b)*

During discussions on the Charter dispute settlement provisions at the Geneva session of the Preparatory Committee, it was stated that, in case of recommendations affecting otherwise lawful conduct, member states “are under no specific and contractual obligations to accept those Recommendations”.<sup>166</sup>

<sup>165</sup>GPR/DS.2/R, adopted on 13 May 1992, paras. 4.17-4.26.

<sup>166</sup>EPCT/A/PV/5, p. 16.

The 1950 Report of the Working Party on “The Australian Subsidy on Ammonium Sulphate” notes as follows:

“In making this recommendation the working party wishes to draw attention to one point of particular importance. There is in their view nothing in Article XXIII which would empower the CONTRACTING PARTIES to require a contracting party to withdraw or reduce a consumption subsidy such as that applied by the Government of Australia to ammonium sulphate, and the recommendation made by the working party should not be taken to imply the contrary. The ultimate power of the CONTRACTING PARTIES under Article XXIII is that of authorizing an affected contracting party to suspend the application of appropriate obligations or concessions under the General Agreement. The sole reason why the adjustment of subsidies to remove any competitive inequality between the two products arising from subsidization is recommended is that, in this particular case, it happens that such action appears to afford the best prospect of an adjustment of the matter satisfactory to both parties”.<sup>167</sup>

The 1952 Panel Report on “Treatment by Germany of Imports of Sardines”, concerning the treatment of certain imports relative to tariff concessions negotiated by Norway in the Torquay Round, provides that “... the Panel suggests to the CONTRACTING PARTIES that it would be appropriate for the CONTRACTING PARTIES to make a recommendation to Germany and Norway in accordance with the first sentence of paragraph 2 of Article XXIII. This recommendation should aim at restoring, as far as practicable, the competitive relationship which existed at the time when the Norwegian Government negotiated at Torquay and which that Government could reasonably expect to be continued”.<sup>168</sup> The Recommendation of 31 October 1952 on the “Complaint by Norway concerning the Treatment by Germany of Imports of preparations of Clupea Sprattus and Clupea Harengus” provides:

“*Having Investigated* in accordance with Article XXIII the complaint of Norway concerning the treatment by Germany of imports of preparations of Clupea sprattus and Clupea harengus,

...

“*Having Concluded* that the evidence produced was not such as to warrant a finding that the measures taken by the German Government regarding the treatment of preparations of Clupea pilchardus were inconsistent with the provisions of Article I paragraph 1 and Article XIII paragraph 1 of the General Agreement, and

“*Having Found*, however, that as a result of these measures the value of the tariff concession obtained by Norway has been impaired,

The CONTRACTING PARTIES

“*Recommend* that the Government of the Federal Republic of Germany consider ways and means to remove the competitive inequality between the preparations of Clupea pilchardus and those of other varieties of the Clupeoid family which may, in practice, exist as a result of the changes introduced in 1951 and 1952 in the treatment of preparations of Clupea pilchardus as regards the imposition of import duties and taxes and as regards the relaxation of quantitative restrictions on imports, and consult with the Government of Norway with respect to the results of their consideration, and that the two parties report to the CONTRACTING PARTIES not later than the opening day of the Eighth Session”.<sup>169</sup>

The report of the reconvened Panel on “Uruguayan Recourse to Article XXIII” on its examination in 1964 notes in respect of the previous report by the same Panel, adopted on 16 November 1962:

“In dealing with the first group of Uruguayan applications under Article XXIII:2 in 1962, the Panel had been unable to find nullification or impairment under the General Agreement in respect of a large number of items. In many of such cases the contracting party concerned was nevertheless urged to remove the

<sup>167</sup>GATT/CP.4/39, adopted on 3 April 1950, II/188, 195, para. 16.

<sup>168</sup>G/26, adopted on 31 October 1952, 1S/53, 59, para. 18.

<sup>169</sup>1S/30-31.

measure in question or any adverse effect which it might have on Uruguayan exports. The Panel was now informed by certain contracting parties that they had been able to take action in this direction".<sup>170</sup>

The 1982 Report of the "Panel on Vitamins" concluded that "The Panel considers that the United States has not infringed its commitment under the General Agreement or under the ASP Chemical Products Understanding of 2 March 1979".<sup>171</sup> The Panel also concluded that the "European Economic Community ... had in the opinion of the Panel no reason to assume that the tariff treatment of feed-grade quality vitamins would be modified in such a way that imports into the United States would decrease to the extent experienced"<sup>172</sup>, and that "the Panel feels that in the light of the particular circumstances, the Council could invite the United States to advance the implementation of the Tokyo Round concession rate on feed-grade Vitamin B12 to such an extent that imported vitamins could again attain their traditional competitive position in the United States market".<sup>173</sup>

The 1989 Panel Report on the complaint of Chile with respect to "EEC - Restrictions on Imports of Dessert Apples" notes a claim of Chile regarding compensation related to non-violation nullification or impairment. Recalling the EEC's tariff concessions on apples, Chile argued that the restrictions in question, even if consistent with the EEC's GATT obligations, distorted the competitive relationship which would otherwise have prevailed between Chilean suppliers and other suppliers on the Community market. Chile argued that compensation was appropriate since of the other possible recommendations - withdrawal of the restrictions or retaliatory withdrawal of concessions - one was meaningless as the measures had lapsed on 31 August 1988 and the other was an undesirable last resort which would not be in Chile's interests. Chile requested that the Panel make a finding of "retroactive prejudice" calculated on the basis of the losses and lost opportunities to Chilean exporters which had been demonstrated to the Panel. Chile also requested that the Panel propose that the CONTRACTING PARTIES recommend to the EEC that it take positive measures to compensate Chile for this damage. One possibility for compensation would be an appropriate reduction in the EEC duty rate during the peak period for Chilean apple shipments. The EEC argued that the Panel's terms of reference did not allow it to go beyond the framework of Article XXIII:2, and create new obligations.<sup>174</sup>

"The Panel observed that it was customary for a panel examining complaints under paragraph 2 of Article XXIII to make a finding regarding nullification or impairment of benefits and to recommend the termination of measures found to be inconsistent with the General Agreement. It noted that there was no provision in the General Agreement obliging contracting parties to provide compensation, and that the Annex to the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance indicated that:

'... The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement.'

"The Panel further recalled that a 1965 Secretariat note discussed this issue in relation to residual quantitative restrictions affecting developing countries. This note indicated:

'... Where a proposal for compensation has been made, it would appear that it is open to the CONTRACTING PARTIES to make an assessment of the loss sustained ... and to make a recommendation that pending elimination of these restrictions the country applying such restrictions should consider the establishment of other appropriate concessions which would serve to compensate this loss. There are, however, two points which need to be noted in this connection. Firstly, any such recommendation under the provisions of the present Article XXIII can be implemented only to the extent that it proves acceptable to the contracting party to whom it is addressed. If such contracting party is not in a position to accept the recommendation, the final sanction must remain the authority for withdrawing equivalent obligations as provided in paragraph 2 of Article XXIII.

<sup>170</sup>L/2278, adopted on 3 March 1965, 13S/45, 48, para. 12.

<sup>171</sup>L/5331, adopted on 1 October 1982, 29S/110, 117, para. (h).

<sup>172</sup>*Ibid.*, para. (g).

<sup>173</sup>*Ibid.*, para. (h).

<sup>174</sup>L/6491, adopted on 22 June 1989, 36S/93, 120-121, paras. 10.2-10.4.

‘Secondly, the nature of the compensatory concessions and the items on which these are offered would have to be determined by the contracting party to whom the recommendation is directed and would have to be a matter of agreement between the parties concerned. It would not be possible for a panel or other body set up by the CONTRACTING PARTIES to adjudicate on the specific compensations that should be offered ...’

“The Panel endorsed the views contained in this note. It recognized that it would be possible for the EEC and Chile to negotiate compensation consistent with the provisions of the General Agreement; however the Panel did not consider that it would be appropriate for it to make a recommendation on this matter.”<sup>175</sup>

See also the Secretariat Note referred to immediately above, on “Compensation to Less-developed Contracting Parties for Loss of Trading Opportunities Resulting from the Application of Residual Restrictions”, done in preparation for the Ad-Hoc Working Group on Legal Amendments of the Committee of Trade and Development in 1965 (see further at page 764 below).<sup>176</sup> See also a 1989 Secretariat Note on “Compensation in the Context of GATT Dispute Settlement Rules and Procedures”.<sup>177</sup>

Paragraphs 156 and 157 of the 1990 Panel Report on “EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins” make the following findings and recommendations with respect to the non-violation nullification or impairment claims made:

“The Panel ... found that benefits accruing to the United States under Article II of the General Agreement in respect of the zero tariff bindings for oilseeds in the Community Schedule of Concessions were impaired as a result of the introduction of production subsidy schemes which operate to protect Community producers of oilseeds completely from the movement of prices of imports and thereby prevent the tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds. The Panel recommends that the CONTRACTING PARTIES suggest that the Community consider ways and means to eliminate the impairment of its tariff concessions for oilseeds.

“The Panel finally considered that, as the inconsistency with Article III:4 and the impairment of the tariff concessions arise from the same Community Regulations, a modification of these Regulations in the light of Article III:4 could also eliminate the impairment of the tariff concessions. The Panel therefore recommends that the CONTRACTING PARTIES take no further action under Article XXIII:2 in relation to the impairment of the tariff concessions until the Community has had a reasonable opportunity to adjust its Regulations to conform to Article III:4”.<sup>178</sup>

The 1992 Report of the Members of the Original Oilseeds Panel on “Follow-up on the Panel Report ‘EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins’” includes the following conclusions:

“With reference to paragraph 156 of the Oilseeds Panel Report, the present Panel finds that benefits accruing to the United States under Article II of the General Agreement in respect of the zero tariff bindings for oilseeds in the Community Schedule of Concessions continue to be impaired by the production subsidy scheme provided for in Council Regulation (EEC) No 3766/91.

“With reference to paragraph 157 of the Oilseeds Panel Report, the Panel considers that there is no reason for the CONTRACTING PARTIES to continue to defer consideration of further action in relation to the impairment of the tariff concessions.

“The Panel accordingly recommends that the Community should act expeditiously to eliminate the impairment of the tariff concessions - either by modifying its new support system for oilseeds or by renegotiating its tariff concessions for oilseeds under Article XXVIII. In the event that the dispute is not

<sup>175</sup> *Ibid.*, 36S/134, paras. 12.35-12.36.

<sup>176</sup> COM.TD/5, dated 2 March 1965.

<sup>177</sup> MTN.GNG/NG13/W/32, dated 14 July 1989.

<sup>178</sup> L/6627, adopted on 25 January 1990, 37S/86, 132, paras. 156-157.

resolved expeditiously in either of these ways, the CONTRACTING PARTIES should, if so requested by the United States, consider further action under Article XXIII:2 of the General Agreement".<sup>179</sup>

See also below at pages 695, 696 and 700 on the further follow-up to this panel report, as well as material under Article XXVIII on the subsequent invocation of Article XXVIII:4 by the EC.

*(d) Recommendations in the absence of a finding of either violation or non-violation nullification or impairment*

In the discussion at the June 1989 Council meeting of the Panel report on "United States - Trade Measures affecting Nicaragua"<sup>180</sup>, which has not been adopted, the representative of Nicaragua stated that the Panel report "could not be adopted unless complementary decisions were also taken. ... the Panel had been unable to fulfil its fundamental tasks under Article XXIII, namely: (a) to make findings as to whether or not the United States was complying with its obligations under the General Agreement ... and (b) to make findings as to whether the embargo nullified or impaired benefits accruing to Nicaragua under the General Agreement ... As the report explained, this had been due to the limitations imposed by the Panel's terms of reference. To adopt the report without any further decisions by the Council to redress this situation would create an extremely dangerous precedent. It would mean that the CONTRACTING PARTIES refused a contracting party's right to have its complaint examined in accordance with Article XXIII:2— a right which, in the case of the application of Article XXI, was recognized by the CONTRACTING PARTIES in the Decision of 30 November 1982".<sup>181</sup>

In Council discussion of the Panel Report on "United States - Restrictions on the Importation of Sugar and Sugar-containing Products applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions"<sup>182</sup>, in which the Panel did not find any inconsistency with the General Agreement and therefore did not propose any recommendations, the EC representative referred to the Council action on the Panel Report on "Spain - Measures concerning Domestic Sale of Soyabean Oil"<sup>183</sup>, and stated that "the Panel had not, indeed, made recommendations, but had merely offered a number of reasonings and conclusions. He wondered what the adoption of the report would mean ... and proposed that the Council take note of the report at hand. ... The representative of the United States said that the basic flaw in the proposal to merely take note of the Panel report on the ground that it contained no recommendation was that, should this approach be followed, it would imply that every time a complainant lost a case, the relevant report would not be adopted".<sup>184</sup> The Panel Report was adopted on 7 November 1990.

*(e) Time frame for implementation of recommendations or rulings*

At the Sixth Session in September 1951, the delegations of the Netherlands and of Denmark each submitted a complaint under paragraph 2 of Article XXIII regarding the July 1951 enactment by the United States of Section 104 of the Defense Production Act of 1951, which imposed quantitative restrictions and prohibitions on the importation of dairy products into the United States.<sup>185</sup> A number of other contracting parties also indicated that they had requested consultations under Article XXIII:1. The Chairman, summing up the initial discussion of this item at the Sixth Session, noted that "there was general agreement that Section 104 of the Defence Production Act was an infringement of Article XI of the General Agreement. That the provisions of this Article were contravened was accepted by the United States delegation, and, to rectify the situation, the executive branch of the United States Government was making serious efforts to get the repeal of that Section. Secondly, it was clear that if these efforts should fail to produce satisfactory results the matter would have to be considered under Article XXIII of the Agreement regarding impairment and nullification; this might involve withdrawals of concessions by other contracting parties; and it was hoped that it would not prove necessary ...".<sup>186</sup> At the end of the Sixth Session a Resolution was adopted which recognized that concessions had been nullified or impaired and that the import restrictions constituted an infringement of Article XI; recognized that "the circumstances are

<sup>179</sup>DS28/R, dated 31 March 1992, 39S/91, 118-119, paras. 90-92.

<sup>180</sup>L/6053, unadopted. See also C/W/506 (statement by Nicaragua on the Panel report), C/W/522 (communication from Nicaragua), C/W/524 (draft decision submitted by Nicaragua), C/W/525 (statement by certain Latin American contracting parties).

<sup>181</sup>C/M/234, p. 40, referring to Decision at 29S/23.

<sup>182</sup>L/6631, adopted on 7 November 1990, 37S/228.

<sup>183</sup>L/5142, noted by the Council on 3 November 1981, C/M/152, p. 7-19; see material at page 762 below.

<sup>184</sup>C/M/241, p. 15-16.

<sup>185</sup>Netherlands: GATT/CP.6/26 dated 19 September 1951; Denmark: GATT/CP.6/28 dated 21 September 1951.

<sup>186</sup>GATT/CP.6/SR.10, p. 9.

serious enough to justify recourse ... to Article XXIII paragraph 2” by the contracting parties that had suffered serious damage as a result; and “counsel[ed] the contracting parties affected, in view of the continuing determination of the United States Government to seek the repeal of Section 104 of the United States Defense Production Act and the high priority and urgency which it has stated it will give to further action to this end, to afford to the United States Government a reasonable period of time, as it has requested, in order to rectify the situation through such repeal ...”.<sup>187</sup> Concerning further events in this case, see the material below at pages 690, 693, 695 and 696.

Paragraph 22 of the 1979 Understanding indicates that recommendations by the CONTRACTING PARTIES under Article XXIII:2 are to be implemented “within a reasonable period of time”.<sup>188</sup> This obligation has been referred to by various contracting parties as “customary GATT practice”.<sup>189</sup>

Footnote 2 to paragraph (e) of the Illustrative List of Export Subsidies annexed to the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement provides *inter alia*, “Where measures incompatible with the provisions of paragraph (e) exist, and where major practical difficulties stand in the way of the signatory concerned bringing such measures promptly into conformity with the Agreement, the signatory concerned shall, without prejudice to the rights of other signatories under the General Agreement or this Agreement, examine methods for bringing these measures into conformity within a reasonable period of time”.

Paragraph (vii) of the 1982 Ministerial Decision provides that “.. Where a decision on the findings contained in a report calls for a ruling or a recommendation by the Council, the Council may allow the contracting party concerned a reasonable specified time to indicate what action it proposes to take with a view to a satisfactory settlement of the matter, before making any recommendation or ruling on the basis of the report”.

Paragraphs I(1) and (2) of the 1989 Improvements provide:

“1. Prompt compliance with recommendations or rulings of the CONTRACTING PARTIES under Article XXIII is essential in order to ensure effective resolution of disputes to the benefit of all contracting parties.

“2. The contracting party concerned shall inform the Council of its intentions in respect of implementation of the recommendations or rulings. If it is impracticable to comply immediately with the recommendations or rulings, the contracting party concerned shall have a reasonable period of time in which to do so.”

(f) *Implementation and other obligations under the General Agreement*

At the February 1988 Council meeting, in discussion of the Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”<sup>190</sup>, the representative of Australia cited “a history of bilateral negotiations outside GATT’s scope”, and sought advice from the Secretariat on “whether whatever action taken to implement the report would carry an inherent obligation to act fully within the provisions of the General Agreement, in particular, the obligation to take actions having an m.f.n. effect”. The Deputy Director-General, replying to Australia’s questions, “referred, on the first point, to paragraph 22 of the 1979 Understanding which indicated that the responsibility of the CONTRACTING PARTIES was to keep under review a matter which had been the subject of a recommendation or ruling. If such a recommendation, adopted by the Council, were not implemented, it remained open to the contracting party concerned to bring the matter to the CONTRACTING PARTIES for further action. Were the CONTRACTING PARTIES to make ‘suitable efforts’ on the basis of this referral by the contracting party bringing the case, such efforts could only be made with a view to finding an ‘appropriate solution’, for which only a solution within the terms of the General Agreement would qualify”.<sup>191</sup>

<sup>187</sup>Resolution of 26 October 1954 on “United States Import Restrictions on Dairy Products”, II/16, 17, adopted at GATT/CP.6/SR.27, p. 8.

<sup>188</sup>26S/214, para. 22.

<sup>189</sup>C/M/178, p. 3-4.

<sup>190</sup>L/6253, adopted on 2 February 1988, 35S/163.

<sup>191</sup>C/M/217, p. 21-22.

g) *Compensation as a temporary measure pending implementation of recommendations or rulings*

During the same discussion referred to immediately above, the representative of Australia asked for Secretariat advice on the question "... if, at some point in the implementation of this report, the question arose of compensation as a means of implementation, whether the following terms of paragraph 4 of the Annex to the 1979 Understanding would fully apply: 'The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement'". The Deputy Director-General stated in reply that "his understanding was that it was clearly preferable that a solution mutually acceptable to the parties could be reached before the matter became the subject of a decision by the Council or the CONTRACTING PARTIES. Were that not to be the case, the CONTRACTING PARTIES' action following consideration of the matter and the adoption of any recommendations would be directed, as paragraph 4 of the Annex stated, to securing the 'withdrawal of the measures concerned', and were that not possible, to providing for compensatory adjustment until the withdrawal became possible".<sup>192</sup>

The 1990 Panel Report on "United States - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions" notes that the EEC had claimed that restrictions on imports of sugar-containing products were inconsistent with Article XI even whether or not they met the terms of the waiver concerned, that the waiver simply suspended the obligation to implement provisions of the General Agreement, that these restrictions nullified or impaired benefits accruing to the EEC under the General Agreement, and that the EEC was entitled to compensation from the US pending the withdrawal of these restrictions.

"... the Panel noted that Article XXIII:1(b) applies whether or not the measure at issue conflicts with the General Agreement and that, therefore, the question of whether a measure inconsistent with Article XI:1 remains inconsistent with the General Agreement even though covered by a waiver cannot, by itself, determine whether it nullifies or impairs benefits accruing under the General Agreement within the meaning of that provision. ...

"The Panel further examined whether the EEC had provided a detailed justification for its claim that the United States owes compensation for its actions under the Waiver. As pointed out in a previous panel report adopted by the CONTRACTING PARTIES, there is no provision in the General Agreement obliging contracting parties to provide compensation (L/6491, page 48). Paragraph 4 of the Annex to the Understanding on Dispute Settlement which the EEC invokes as a basis for its claim gives contracting parties the possibility to offer compensation as a temporary measure when the immediate withdrawal of a measure found to be inconsistent with the General Agreement is impracticable. A contracting party might, in conformity with that provision, choose to grant compensation to forestall a request for an authorization of retaliatory measures under Article XXIII:2, but the Understanding does not oblige it to do so. The Panel therefore considered that the EEC did not provide the required justification for its claim that the alleged nullification or impairment entitles it to compensation by the United States."<sup>193</sup>

(h) *Multilateral surveillance of implementation*

Paragraph 22 of the 1979 Understanding provides:

"The CONTRACTING PARTIES shall keep under surveillance any matter on which they have made recommendations or given rulings".

Paragraph (viii) of the 1982 Ministerial Decision provides:

"... In furtherance of the provisions of paragraph 22 of the Understanding the Council shall periodically review the action taken pursuant to such recommendations. The contracting party to which such a

<sup>192</sup>*Ibid.*

<sup>193</sup>L/6631, adopted on 7 November 1990, 37S/228, 262, paras. 5.21-5.22; reference is to 1989 panel report on EEC apple restrictions (see p. 682).

recommendation has been addressed, shall report within a reasonable specified period on action taken or on its reasons for not implementing the recommendation or ruling by the CONTRACTING PARTIES”.

In compliance with this paragraph and with paragraph (ii) of the same 1982 Decision, the Director-General presented to the Council on 9 March 1983 “a full report on the state of the panels presently in operation”.<sup>194</sup> The Director-General thereafter has submitted such reports to the Council every six months, in June and November. In his report to the Council in June 1985, the Director-General noted that at the meeting of the Council on 12 March 1985,<sup>195</sup> it had been suggested that he should include in his regular reports some remarks on the implementation of panel recommendations. Since 1985, the Director-General’s semi-annual report to the Council on the status of work in panels has included a discussion of the status of implementation of panel reports.<sup>196</sup>

Paragraph I.3 of the 1989 Improvements provides:

“The Council shall monitor the implementation of recommendations or rulings adopted under Article XXIII:2. The issue of implementation of the recommendations or rulings may be raised at the Council by any contracting party at any time following their adoption. Unless the Council decides otherwise, the issue of implementation of the recommendations or rulings shall be on the agenda of the Council meeting after six months following their adoption and shall remain on the Council’s agenda until the issue is resolved. At least ten days prior to each such Council meeting, the contracting party concerned shall provide the Council with a status report in writing of its progress in the implementation of the panel recommendations or rulings”.

Discussions of implementation of panel reports have been held on numerous occasions since 1989. In July 1992 the Council agreed that its Chairman would hold consultations on the handling of such discussions in Council meetings. In March 1993, the Chairman announced that his consultations had shown that from a purely procedural point of view, the scope of the 1989 Decision did not extend to panel reports which predated it and, consequently, that they should not be listed or considered under this item on the Council’s agenda. It had been pointed out, in this connection, that contracting parties retained the right to raise any issues related to those panel reports under separate agenda items. It had therefore been understood that this item would continue to appear on the agenda in its present form.<sup>197</sup>

(i) *Proceedings to examine implementation of particular panel reports*

In 1962 the CONTRACTING PARTIES made recommendations to seven contracting parties on adopting the Report of the Panel on “Uruguayan Recourse to Article XXIII.” The decision in question provides: “As a part of these recommendations the contracting parties concerned were asked to report by 1 March 1963 on action taken to comply with the recommendations or on any other satisfactory adjustment, such as the provision of suitable concessions acceptable to Uruguay. If by that date any recommendation has not been carried out and no satisfactory adjustment has been effected, the circumstances will be deemed to be ‘serious enough’ to justify action under the penultimate sentence of paragraph 2 of Article XXIII and Uruguay will be entitled immediately to request authority to suspend obligations or concessions”.<sup>198</sup> In 1963, this Panel was reconvened at the request of Uruguay, and the Uruguayan delegation requested that it consider the replies received from the seven countries and make a recommendation on the degree of compliance with the CONTRACTING PARTIES’ recommendations.<sup>199</sup>

Paragraph 22 of the 1979 Understanding provides:

“... If the CONTRACTING PARTIES’ recommendations are not implemented within a reasonable period of time, the contracting party bringing the case may ask the CONTRACTING PARTIES to make suitable efforts with a view to finding an appropriate solution”.

---

<sup>194</sup>C/M/166, p. 17.

<sup>195</sup>C/M/186.

<sup>196</sup>C/124, C/136, C/139, C/141, C/148, C/152, C/156, C/160, C/167, C/170, C/172, C/175, C/178, C/180, C/181, C/182, C/183, C/186, C/186/Corr.1.

<sup>197</sup>C/M/262, p. 13.

<sup>198</sup>11S/56, Recommendation of 16 November 1962.

<sup>199</sup>L/2074, adopted on 3 March 1965, 13S/35, 37, para. 6.

Paragraph (viii) of the 1982 Ministerial Decision, referred to directly above, further provides: "... The contracting party bringing the case may also ask the CONTRACTING PARTIES to make suitable efforts with a view to finding an appropriate solution as provided in paragraph 22 of the Understanding".

The Panel Report on "United States Tax Legislation (DISC)"<sup>200</sup>, adopted in December 1981, examined provisions in US tax law providing for deferral of taxes on a portion of income from export sales when such income was held in a "Domestic International Sales Corporation" (DISC). The Panel found that there was a *prima facie* case of nullification or impairment of benefits. During Council discussion in November 1984 of the US Foreign Sales Corporation Act enacted in response to this panel report, paragraph 22 of the 1979 Understanding was invoked in support of a request for plurilateral consultations to examine the question of the taxes which had been deferred under the DISC legislation and which this new legislation had now forgiven. The representative of the United States objected to the establishment of a plurilateral follow-up review pursuant to paragraph 22 of the 1979 Understanding and said

"that the Community was suggesting that Article XXIII somehow required payment of some kind of back damages, and pointed out that this Article promoted prospective remedies. The FSCA was the response to the DISC Panel report".<sup>201</sup>

At the Council meeting in January 1985 "the Community remained convinced that paragraph 22 of the 1979 Understanding ... provided for the type of consultation that it was requesting [but] in view of the US attitude, decided to follow the procedures adopted on 10 November 1958 under Article XXII on questions affecting the interests of a number of contracting parties (BISD 7S/24)".<sup>202</sup>

The Report of the Members of the Original Oilseeds Panel on "Follow-up on the Panel Report 'EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins'" notes, concerning the background of their work in 1992:

"Following discussions regarding the follow-up on the Oilseeds Panel Report at previous meetings of the Council, the United States proposed at the Council meeting on 8 October 1991 that the original Oilseeds Panel be reconvened for the purpose of assisting the CONTRACTING PARTIES in determining whether measures being taken by the European Economic Community (the Community) would bring its regulations into GATT conformity and would eliminate the impairment of the Community's tariff concessions on oilseeds. Following further discussions in the Council and informal consultations, the CONTRACTING PARTIES at their Forty-Seventh Session reached an agreement on 3 December 1991 (SR.47/1 and DS28/1 refer) under which the members of the original Oilseeds Panel were reconvened to begin work on the basis of document W.47/22 which provides as follows:

'Paragraph I.3 of the "Improvements to the GATT Dispute Settlement Rules and Procedures," adopted 12 April 1989 (BISD 36S/61), provides that the Council shall monitor the implementation of recommendations and rulings adopted under Article XXIII:2. Acting pursuant to this provision, the CONTRACTING PARTIES hereby request the Director-General to reconvene the members of the Panel on European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, adopted on 25 January 1990 (BISD 37S/86), for the purpose of examining whether the measures taken by the European Community in Council Regulation (EEC) 3766/91 of 12 December 1991, establishing a support system for producers of soya beans, rapeseed, colzaseed and sunflowerseed, comply with the recommendations and rulings, as expressed in the Conclusions (paragraphs 155-157), of the Oilseeds Panel Report as adopted on 25 January 1990. The original Panel Members shall provide such findings as will assist the CONTRACTING PARTIES within 90 days of this decision'".<sup>203</sup>

<sup>200</sup>L/4422, adopted on 7 December 1981, 23S/98.

<sup>201</sup>C/M/183, p. 77.

<sup>202</sup>C/M/185, p. 4. See request for consultations at L/5774 (communication dated 18 January 1985); see also Article XXII in this Index for these procedures.

<sup>203</sup>DS28/R, dated 31 March 1992, 39S/91, 92, para. 3.

The “Introductory Comments” delivered by the Chairman of this body at the first meeting with the parties on 3-4 February 1992, which are attached to this report, indicate that

“... the Members of the original Panel have been reconvened for a specific purpose and not, for example, to re-try the whole case ab initio, or to pass judgement on the consistency of the new Community support system for oilseeds in relation to provisions of the General Agreement other than those that were directly relevant to the original Panel’s reasoning and conclusions ...

“In these circumstances we consider that the Community is required in these proceedings to demonstrate that the measures it has taken satisfy the ruling relating to Article III:4 in paragraph 155 of the Oilseeds Panel Report; and that, in relation to the ruling in paragraph 156 of that report, as qualified by paragraph 157 thereof, the Community would be expected to demonstrate, if this is what the Community is asserting, that the measures it has taken have in fact also eliminated the impairment of concessions as found by the original Panel. In other words, if the assertion of the Community is that the impairment of concessions as found by the original Panel has been eliminated, then this body would expect the Community to substantiate its assertion because this is a matter which has a bearing on the matters to be examined by this body and on the nature of the findings it is required to make in terms of its mandate”.<sup>204</sup>

For the conclusions of this body, see page 683 above.

**(5) “may consult with ... the Economic and Social Council of the United Nations and with any appropriate intergovernmental organization ... where ... necessary”**

During the Second Session of the Preparatory Committee in Geneva, it was stated that consultations with other intergovernmental organizations might prove “necessary” before taking action in “a general deflationary situation” where the matter was not exclusively within the competence of the ITO and where remedial action might best be taken outside the field of activity of the ITO. It was noted in this connection that the inclusion of the words “if necessary” meant that “if the matter is exclusively one within the competence of the ITO itself, then the ITO is not called upon to consult with anybody”.<sup>205</sup>

As noted at page 669 above, the Report of the Review Working Party on “Organizational and Functional Questions” in 1955 notes, in connection with the rejection of a proposal to include in the General Agreement provisions for initiating consultations in urgent cases to prevent the international spread of a decline in employment, production or demand, that “... the kind of action [proposed] was already provided for in existing or proposed new Articles of the Agreement. It was clear, for example, that Article XXIII contemplates that any country which considers that a situation had arisen which impeded the attainment of any objective of the Agreement ... may refer the matter to the CONTRACTING PARTIES, which then would be obliged promptly to investigate the matter and to make appropriate recommendations. It was also clear that in such a case the CONTRACTING PARTIES would be free to enter into consultations with other interested international bodies which would be in a position to make a contribution to the problem presented”.<sup>206</sup>

In 1951, a working party was established under Article XXIII:2 to examine a United States complaint concerning Belgian restrictions on imports from the dollar area. The terms of the reference of the working party provided that “In its consideration of this matter, the Working Party should consult as necessary with the International Monetary Fund in accordance with Article XV of the General Agreement”.<sup>207</sup> The 1990 Panel Report on “Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes” notes that this Panel consulted with officials of the World Health Organization in accordance with the request of Thailand and the understanding between the parties to the dispute that “Thailand will make a request for the Panel to consult with competent international organizations on technical aspects such as the health effects of cigarette use and consumption ... if Thailand makes such a request, the Panel may so consult”.<sup>208</sup>

<sup>204</sup>*Ibid.*, 39S/126-127, Annex B, paras. 3 and 5.

<sup>205</sup>EPCT/A/PV/12, p. 15-16.

<sup>206</sup>L/329, adopted on 28 February, 5 and 7 March 1955, 3S/231, 241, para. 29.

<sup>207</sup>GATT/IC/SR.3, p. 20.

<sup>208</sup>DS10/R, adopted on 7 November 1990, 37S/200, 201, paras. 3 and 5, and 216-220, paras. 50-62.

**(6) “serious enough”**

As noted above on page 684, on 26 October 1951 at the Sixth Session, the CONTRACTING PARTIES adopted a Resolution on “United States Import Restrictions on Dairy Products” which provided *inter alia* that “concessions granted by the United States Government to contracting parties under the General Agreement have been nullified or impaired within the meaning of Article XXIII of the General Agreement ... a large number of contracting parties have indicated that they have suffered serious damage as a result of this nullification or impairment, and ... the circumstances are serious enough to justify recourse by those contracting parties to Article XXIII paragraph 2”. However, the Resolution urged the contracting parties affected, in view of the continuing determination of the United States Government to seek repeal of the import restrictions to afford to the United States “a reasonable period of time, as it has requested, in order to rectify the situation through such repeal”.<sup>209</sup>

During the Review Session of 1954-55, the Review Working Party on Organizational and Functional Questions considered various proposals for the amendment of Article XXIII. Denmark, Norway and Sweden proposed to add the following interpretative note to paragraph 2 of Article XXIII: “It is understood that the recommendation referred to in paragraph 2 should aim at a positive solution of the matter through the removal of the measure or measures in question or the provision of compensation for the damage suffered. As a rule retaliatory measures should not be authorized unless such recommendations have failed to lead to a solution within a reasonable period of time”.<sup>210</sup> The Report of the Working Party notes as follows:

“... The representative of the Scandinavian countries, when introducing the proposal, stressed that action by the CONTRACTING PARTIES under Article XXIII should be directed towards the maintenance of a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in the original situation; it was, therefore, desirable that resort should be had to retaliatory action only when all other possibilities had been explored.

“The proposal was withdrawn in the light of the agreement by the Working Party that, subject to the qualifications explained in the following paragraph, the principle set out in the proposed interpretative note conformed with both the intention of the Article and the practice the CONTRACTING PARTIES had hitherto followed in applying its provisions. The Working Party considered that the requirement in paragraph 2 of the Article that the circumstances must be ‘serious enough’ limits the possibility of authorizing a contracting party or parties to take appropriate retaliatory action to cases where endeavours to solve the problem through the withdrawal of the measures causing the damage, the substitution of other concessions, or some other appropriate action have not proved to be possible, and where there is considered to be a substantial justification for retaliatory action, as in cases in which such authorization appears to be the only means either of preventing serious economic consequences to the country for which a benefit has been nullified or impaired, or the only means of restoring the original situation”.<sup>211</sup>

The 1962 Panel Report on “Uruguayan Recourse to Article XXIII” notes that “the requirement that the situation must be serious enough limits the applicability of the provision to cases where there is nullification or impairment; it would at any rate be difficult to conceive a situation in which the suspension of concessions or obligations could be appropriate where nullification or impairment was not involved”.<sup>212</sup> The Recommendation adopted on 16 November 1962 with this Panel report provides in part:

“On adopting the report of the Panel on Uruguayan Recourse to Article XXIII, the CONTRACTING PARTIES, acting pursuant to paragraph 2 of that Article, made certain recommendations to the Governments of ...

“As part of these recommendations the contracting parties concerned were asked to report by 1 March 1963 on action taken to comply with the recommendations or on any other satisfactory adjustment,

<sup>209</sup>II/16-17. See discussion at Sixth Session GATT/CP.6/SR.10, press releases GATT/39 - GATT/43, and GATT/CP.6/SR.27; memoranda by the Netherlands and Denmark, GATT/CP.6/26 and GATT/CP.6/28; follow-up discussion in the Intersessional Committee, IC/SR.3; appointment of working party by Intersessional Committee, GATT/CP/129/Add.1.

<sup>210</sup>L/273 (Denmark, omits second sentence of proposed note), L/275 (Sweden), L/276 (Norway).

<sup>211</sup>L/327, adopted on 28 February, 5 and 7 March 1955, 3S/231, 250-251, paras. 62-63.

<sup>212</sup>L/1923, adopted on 16 November 1962, 11S/95, 99, para. 13.

such as the provision of suitable concessions acceptable to Uruguay. If by that date any recommendation has not been carried out and no satisfactory adjustment has been effected, the circumstances will be deemed to be 'serious enough' to justify action under the penultimate sentence of paragraph 2 of Article XXIII and Uruguay will be entitled immediately to request authority to suspend obligations or concessions ...".<sup>213</sup>

As regards this two-stage procedure, the Panel Report notes:

"In recommending this two-stage procedure, the Panel had principally in mind, once again, the requirement stated in Article XXIII:2 that the situation must be 'serious enough' before suspension can be authorized. It noted, as a report of the ninth session (BISD 3S/250-251) had made clear, that the action of authorization of suspension of concessions or obligations should never be taken except as a last resort; it also noted that the aim of Uruguay at this stage was to seek the prompt removal of the measures in question".<sup>214</sup>

The 1984 Panel Report on "United States Manufacturing Clause" found, *inter alia*, that a clause of the US copyright law was inconsistent with Article XI:1 and that this inconsistency could not be justified under the Protocol of Provisional Application. The Panel also found as follows:

"The Panel noted that the US had argued that, even if the Panel were to find nullification or impairment of a benefit accruing to the European Communities under the General Agreement, the circumstances would not be serious enough to justify authorization of a suspension of obligations or concessions under Article XXIII:2, since the European Communities had suffered no economic harm. The Panel decided not to examine this argument, because the complaining party, the European Communities, had not requested the Panel to make findings concerning the authorization of suspension of concessions under Article XXIII".<sup>215</sup>

The Panel Report notes that at the time of the panel proceeding, the clause was scheduled to expire on 1 July 1986. In a communication of 28 February 1986 the EEC noted its "deep concern that legislation has now been tabled in the United States Congress with a view not only to render the Clause permanent but even to expand its coverage. ... Were such legislation to be adopted, the United States would not only have failed to implement the Panel recommendation; it would knowingly have enacted new legislation in breach of its international obligations and commitments ...". The EEC requested authority under Article XXIII:2 "to suspend the application of concessions towards the United States equivalent to the economic damage caused to the Communities. The Community proposes that such suspension should become applicable in the event that further legislation inconsistent with GATT comes into effect in the United States in succession to the present Manufacturing Clause after its expiry ...".<sup>216</sup> In Council discussion in April 1986, the EC representative asked the Council to consider the possible extension of the clause, nearly two years after the Report had found it to be inconsistent with Article XI, as being "sufficiently serious ... to justify the suspension of concessions to the United States as provided in Article XXIII:2. This matter should be treated as a question of principle, irrespective of the volume of trade involved, because a contracting party would not only be failing to remove a measure found to be inconsistent with GATT but would be extending and enlarging the scope of the measure".<sup>217</sup> He further stated that the circumstances would be even more serious if the new legislation were to take effect.<sup>218</sup> The clause expired on 1 July 1986.<sup>219</sup>

At the October 1990 Council meeting, referring to the 1988 Panel Report on "Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies"<sup>220</sup> the United States stated that practices referred to in the Panel Report "remained in place despite Canada's obligation to bring them into GATT-conformity", and requested that "the Council decide, pursuant to Article XXIII:2, that the circumstances concerning this matter were serious enough to authorize the United States to suspend the application to Canada of appropriate concessions or other obligations". In addition, the United States sought

<sup>213</sup>11S/56.

<sup>214</sup>L/1923, adopted on 16 November 1962, 11S/95, 102, para. 21.

<sup>215</sup>L/5609, adopted on 15/16 May 1984, 31S/74, 91, para. 41.

<sup>216</sup>L/5968.

<sup>217</sup>C/M/196, p. 4.

<sup>218</sup>C/M/198, p. 9.

<sup>219</sup>C/M/201, p. 14.

<sup>220</sup>L/6304, adopted on 22 March 1988, 35S/37.

Council authorization to withdraw concessions in the event that Canada did not comply with the Panel's recommendations. The representative of the EEC, which was the applicant party in the 1988 proceeding, said that the Community "welcomed the fact that the United States, in defence of its trade interests, took recourse, for the first time, to the procedures of Article XXIII:2 to request authorization to suspend the application of US GATT concessions".<sup>221</sup> At the following Council meeting in November, the US representative stated that the United States would request establishment of a panel and would request that the 1988 Panel be reconvened and make findings on an expedited basis.<sup>222</sup>

(7) *"may authorize ... to suspend"*

At its meeting on 8-9 February 1989<sup>223</sup> the Council agreed to a suggestion by the European Communities that prior to the approval of the agenda, there be a general discussion on the subject of unilateral measures. After statements by a number of contracting parties on this subject, the Director-General commented that

"... His own conclusion was to remind governments that the cornerstone of cooperation under the GATT was their readiness to submit their differences of views as to the GATT-conformity of their measures to the process of consultation and dispute settlement provided by the General Agreement.

"He considered it his duty to refer to what the drafters of the Havana Charter had in mind when they had evolved this concept of cooperation through the use of the process of consultation and dispute settlement, and in particular in respect of the recourse to unilateral measures. He quoted Clair Wilcox, one of the drafters of the Havana Charter, who had said 'we have introduced [in the Havana Charter provisions corresponding to Article XXIII:2] a new principle in international economic relations. We have asked the nations of the world to confer upon an international organization the right to limit their power to retaliate. We have sought to tame retaliation, to discipline it, to keep it within bounds. By subjecting it to the restraints of international control, we have endeavoured to check its spread and growth, to convert it from a weapon of economic warfare to an instrument of international order'.<sup>224</sup>

"As for 'finger-pointing', he said that he had no fingers but he did have the General Agreement by which all contracting parties were bound. This Agreement said that discriminatory import tariffs were contrary to its Article I. There was no exception in the General Agreement which could justify discriminatory import tariffs imposed for the particular purpose of inducing another contracting party to bring its trade policies into conformity with the General Agreement. The CONTRACTING PARTIES could, however, - in particular where it was found that a contracting party was maintaining measures contrary to the General Agreement - be requested to authorize, in accordance with Article XXIII:2, the suspension of obligations towards a contracting party failing to observe its obligations under the General Agreement".<sup>225</sup>

(a) *Suspension of concessions under Article XXIII:2 and proposals therefor*

The 1979 Understanding Annex on customary practice provides in paragraph 4:

"... The last resort which Article XXIII provides to the country invoking this procedure is the possibility of suspending the application of concessions or other obligations on a discriminatory basis vis-a-vis the other contracting party, subject to authorization by the CONTRACTING PARTIES of such measures. Such action has only rarely been contemplated and cases taken under Article XXIII:2 have led to such action in only one case."

The instance referred to by this paragraph occurred in 1952. As noted above at pages 684 and 690, a Resolution adopted in the Sixth Session on "United States Import Restrictions on Dairy Products" determined that the circumstances were "serious enough", and required a follow-up report by the United States not later than

<sup>221</sup>C/W/646, C/M/245, p. 28-29.

<sup>222</sup>C/M/246, p. 14-17. Concerning the composition of this Panel see page 726 below; concerning the US request for expedited findings see page 757 below.

<sup>223</sup>C/M/228.

<sup>224</sup>The text refers to EPCT/A/PV/6, p. 4.

<sup>225</sup>Discussion on Unilateral Measures, C/163, p. 14.

the opening of the Seventh Session in 1952. During discussion in the Intersessional Committee between the Sixth and Seventh Sessions, the issue was raised whether this Resolution in itself provided authorization for the suspension of application of concessions under Article XXIII:2.

“The Chairman agreed with the interpretation of the Netherlands representative, that no contracting party was entitled to take retaliatory action towards the United States until an authorization had been obtained from the CONTRACTING PARTIES in terms of Article XXIII:2; the purpose of requiring such an authorization was to prevent contracting parties from taking unnecessary and excessive measures in retaliation. It was clear from the provisions of the Agreement that if the United States Government should fail to secure the repeal of the legislation in question and to re-open its market to European exporters of dairy products, the European contracting parties concerned would have to present their case to the CONTRACTING PARTIES and to request an authorization for retaliatory action ...”<sup>226</sup>

At the Seventh Session, having received the report that these import restrictions had not been repealed<sup>227</sup>, the CONTRACTING PARTIES agreed to establish a Working Party to examine the proposal made at the Sixth Session by the Netherlands for measures to be taken under Article XXIII:2.<sup>228</sup> On 8 November 1952 the CONTRACTING PARTIES adopted the Report of the Working Party and the Determination therein on “Netherlands measures of suspension of obligation to the United States”.<sup>229</sup> This Determination authorized the Netherlands to “suspend the application to the United States of their obligations under the General Agreement to the extent necessary to allow the Netherlands Government to impose an upper limit of 60,000 metric tons on imports of wheat flour from the United States during the calendar year 1953”.<sup>230</sup> See also the material at page 696 and following on how the amount of this suspension was determined.

At the same meeting the CONTRACTING PARTIES adopted a Resolution which confirmed the findings in the Sixth Session Resolution, recommended “notwithstanding any recourse that contracting parties may take to Article XXIII while these restrictions are in effect ... that the United States Government ... continue its efforts to seek the repeal of Section 104 of the Defense Production Act as the only satisfactory solution of this problem” and requested a further report by the United States no later than the opening of the Eighth Session.<sup>231</sup>

In 1962, a Panel Report on “French Import Restrictions” suggested that the CONTRACTING PARTIES recommend to the French Government the withdrawal of import restrictions which the Panel found were inconsistent with Article XI. The Panel also suggested

“that the CONTRACTING PARTIES recommend to the United States Government that it refrain, for a reasonable period, from exercising its right, under the procedures of paragraph 2 of Article XXIII, to propose suspension of the application of equivalent obligations or concessions”.<sup>232</sup>

On 8 September 1972, the United States made a proposal to suspend tariff concessions on articles of French origin covering trade of US\$12.2 million, because the French Government had not withdrawn import restrictions inconsistent with Article XI.<sup>233</sup> At the Council meeting of 19 September 1972, the United States stated that although some restrictions had been removed, full satisfaction had not been obtained, and it had not been possible to achieve agreement on elimination of remaining import restrictions within two years. The Chairman of the Council “reaffirmed the conclusions and recommendations of the CONTRACTING PARTIES, as set out in paragraphs 6 and 7 of the Panel Report of 14 November 1962, and in particular the entitlement of the United States to make a proposal regarding the suspension of the application to France of equivalent obligations and concessions, in

<sup>226</sup>GATT/IC/SR.3, p. 4.

<sup>227</sup>Report by the United States at L/19, Add.1 and Add.1/Corr.1.

<sup>228</sup>SR.7/10, p. 2-9; see Netherlands proposal, GATT/CP.6/26; see also Danish memorandum, GATT/CP.6/28.

<sup>229</sup>SR.7/16, p. 4-7; Working Party report, L/61.

<sup>230</sup>IS/33.

<sup>231</sup>“United States Import Restrictions on Dairy Products,” Resolution of 8 November 1952, IS/31; see L/59, draft resolution, adoption at SR.7/16 p. 4.

<sup>232</sup>L/1921, adopted on 14 November 1962, 11S/94, 95, para. 7.

<sup>233</sup>L/3744.

accordance with the provisions of paragraph 2 of Article XXIII".<sup>234</sup> See also the discussion of the amount of this proposed suspension at page 698 below.

In 1985 Canada referred to the Netherlands suspension and the US proposal of 1972 in support of its requests for the establishment of a Panel on "United States - Restrictions on Imports of Certain Sugar-containing Products" and for Council authorization of immediate suspensions of obligations on an interim basis pending the results of the Panel's deliberations.<sup>235</sup> The panel was established but the Council did not agree to authorize such a suspension.<sup>236</sup>

See the material above on page 691 concerning the request by the EEC in 1986 for suspension of concessions in the event of enactment of legislation extending the "manufacturing clause" of the United States copyright law. That request did not include a quantification of the amount nor a list of products with respect to which action would be taken.<sup>237</sup>

In connection with the follow-up on the 1987 Panel Report on "United States - Taxes on Petroleum and Certain Imported Substances", which was adopted in June 1987, the EEC requested on 11 March 1988 that the "Council authorize it, in accordance with the provisions of Article XXIII:2 of the General Agreement, to suspend the application to the United States of concessions equivalent to the economic injury caused to the Community". The request noted that "The Community and other contracting parties have repeatedly raised the question of the implementation by the United States of the Panel's recommendation, but without being able to obtain satisfactory results. Furthermore, the United States has not offered any compensation". The EEC later stated that in its view there was "an annual injury for the Community of US\$7.24 million" and circulated a list of products with respect to which the EEC proposed to levy an additional duty of 2.5 per cent ad valorem.<sup>238</sup> In connection with the same Panel Report, on 28 September 1989 Canada requested "the authority of the CONTRACTING PARTIES to suspend the application to the United States of concessions substantially equivalent to the economic injury caused to Canada due to the failure of the United States to comply with the conclusions of the panel report adopted by the Council in June 1987". The request included a figure for annual injury to Canada of US\$9.2 million, calculated by the same method as in the EEC request above, and a list of products with respect to which Canada proposed to apply an additional duty of 2.5 per cent ad valorem.<sup>239</sup> See further the discussion on these two requests below at page 698.

See also the reference above at page 691 to the 1990 request by the United States for suspension of concessions with respect to Canada in relation to the 1988 Panel Report on "Canada - Import, Distribution and Sale of Alcoholic Drinks by Provincial Marketing Agencies".<sup>240</sup>

At the 14 July 1992 Council meeting, the United States raised the issue of follow-up to the 1992 Panel Report on "Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies".<sup>241</sup> Citing measures adopted by the province of Ontario since the 18 February 1992 adoption of this Panel Report, the United States requested the Council to authorize the suspension of concessions with respect to Canada in an amount not to exceed US\$80.7 million.<sup>242</sup> The representative of Canada stated that

"Canada regarded the United States' request for authority to suspend concessions as unwarranted because the United States had not provided the Council with a sufficient basis on which to address the question. A proper request would call for an indication to the Council prior to its meeting of the specific action being proposed, i.e., the product coverage, the amount of trade involved and the tariff rates to be applied ... . Canada was prepared to have the Council agree to an expedited review of the specific measures raised by the United States, namely the increase in Ontario's environmental levy, the operation of the import monopoly and the pricing of beer imported into Ontario. This could be done along the lines of

---

<sup>234</sup>C/M/80, p. 5.

<sup>235</sup>C/M/186, p. 18-19.

<sup>236</sup>At the request of Canada, further proceedings of this panel were suspended; at the 12 November 1991 Council meeting Canada agreed to terminate the panel (C/M/253).

<sup>237</sup>L/5968.

<sup>238</sup>C/W/540 and Add.1.

<sup>239</sup>C/W/608.

<sup>240</sup>L/6304, adopted on 22 March 1988, 35S/37.

<sup>241</sup>DS17/R, adopted on 18 February 1992, 39S/27.

<sup>242</sup>C/M/258, p. 20.

paragraph 19.5 of the draft text on dispute settlement in the Uruguay Round Draft Final Act (MTN.TNC/W/FA) which called for an examination and decision within ninety days ... Retaliation without the authorization of the CONTRACTING PARTIES was clearly contrary to GATT obligations. Were the United States to disregard its obligations and retaliate against Canadian products without the authority of the Council, Canada reserved the right to respond accordingly".<sup>243</sup>

The United States representative responded that "The United States did not consider it acceptable for the GATT to respond to this continuing discrimination by suggesting that the appropriate mechanism was yet another panel report. Presumably, once another panel report had been issued, Ontario would make another minor change in its law in a way that would require the United States to come back to the GATT again".<sup>244</sup> On 27 July 1992, Canada informed the CONTRACTING PARTIES that on 24 July, the United States had imposed a surtax of 50 per cent ad valorem on imports of beer brewed or bottled in Ontario, affecting exports of over C\$99 million in 1991; and that Canada would impose a surtax of 50 per cent ad valorem on imports of beer brewed by two United States companies destined for the province of Ontario, affecting some C\$9.3 million in trade, to be removed upon removal of the United States surtax. Canada stated as well that it would accept the result of an expedited examination of the issues, that this examination could include the issue of damages, and that "Canada would not stand in the way of a properly constituted decision of the Council on suspension of concessions".<sup>245</sup> At the September 1992 Council meeting, there was a difference of views between Canada and the United States as to whether the issues being complained of had been subject to adjudication by a panel, and as to the desirability of the expedited review proposed by Canada. A number of other contracting parties expressed concern at the use of unilateral measures.<sup>246</sup>

At the November 1992 Council meeting, in discussion of the follow-up to the 31 March 1992 Report of the Members of the Original Oilseeds Panel on "Follow-up on the Panel Report on 'EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins'",<sup>247</sup> the United States requested under Article XXIII:2 "that the Chairman put the following proposition to the Council at the present meeting: 'The CONTRACTING PARTIES authorize the United States to suspend the application to the European Community of concessions under the General Agreement in the amount of US\$1 billion'.<sup>248</sup> In the discussion of this request the representative of the EEC stated that "The present situation in this dispute stemmed from the report of the reconvened Panel members, which had recommended that the Community act promptly to eliminate the impairment of its tariff concessions by modifying its oilseed subsidy scheme or by renegotiating its concessions under Article XXVIII. The Community had not been requested to combine the two alternatives, but had been allowed to choose between them; it had accordingly chosen the Article XXVIII procedure, with the Council's approval. The Council should therefore be consistent and not tamper with the Community's choice. He recognized that the Panel's recommendation had also stated that in the event that the dispute was not resolved expeditiously in either of these ways, the CONTRACTING PARTIES should, if requested by the United States, consider further action under Article XXIII:2. He did not challenge the United States' right to seek authorization for the withdrawal of concessions, but he could answer neither positively nor negatively".<sup>249</sup> See also above at page 683 and below at pages 696 and 700.

(b) *Procedures for decision on suspension under Article XXIII:2*

The records of the Seventh Session on the adoption on 8 November 1952 of the Working Party Report and the Determination therein on "Netherlands Measures of Suspension of Obligation to the United States"<sup>250</sup> (in connection with the United States' import restrictions on dairy products) note the statement of the United States representative that "His delegation was prepared to accept the decision but in view of its nature, wished to be recorded as abstaining on the taking of the decision" and of the Netherlands representative that "he also, for the

<sup>243</sup>*Ibid.*, p. 24.

<sup>244</sup>*Ibid.*, p. 25-26. See also Communication from the United States of 14 August 1992, DS17/8.

<sup>245</sup>DS17/7.

<sup>246</sup>C/M/259, p. 27-31. The surtaxes were removed by both sides upon the signature, on 5 August 1993, of a Memorandum of Understanding on Provincial Beer Marketing Practices (DS17/10, dated 28 September 1993).

<sup>247</sup>DS28/R, 39S/91.

<sup>248</sup>C/M/260, p. 15.

<sup>249</sup>*Ibid.*, p. 25.

<sup>250</sup>SR.7/16, p. 4-7; Working Party report, L/61. See also above at page 693.

same reasons as the United States delegation, would abstain from voting on the decision”.<sup>251</sup> The Report was adopted with the United States and Netherlands abstaining.<sup>252</sup>

Paragraph (x) of the 1982 Ministerial Declaration provides:

“The Parties to a dispute would fully ... participate and have their views recorded in the considerations of the further actions provided for under paragraphs (viii) and (ix) above. The CONTRACTING PARTIES reaffirmed that consensus will continue to be the traditional method of resolving disputes; however, they agreed that obstruction in the process of dispute settlement shall be avoided.<sup>1</sup> It is understood that decisions in this process cannot add to or diminish the rights and obligations provided in the General Agreement”.

Footnote 1 to this paragraph provides: “This does not prejudice the provisions on decision making in the General Agreement”.

At the November 1992 Council meeting at the close of the discussion on the follow-up to the 31 March 1992 Report of the Members of the Original Oilseeds Panel on “Follow-up on the Panel Report on ‘EEC - Payments and Subsidies Paid to Processors and Products of Oilseeds and Related Animal-feed Proteins’”,<sup>253</sup> the Chairman noted that “the Council had a specific request from the United States for an authorization to suspend concessions under Article XXIII:2, and he was unable to pronounce any consensus thereon”.<sup>254</sup>

**(8) “such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances”**

*(a) Basis of suspension under Article XXIII:2*

During negotiation of the General Agreement in 1947, it was stated that this phrase, taken from the nullification or impairment Article of the Charter, “clearly means ... the concession is suspended in respect of the trade of a particular Member ... If a particular Member takes action contrary to the Charter, other Members may suspend the application to the trade of that Member of concessions granted. That means that other countries should not be penalized because one country has failed to carry out its commitments”.<sup>255</sup>

See also the references at pages 693 and 698 to the 1972 proposal by the United States under Article XXIII to suspend concessions with respect to imports originating in France, and to the Chairman’s statement in response.

*(b) Determination of extent of suspension under Article XXIII:2*

The 1952 Report of the Working Party in the Seventh Session on “Netherlands Action under Article XXIII:2 to Suspend Obligations to the United States” provides as follows:

“... the Netherlands delegation requested the CONTRACTING PARTIES, in accordance with Article XXIII:2, to authorise the Netherlands to suspend the application to the United States of its obligations under the Agreement to the extent necessary to allow the Netherlands to impose an upper limit of 57,000 metric tons on imports of wheat flour from the United States during the calendar year 1953. This would constitute an annual reduction of approximately 15,000 metric tons from the rate of current imports from the United States.

“The Working Party was instructed by the CONTRACTING PARTIES to investigate the appropriateness of the measure which the Netherlands Government proposed to take, having regard to its equivalence to the impairment suffered by the Netherlands as a result of the United States restrictions.

<sup>251</sup>SR.7/16, p. 4 and 5.

<sup>252</sup>*Ibid.*, p. 7.

<sup>253</sup>DS28/R, 39S/91.

<sup>254</sup>C/M/260, p. 26.

<sup>255</sup>EPCT/TAC/PV/18, p. 42.

“The Working Party felt that the appropriateness of the measure envisaged by the Netherlands Government should be considered from two points of view: in the first place whether, in the circumstances, the measure proposed was appropriate in character, and secondly, whether the extent of the quantitative restriction proposed by the Netherlands Government was reasonable, having regard to the impairment suffered.

“Although the Working Party recognized that it was appropriate to consider calculations of the trade affected by the measures and countermeasures in question, it was aware that a purely statistical test would not, by itself, be sufficient and that it would also be necessary to consider the broader economic elements entering into the assessment of the impairment suffered. It was agreed therefore that it would be proper to take into account the contention of the Netherlands Government that the restrictions imposed by the United States had had serious effects on the efforts which were being made by the Netherlands to stimulate its exports to the United States not only of the products subject to the restrictions but of other products as well, and the further contention of the Netherlands Government that the restrictions had affected its efforts to overcome balance-of-payments difficulties with which the country was confronted.

“The Working Party recognised the difficulties inherent in fixing, with any real precision, the point at which any proposed measure could no longer be considered reasonable. ... the Working Party decided to recommend a measure somewhat different in magnitude form that proposed by the Netherlands.”<sup>256</sup>

The Chairman of the Working Party stated concerning its Report that he “wished to make it clear that the Working Party’s considerations had included various statistical calculations, the additional elements of the damage suffered, and finally, the purpose for which the measure was proposed. As stated in the report, this examination led to two conclusions - first that the measure proposed was not unreasonable, and secondly that the somewhat lower figure would be more appropriate in the sense best calculated to achieve the purpose for which the measure was taken, i.e. the removal of the United States restrictions. In his view the test of appropriateness under Article XXIII was a different concept from mere reasonableness, in that account must be taken of the desirability of limiting such action to that best calculated in the circumstances to achieve the objective.”<sup>257</sup>

The Determination of 8 November 1952 on “Netherlands Measures of Suspension of Obligations to the United States” provides

- “1. that the measure proposed by the Netherlands Government is appropriate in character, and
- “2. that, having regard to
  - “(i) the value of the trade involved,
  - “(ii) the broader elements in the impairment suffered by the Netherlands, and
  - “(iii) the statement of the Netherlands Government that its principal objective in proposing the measure in question is to contribute to the eventual solution of the matter in accordance with the objectives and spirit of the General Agreement,

the limitation by the Netherlands of imports of wheat flour from the United States to 60,000 tons in 1953 would be appropriate within the meaning of Article XXIII ...”.

and authorizes the Netherlands Government “to suspend the application to the United States of their obligations under the General Agreement to the extent necessary to allow the Netherlands Government to impose an upper limit of 60,000 metric tons on imports of wheat flour from the United States during the calendar year 1953”.<sup>258</sup>

The Report of the Panel on the “Uruguayan Recourse to Article XXIII” on its work when it was reconvened in 1963 notes that the Panel forwarded to the Uruguayan delegation its comments on reports made by the

<sup>256</sup>L/61, adopted on 8 November 1952, 1S/62, 63-64, paras. 1-6.

<sup>257</sup>SR.7/17, p. 1.

<sup>258</sup>1S/32-33.

contracting parties to which the recommendations had been addressed, and further notes: “The Panel stands ready to deal with any proposals which Uruguay, after further reflection, might wish to submit in terms of the penultimate sentence of Article XXIII:2, concerning the suspension of Uruguay’s obligations and concessions. In that event, the Panel expects promptly to recommend, for consideration and approval by the Council, whether, in each case, the proposed compensation was or was not appropriate in the circumstances”.<sup>259</sup>

As noted above at page 693, in 1972 the United States gave notice, as a follow-up to the 1962 Panel Report on “French Import Restrictions”, that as the Government of France had not withdrawn all of the restrictions found by that Panel to be inconsistent with Article XI, “in conformity with the recommendation of the decision of the CONTRACTING PARTIES on 14 November 1962, the United States has decided to exercise its right to propose suspension of equivalent concessions” on articles of French origin covering trade of US\$12.2 million.<sup>260</sup> At the Council meeting of 19 September 1972 the United States further described its proposal as follows:

“This amount covered only the impairment attributed to restrictions on agricultural products and the United States reserved its position as to the industrial products concerned. The amount was based on a conservative estimate of what, in the absence of quantitative restrictions, United States exports could be of three agricultural products: canned fruit, dried prunes and dried and dehydrated vegetables. No account had been taken of restrictions remaining on certain tomato products. The estimate was based on trends of United States exports in other European markets which were free from restrictions and also reflected United States export experience under quotas and French administrative arrangements. The United States delegation considered this a fair proposal which, in their view, should be acceptable to the Council”.

The Chairman pointed out that “in a case like this, the Council normally would wish to seek the recommendations of a panel of experts on the question of the appropriateness of the United States proposal, in particular as to the amount of trade coverage involved. ... he suggested that the two parties concerned should consult between themselves with a view to reaching agreement, in particular as regards the amount proposed by the United States”. The two parties so agreed.<sup>261</sup> No further action was taken by the Council, as a bilateral solution was reached.

Article 18.9 of the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII provides that “... If the Committee’s recommendations are not followed within a reasonable period, the Committee may authorize appropriate countermeasures (including withdrawal of GATT concessions or obligations) taking into account the nature and degree of the adverse effect found to exist. ...”<sup>262</sup>

The Panel Report on “United States - Taxes on Petroleum and Certain Imported Substances”<sup>263</sup> was adopted on 17 June 1987. The implementation of this Panel Report was raised in the Council and at the Session of the CONTRACTING PARTIES a number of times in 1987, 1988 and 1989 by the parties to the dispute and by other contracting parties. As noted above at page 694, in March and April 1988 the EEC requested the Council to authorize, in accordance with Article XXIII:2, the retaliatory withdrawal of equivalent concessions granted to the United States in respect of specific products.<sup>264</sup> At the May 1988 Council meeting, the United States representative, supported by a number of delegations, stated that his Government could not agree to the request and proposed that a working party be convened to examine it. In response to questions on calculation of the level of damages and the work of such a working party, the Legal Adviser to the Director-General stated that

“... there were a few provisions in the General Agreement where retaliation was foreseen. In two of those, Articles XIX and XXVIII, retaliation was defined as the withdrawal of substantially equivalent concessions. In the case of Article XXIII, the wording was wider, referring to measures determined to be appropriate in the circumstances, which meant that there was a wider leeway in calculating the retaliatory measures under Article XXIII than under Articles XIX or XXVIII ... . A working party in

---

<sup>259</sup>L/2074, adopted on 3 March 1965, 13S/35, 37, para. 6.

<sup>260</sup>L/3744.

<sup>261</sup>C/M/80.

<sup>262</sup>26S/77. See also a Secretariat Note on “Negotiating History of Article 18:9 and the treatment of reports of Working Parties and Panels under Article XXIII of the General Agreement”, SCM/W/48, dated 11 May 1983.

<sup>263</sup>L/6175, adopted on 17 June 1987, 34S/136.

<sup>264</sup>C/W/540 & Add.1.

the present case would examine whether the retaliatory measures proposed by the Community would be appropriate in the circumstances; that would include the question of how to calculate the damage and the compensation”.<sup>265</sup>

At the June 1988 Council meeting the Chairman stated that “there were essentially technical questions to be answered, and a working party might not be the most suitable way to address them”.<sup>266</sup> At its 22 September 1988 meeting, the Council discussed a Secretariat Note providing technical advice on, *inter alia*, the correctness of the Community’s assessment of damages.<sup>267</sup> The representative of Mexico remarked concerning the Secretariat Note that

“... from a legal point of view, the Secretariat had begun with the premise of the withdrawal of substantially equivalent concessions which, while applicable to the renegotiation of concessions under Article XXVIII of the General Agreement, did not correspond to the letter or spirit of Article XXIII:2, which was the applicable Article in dispute settlement cases ... . This question was of paramount importance in distinguishing between renegotiations of concessions consistent with GATT rules, and measures which were GATT-inconsistent. The latter implied a different response in order to re-establish provisionally the balance between a contracting party’s rights and obligations ... one had to take into consideration the purpose for which the action had been proposed, i.e. the elimination of the US measure”.<sup>268</sup>

The Deputy Director-General confirmed that

“... Article XXIII:2, unlike Article XXVIII, did not speak about equivalent concessions. Therefore, it was not really a question of authorizing the withdrawal of equivalent concessions as such. That was why the Secretariat had pointed out that Article XXIII did not require that the amount of retaliation should be equivalent, and that the CONTRACTING PARTIES might wish to determine what other factors to take into account in examining the appropriateness of the proposed retaliatory measure. All the Secretariat could do was to help in an examination of the appropriateness of the retaliatory measure to be taken by the Community. It could not, in the context of the advice given to the Community, take into account what would be the appropriate level of the retaliatory measures that might be authorized on a global basis. In this case, it was the Community which had indicated what retaliatory action it wished to take; any other contracting party which considered that its interests were affected had the possibility of indicating that - as all other means of solving the problem had failed in its view to provide results - this was the action it would propose to take. Then, of course, it would be for the CONTRACTING PARTIES in their best judgment to decide whether to authorize that action”.<sup>269</sup>

As an interim solution the United States proposed negotiations with affected contracting parties on the issue of compensatory adjustments pending the early elimination by Congress of the GATT-inconsistent aspects of the tax.

In connection with the September 1989 request by Canada for authorization to withdraw concessions in connection with the same matter (referred to above at page 694), Canada stated at the October 1989 Council meeting that “Canada believed that the Council possessed sufficient information to allow it to determine the two essential points: (1) that the circumstances were serious enough to warrant Canada’s proposed action, and (2) that Canada’s request was appropriate in the circumstances. One option for dealing with this matter would be to establish a small group, perhaps along the lines of a panel, to examine Canada’s request against these two criteria and to report quickly. Both Canada and the United States could present information to the group, but neither would participate in the group’s decision. This would be consistent with the only existing precedent, established in 1952, regarding a dispute between the Netherlands and United States. ... the term ‘small group’ had been used in the case of the 1952 precedent. The small group had operated in fact along the lines of a panel, having heard arguments from the two sides on the question of whether (1) the circumstances had been serious enough to warrant the action, and (2) the action proposed had been appropriate in the circumstances. The group had then made up its mind, in the absence of the two parties concerned, and had come up very quickly with its

---

<sup>265</sup>C/M/220, p. 36.

<sup>266</sup>C/M/222, p. 24.

<sup>267</sup>Spec(88)48.

<sup>268</sup>C/M/224, p. 17.

<sup>269</sup>C/M/224, p. 19.

recommendation ... ”.<sup>270</sup> At this and the October 1989 Council meeting the United States indicated that it could not accept such a group.<sup>271</sup>

See also above at page 694 concerning the proposal of Canada in 1992 for an expedited review to combine examination of measures cited by the United States in connection with the implementation of the 1992 Panel Report on “Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies”<sup>272</sup> and the issue of damages.

At the September 1992 Council meeting, in connection with the discussion of the follow-up to the 31 March 1992 Report of the Members of the Original Oilseeds Panel on “Follow-up on the Panel Report on ‘EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins’”,<sup>273</sup> the United States requested that the Council establish an arbitral body “solely to determine the total value to be ascribed to the nullification or impairment” which would be composed of the two surviving members of the original oilseeds panel and a third member to be selected by the Director-General. The arbitration panel would render its decision in thirty days and its determination would be binding on both the United States and the EEC.<sup>274</sup> The EEC representative noted in response that arbitration could only be voluntary and there was no obligation to accept such a procedure; the Community could not accept the proposed arbitration procedure, not only in the oilseeds case, but also more generally because of the GATT precedent it would create. After debate, the Chairman said that it had not been possible to build consensus for the arbitration proposal of the United States.<sup>275</sup>

## C. RELATIONSHIP BETWEEN ARTICLE XXIII AND OTHER GATT ARTICLES

### 1. General

As noted in Section III below, the Charter provisions corresponding to Article XXII (on consultations in respect of commercial policy measures) were located in the commercial policy chapter, Chapter IV, and the nullification and impairment provisions corresponding to Article XXIII applied to the entire Charter and were located in Chapter VIII. The Havana Reports record the following notification to other Committees of the Havana Conference by the Sixth Committee, which considered Chapter VIII:

“The Sixth Committee has discussed the question of the relationship between Chapter VIII and other parts of the Charter. In the light of its discussion the Committee wishes to make known to other Committees of the Conference that, in its opinion, where an article of the Charter other than those contained in Chapter VIII establishes procedures for action by a Member or by the Organization, action in accordance with that procedure should precede that provided for in Chapter VIII, but shall not, unless it is so specified, impair the rights of Members under Chapter VIII. However, it is the view of the Committee that if consultation or investigation has taken place under the provisions of another article, the Organization may regard such consultation or investigation as fulfilling, either in whole or in part, any similar procedural requirement in Chapter VIII.”<sup>276</sup>

### 2. Article VI

The report of the Havana Sub-Committee on the customs articles of the Charter notes that “It was ... the general view of the Sub-Committee that the point of chief concern to [certain countries] ... (*i.e.* adequate means for dealing with abuses by a Member unnecessarily levying anti-dumping or countervailing duties) was adequately covered by the general provisions of the Charter, particularly by Articles 41 [XXII] and 93 [XXIII]”.<sup>277</sup>

<sup>270</sup>C/M/236, p. 20-21.

<sup>271</sup>C/M/236, p. 21, C/M/237, p. 11-12.

<sup>272</sup>DS17/R, adopted on 18 February 1992, 39S/27.

<sup>273</sup>DS28/R.

<sup>274</sup>DS28/3.

<sup>275</sup>C/M/259, p. 35, 49.

<sup>276</sup>E/CONF.2/C.6/63, Havana Reports, p. 159.

<sup>277</sup>Havana Reports, p. 74, para. 22.

The 1955 Panel Report on “Swedish Anti-Dumping Duties” examined a Swedish Decree imposing a basic price scheme under which an anti-dumping duty was levied on imports of nylon stockings whenever the invoice price was lower than a minimum price fixed by the Swedish Government. The Italian government had argued that the Decree was inconsistent with Article VI because “the Swedish Government has not proved that the export of Italian nylon stockings has been carried out at dumping prices or that the conditions referred to in Article VI (for example, material injury to national products) have been fulfilled”.<sup>278</sup>

“The Panel ... considered the argument developed by the Italian representative to the effect that the Swedish Decree [on a basic price scheme for stocking imports] reversed the onus of proof since the customs authorities can act without being required to prove the existence of dumping practices or even to establish a *prima facie* case of dumping. ... it was clear from the wording of Article VI that no anti-dumping duties should be levied unless certain facts had been established. As this represented an obligation of the contracting party imposing such duties, it would be reasonable to expect that that contracting party should establish the existence of these facts when its action is challenged”.<sup>279</sup>

“... The Italian delegation contended that the main injury suffered by exporters was due to the fact that the Swedish Government was levying an anti-dumping duty on Italian stockings although it had not established that the export prices of the products were less than the normal value of those products as required in Article VI of the GATT. The Panel agreed that if the Swedish Decree was being applied in such a manner as to impose an anti-dumping levy in the absence of dumping practices, the Italian Government ... could claim an impairment of benefits.

“The Swedish representative stated that it appeared doubtful to his delegation that the CONTRACTING PARTIES could consider that question and that it was the right of the national authorities to decide whether dumping had really taken place. The Panel agreed that no provision of the General Agreement could limit in any way the rights of national authorities in that respect. But for the reason set forth in paragraph 15 above, it would be reasonable to expect from the contracting party which resorts to the provisions of Article VI, if such action is challenged, to show to the satisfaction of the CONTRACTING PARTIES that it had exercised its rights consistently with those provisions”.<sup>280</sup>

In the 1985 Panel Report on “New Zealand - Imports of Electrical Transformers from Finland”,

“The Panel ... considered the evidence put forward by both sides as to the appropriateness of the cost elements used by the New Zealand authorities in arriving at their decision that dumping had occurred. The Panel noted that this evidence was of a highly technical nature, especially because it related to complicated custom-built products. It also noted that Article VI did not contain any specific guidelines for the calculation of cost-of-production and considered that the method used in this particular case appeared to be a reasonable one. In view of this and having noted the arguments put forward by both sides as regards the costing of certain inputs used in the manufacture of the transformers, the Panel considered that there was no basis on which to disagree with the New Zealand authorities’ finding of dumping and proceeded to the question of whether the imports in question had caused or threatened to cause injury to the New Zealand transformer industry.

“The Panel noted the view expressed by the New Zealand delegation that the determination of material injury was a matter specifically and expressly reserved, under the terms of Article VI:6 (a), for the decision of the contracting party levying the anti-dumping duty. It also noted the contention that other contracting parties might inquire as to whether such a determination had been made, but that the latter could not be challenged or scrutinized by other contracting parties nor indeed by the CONTRACTING PARTIES themselves. The Panel agreed that the responsibility to make a determination of material injury caused by dumped imports rested in the first place with the authorities of the importing contracting party concerned. However, the Panel could not share the view that such a determination could not be scrutinized if it were challenged by another contracting party. On the contrary, the Panel believed that if a contracting party

<sup>278</sup>L/215, dated 29 July 1954.

<sup>279</sup>L/328, adopted on 26 February 1955, 3S/81, 85-86, para. 15.

<sup>280</sup>*Ibid.*, 3S/87-88, para. 22-23.

affected by the determination could make a case that the importation could not in itself have the effect of causing material injury to the industry in question, that contracting party was entitled, under the relevant GATT provisions, in particular Article XXIII, that its representations be given sympathetic consideration and that eventually, if no satisfactory adjustment was effected, it might refer the matter to the CONTRACTING PARTIES, as had been done by Finland in the present case. To conclude otherwise would give governments complete freedom and unrestricted discretion in deciding anti-dumping cases without any possibility to review the action taken in the GATT. This would lead to an unacceptable situation under the aspect of law and order in international trade relations as governed by the GATT".<sup>281</sup>

See also the discussion in the 1993 Panel Report on "United States - Measures Affecting Imports of Softwood Lumber from Canada".<sup>282</sup>

### 3. Articles XII and XVIII:B

The 1950 Report of the Working Party on "The Use of Quantitative Restrictions for Protective and Commercial Purposes"<sup>283</sup> notes that

"It appeared to the Working Party that insofar as these types of practice were in fact carried on for the [protective and commercial] purposes indicated above and were not justified under the provisions of Articles XII to XIV relating to the use of import restrictions to protect the balance of payments or under other provisions of the Agreement specifically permitting the use of import restrictions, they were inconsistent with the provisions of the Agreement, and such misuse of import restrictions might appropriately provide a basis for recourse to the procedures laid down in the Agreement for the settlement of disputes. Moreover, it was not particularly relevant to the Agreement whether such practices were determined unilaterally or in the course of bilateral negotiations".<sup>284</sup>

In 1952, the United States brought a complaint against Belgian import restrictions which discriminated against imports from the dollar area in order to avoid a Belgian surplus in intra-European trade; a panel was established and was authorized to consult with the International Monetary Fund under Article XV regarding the justification for such restrictions.<sup>285</sup>

In the "Uruguayan Recourse to Article XXIII" in 1962, the complaint of Uruguay included, *inter alia*, balance-of-payments measures maintained by Denmark, Finland, and Japan. In each instance, the Panel Report noted that "the Panel would recall the view of contracting parties, as expressed in the consultations under Article XII:4, that the Government of [Denmark/Finland/Japan] should endeavour to ensure that the quantitative restrictions maintained under Article XII did not have incidental protective effects which would render their removal difficult when [Denmark/Finland/Japan] no longer had need to have recourse to Article XII".<sup>286</sup>

In its Report to the Council reviewing its work in the period 1970-74, the Committee on Balance-of-Payments Restrictions noted with regard to import surcharges and import deposits applied for balance-of-payments reasons:

"The procedural assimilation of surcharges to import restrictions by the Committee does not, of course, change the rights of contracting parties affected by surcharges. The Committee, in some of its conclusions on surcharges re-affirmed the rights of affected countries by stating that the decision to take note by the Council would in no way preclude recourse to the appropriate provisions of the General Agreement by any contracting party which considered that any benefits accruing to it under Article II of the Agreement in respect of any bound item were nullified or impaired as a consequence of the surcharge".<sup>287</sup>

<sup>281</sup>L/5814, adopted on 18 July 1985, 32S/55, 67, paras. 4.3-4.4.

<sup>282</sup>SCM/162, adopted on 26 October 1993; see also communication from the Panel Chairman in SCM/163.

<sup>283</sup>GATT/CP.4/33 (Sales No. GATT/1950-3).

<sup>284</sup>*Ibid.*, para. 22.

<sup>285</sup>GATT/IC/7, GATT/IC/SR.3, p. 19-20. See also SR.7/11, SR.9/2.

<sup>286</sup>L/1923, adopted on 16 November 1962, 11S/95, Annexes E, F and J, at 11S/116 para. 4, 11S/119 para. 4, and 11S/133 para. 4.

<sup>287</sup>L/4200, paras. 40-42.

Paragraph 1 of the 1979 Declaration on “Trade Measures Taken for Balance-of-Payments Purposes” provides that “The procedures for examination stipulated in Articles XII and XVIII shall apply to all restrictive import measures taken for balance-of-payments purposes. ... The provisions of this paragraph are not intended to modify the substantive provisions of the General Agreement”.<sup>288</sup>

In the three parallel Panel Reports of 1989 on “Republic of Korea - Restrictions on Imports of Beef” Complaints by Australia<sup>289</sup>, the United States<sup>290</sup> and New Zealand:<sup>291</sup>

“The Panel examined Korea’s contention that its import restrictions ... were justified under the provisions of Article XVIII:B. The Panel noted Korea’s view that the compatibility with the General Agreement of Korea’s import restrictions could not be challenged under Article XXIII because of the existence of special review procedures in paragraphs 12(b) and 12(d) of Article XVIII:B, and the adoption by the CONTRACTING PARTIES of the results of the paragraph 12(b) reviews in the Balance-of-Payments Committee. The Panel decided first to consider whether the consistency of restrictive measures with Article XVIII:B could be examined within the framework of Article XXIII.

“The Panel considered the various arguments of the parties to the dispute concerning past deliberations by the CONTRACTING PARTIES on the exclusivity of special review procedures under the General Agreement. However, the Panel was not persuaded that any of these earlier deliberations in the GATT were directly applicable to the present dispute. Moreover, the Panel had a clear mandate to examine Korea’s beef import restrictions under Article XXIII. The Panel’s terms of reference, as agreed by Korea and [Australia/New Zealand/the United States], and approved by the Council, required the Panel, however, to examine the beef import restrictions ‘in the light of the relevant GATT provisions’, which included Article XVIII:B.

“The Panel examined the drafting history of Article XXIII and Article XVIII, and noted that nothing was said about priority or exclusivity of procedures of either Article. The Panel observed that Article XVIII:12(b) provided for regular review of balance-of-payments restrictions by the contracting parties. Article XVIII:12(d) specifically provided for consultations on balance-of-payments restrictions at the request of a contracting party where that party established a *prima facie* case that the restrictions were inconsistent with the provisions of Article XVIII:B or those of Article XIII, but the Article XVIII:12(d) provision had hitherto not been resorted to. In comparison, the wording of Article XXIII was all-embracing; it provided for dispute settlement procedures applicable to all relevant articles of the General Agreement, including Article XVIII:B in this case. Recourse to Article XXIII procedures could be had by all contracting parties. However, the Panel noted that in GATT practice there were differences with respect to the procedures of Article XXIII and Article XVIII:B. The former provided for the detailed examination of individual measures by a panel of independent experts whereas the latter provided for a general review of the country’s balance-of-payments situation by a committee of government representatives.

“It was the view of the Panel that excluding the possibility of bringing a complaint under Article XXIII against measures for which there was claimed balance-of-payments cover would unnecessarily restrict the application of the General Agreement. This did not preclude, however, resort to special review procedures under Article XVIII:B. Indeed, either procedure, that of Article XVIII:12(d) or Article XXIII, could have been pursued by the parties in this dispute. But as far as this Panel was concerned, the parties had chosen to proceed under Article XXIII”.<sup>292</sup>

Footnote 1 to the Uruguay Round Understanding on the Balance-of-Payments Provisions of the GATT 1994, which is incorporated into the GATT 1994, provides that “Nothing in this Understanding is intended to modify the rights and obligations of Members under Articles XII or XVIII:B of GATT 1994. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of restrictive import measures taken for balance-of-payments purposes.”

<sup>288</sup>L/4904, adopted 28 November 1979, 26S/205, 206, para. 1.

<sup>289</sup>L/6504, adopted on 7 November 1989, 36S/202.

<sup>290</sup>L/6503, adopted on 7 November 1989, 36S/268.

<sup>291</sup>L/6505, adopted on 7 November 1989, 36S/234.

<sup>292</sup>*Ibid.*, paras. 94-97, 116-119, and 110-113 respectively.

#### 4. Article XV

The Report of the Special Sub-Group on GATT/Fund Relations in the 1954-55 Review Session notes that there was a proposal, which the Sub-Group rejected as unnecessary, to add a note to Article XV:9(a) confirming the right to invoke Article XXIII with respect to exchange controls or exchange restrictions which were in accordance with the IMF Articles of Agreement.<sup>293</sup>

#### 5. Article XVIII:C

The Report of the Review Working Party on “Quantitative Restrictions” includes an agreed interpretation of Article XVIII concerning the application of Article XXIII with respect to measures concurred with by the CONTRACTING PARTIES under Sections C or D of Article XVIII.<sup>294</sup> The text of this interpretation appears at page 662 above.

The Panel Report on “Canada - Administration of the Foreign Investment Review Act” noted that “the Panel recognizes that in disputes involving less-developed contracting parties full account should be taken of the special provisions in the General Agreement relating to these countries (such as Article XVIII:C). The Panel did not examine the issues before it in the light of these provisions since the dispute only involved developed contracting parties”.<sup>295</sup>

#### 6. Article XIX

During the Fifth Session of the CONTRACTING PARTIES, during discussion of Czechoslovakia’s complaint concerning the United States’ Article XIX action on women’s fur felt hats and hat bodies, there was a discussion of whether this complaint should be considered in the framework of Article XIX or Article XXIII. Czechoslovakia declined to accept a proposed declaration that Czechoslovakia would be entitled to take action under Article XIX:3. Instead, a working party was established under Article XXIII to examine whether the United States action had conformed to the requirements of Article XIX:1.<sup>296</sup>

The Panel Report on “Norway’s Article XIX Action on Certain Textile Products” notes the factual background of this dispute, which involved introduction by Norway of import restrictions on textiles from Hong Kong, authorization of establishment of a panel under Article XXIII:2, subsequent invocation of Article XIX:1 by Norway, consultations under (*inter alia*) Article XIX:2, and a second decision to establish a panel under Article XXIII:2.<sup>297</sup> As Hong Kong stated to the Panel that it “was prepared to assume that Norway had the necessary justification for taking this action”, the Panel did not make a finding with respect to the invocation of Article XIX itself.<sup>298</sup>

During the March 1985 Council meeting, in connection with the discussion of proposed compensatory adjustments under Article XIX:3(a) by the EEC in response to a Canadian Article XIX action, Canada stated that it would seek a panel under Article XXIII to determine whether such compensatory adjustments were consistent with Article XIX:3(a); the issue was raised whether such a panel should be established under Article XIX:3(a) and not Article XXIII.<sup>299</sup>

#### 7. Article XX

In discussions of the article on exceptions to the commercial policy chapter of the Charter, in the London Session of the Preparatory Committee, it was stated in relation to Article 30 of the draft Charter [XXII and XXIII] that “one of the main objectives of Article 30 was to prevent evasion of the provisions of Chapter IV. If a

<sup>293</sup>L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 198, para. 8, referring to note proposed by UK reprinted at 3S/205.

<sup>294</sup>L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 188, para. 63; see also discussion of non-violation nullification or impairment relative to the draft Article XVIII:C, W.9/129.

<sup>295</sup>L/5504, adopted on 7 February 1984, 30S/140, 158, para. 5.2.

<sup>296</sup>GATT/CP.5/SR.22 and SR.23.

<sup>297</sup>L/4959, adopted on 18 June 1979, 27S/119, 121, para. 5.

<sup>298</sup>*Ibid.* 27S/125, para. 14(a).

<sup>299</sup>C/M/186, p. 4.

Member country used the exceptions of sub-paragraph (b) [XX(b)] as a means of protection, Article 30 provided that another Member might make representations to the ITO and so obtain satisfaction. It was almost impossible to draft exceptions which could not be abused, if good faith was lacking. The League of Nations had adopted an Article on the lines of Article 30, precisely because they had been unable to formulate exceptions which would exclude all possibility of abuse”.<sup>300</sup>

## 8. Article XXI

During discussions at the Geneva session of the Preparatory Committee in 1947, the provisions now contained in Article XXI were removed from the Article on general commercial policy exceptions and relocated in a separate exception (Article 94) at the end of the Charter. In this connection, the question was raised whether the dispute settlement provisions of Article 35 of the New York Draft [XXII/XXIII] would nevertheless apply. It was stated that “It is true that an action taken by a Member under Article 94 could not be challenged in the sense that it could not be claimed that a Member was violating the Charter; but if that action, even though not in conflict with the terms of Article 94, should affect another Member, I should think that that Member would have the right to seek redress of some kind under Article 35 as it now stands. In other words, there is no exception from the application of Article 35 to this or any other Article.”<sup>301</sup> The records of the Geneva discussions of the Preparatory Committee indicate that the representative of Australia withdrew its reservation on the inclusion of a reference to “fissionable materials” in Article 94 in the light of a statement that the provisions of Article 35 [XXIII] would apply to Article 94 [XXI].<sup>302</sup> The addition of a note to clarify that the provisions of paragraph 2 of Article 35 [XXIII:2] applied to Article 94 was rejected as unnecessary.<sup>303</sup>

At the Third Session in 1949, Czechoslovakia requested a decision under Article XXIII:2 as to “whether the Government of the United States had failed to carry out its obligations under the Agreement through its administration of the issue of export licences”.<sup>304</sup> The complaint was examined and rejected by a roll-call vote of 17 to 1 with 3 abstentions; see further under Article XXI.<sup>305</sup>

During the discussion in 1982 of trade restrictions affecting Argentina applied for non-economic reasons, the view was expressed “that the provisions of Article XXI were subject to those of Article XXIII:2”. Argentina reserved its rights under Article XXIII in respect of any injury resulting from trade restrictions applied in the context of Article XXI.<sup>306</sup> Paragraph 2 of the “Decision Concerning Article XXI of the General Agreement” of 30 November 1982 stipulates that “... when action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement”.<sup>307</sup>

The 1984 Panel Report on “United States - Imports of Sugar from Nicaragua” examined the action taken by the US government to reduce the share of the US sugar import quota allocated to Nicaragua and distribute the reduction in Nicaragua’s allocation to El Salvador, Honduras and Costa Rica. The Panel Report notes that “The United States stated that it was neither invoking any exceptions under the provisions of the General Agreement nor intending to defend its actions in GATT terms ... the action of the United States did of course affect trade, but was not taken for trade policy reasons.”<sup>308</sup>

“The Panel noted that the measures taken by the United States concerning sugar imports from Nicaragua were but one aspect of a more general problem. The Panel, in accordance with its terms of reference ... examined those measures solely in the light of the relevant GATT provisions, concerning itself only with the trade issue under dispute.”<sup>309</sup>

<sup>300</sup>EPCT/C.II/50, p. 6.

<sup>301</sup>EPCT/A/PV/33, p. 26-27.

<sup>302</sup>EPCT/A/PV/33, p. 29; see also EPCT/A/PV/33/Corr. 3.

<sup>303</sup>EPCT/A/PV/33, p. 27-29 and EPCT/A/PV/33/Corr.3.

<sup>304</sup>GATT/CP.3/SR.22, p. 9.

<sup>305</sup>GATT/CP.3/SR.22, p. 9; Decision of 8 June 1949 at II/28.

<sup>306</sup>C/M/157, p. 9; C/M/159, p. 14; C/M/165, p. 18.

<sup>307</sup>29S/24.

<sup>308</sup>L/5607, adopted on 13 March 1984, 31S/67, 72, para. 3.10.

<sup>309</sup>*Ibid.*, 31S/73, para. 4.1.

“... The Panel noted that the United States had not invoked any of the exceptions provided for in the General Agreement permitting discriminatory quantitative restrictions contrary to Article XIII. The Panel therefore did not examine whether the reduction in Nicaragua’s quota could be justified under any such provision.”<sup>310</sup>

The follow-up on this Panel report was discussed in the Council meetings of May and July 1984. The United States said that it “had not obstructed Nicaragua’s resort to GATT’s dispute settlement process; it had stated explicitly the conditions under which the issue might be resolved; and it recognized that Nicaragua had certain rights under Article XXIII which it had reserved and could continue to exercise”.<sup>311</sup> Nicaragua stated that it was aware of its rights under Article XXIII.

In Council discussion of Nicaragua’s request for the establishment of a panel on “United States - Trade Measures Affecting Nicaragua”, the representative of the United States stated that “while his delegation recognized that Article XXIII rights were not necessarily lost in all cases in which Article XXI was invoked, a panel had no power to address the validity of, or motivation for, invocation of Article XXI:(b)(3)”.<sup>312</sup> While a panel was established in that dispute, its terms of reference provided that the Panel would examine these measures “in the light of the understanding reached at the Council on 10 October 1985 that the Panel cannot examine or judge the validity or motivation for the invocation of Article XXI:(b)(iii) by the United States”.<sup>313</sup>

In the 1986 Panel Report on “United States - Trade Measures affecting Nicaragua”, which has not been adopted, the Panel noted the different views of the parties regarding whether the United States’ invocation of Article XXI(b)(iii) was proper, and concluded that this issue was not within its terms of reference. With regard to Nicaragua’s claim of non-violation nullification or impairment of GATT benefits by actions taken under Article XXI, the Panel decided not to propose a ruling.<sup>314</sup> When the Panel’s report was discussed by the Council in November 1986, the US representative stated that “Nullification or impairment when no GATT violation had been found was a delicate issue, linked to the concept of ‘reasonable expectations’. It was not simply a question of trade damage, since no one doubted the existence of trade damage. Applying the concept of ‘reasonable expectations’ to a case of trade sanctions motivated by national security considerations would be particularly perilous, since at a broader level those security considerations would nevertheless enter into expectations ... the Panel had acted wisely in refraining from a decision that could create a precedent of much wider ramifications for the scope of GATT rights and obligations ...”.<sup>315</sup> The representative of Nicaragua stated that her delegation could not support adoption of the report, *inter alia* because it could only be adopted once the Council was in a position to make recommendations.<sup>316</sup>

## 9. Article XXIV:4-9

During discussion in the Twelfth Session concerning the further examination of the Treaty of Rome, the representative of the Interim Committee for the Common Market and Euratom stated that “the Six drew the attention of the CONTRACTING PARTIES ... to the distinction which they made between, on the one hand, the discussions relevant to what they called an investigation as to whether the provisions of the Treaty were consistent with the provisions of paragraphs 5 to 9 of the Agreement and, on the other hand, the discussions which the CONTRACTING PARTIES would like to hold once the investigation had been completed. With regard to the latter discussions ... [the Six] could not accept any special procedures which would imply for them additional obligations which were not applied to the other contracting parties. In regard to the question under consideration, the provisions of Articles XXII and XXIII of the General Agreement should be sufficient for the holding of any consultations which the CONTRACTING PARTIES might desire”.<sup>317</sup>

The conclusions agreed at the Thirteenth Session concerning the examination of the Treaty of Rome provide, *inter alia*:

<sup>310</sup>*Ibid.*, 31S/74, para. 4.4.

<sup>311</sup>C/M/178, p. 27.

<sup>312</sup>C/M/191, p. 41.

<sup>313</sup>C/M/192, p. 6.

<sup>314</sup>L/6053 (unadopted), dated 13 October 1986, paras. 5.4-5.11.

<sup>315</sup>C/M/204.

<sup>316</sup>C/M/204. See also communication from Nicaragua at C/W/506.

<sup>317</sup>CRT/SR.5, p. 60. See also C/M/73, p. 5; C/M/162, p. 13; C/M/166, p. 12.

“The CONTRACTING PARTIES noted that the other normal procedures of the General Agreement would also be available to call in question any measures taken by any of the six parties in the application of the provisions of the Rome Treaty, it being open of course to such country to invoke the benefit of Article XXIV insofar as it considered that this Article provided justification for any action which might otherwise be inconsistent with a provision or provisions of the General Agreement”.<sup>318</sup>

When the application of Article XXIV:5(a) to the common customs tariff of the EEC was discussed in the Nineteenth Session in 1961, the Executive Secretary stated that “The conclusion of the CONTRACTING PARTIES when they considered the Rome Treaty clearly indicated that all the procedures of the General Agreement, such as those of Article XXIII, were available to contracting parties to deal with any damage resulting from the application of the Rome Treaty. It was also indicated in the same reference that it was open to the six members of the EEC in any matters brought forward under these procedures to advance, if they wished to do so, their rights under Article XXIV to justify actions which were complained of as causing damage”.<sup>319</sup>

A Canadian request for a panel in 1974, because of lack of agreement in the Article XXIV:6 negotiations upon the accession of Denmark, Ireland and the United Kingdom to the European Communities, led to the establishment of a panel under paragraphs 1(c) and 2 of Article XXIII; however, this panel was not activated because the parties reached an agreement. See the material on relationship with Article XXVIII starting at page 712, and see also the references to the Arbitration on Quality Wheat at page 768.

During the Council discussion in 1982 of the United States’ recourse to Article XXIII with regard to EEC measures on imports of citrus fruit and products under association agreements between the EEC and various countries, many contracting parties stressed the right of a contracting party to seek the establishment of a panel where bilateral settlement of a dispute had failed, and rejected the view that the earlier working party procedures under Article XXIV did preclude proceedings under Article XXIII. The Council agreed to establish a panel under Article XXIII.<sup>320</sup> The 1985 Panel report on “EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region”, which has not been adopted, includes *inter alia* the following findings on the relationship between Articles XXIII and XXIV.

“... In the opinion of the Panel, the examination - or re-examination - of Article XXIV agreements was the responsibility of the CONTRACTING PARTIES. In the absence of a decision by the CONTRACTING PARTIES and without prejudice to any decision CONTRACTING PARTIES might take in the future on such a matter, the Panel was of the view that it would not be appropriate to determine the conformity of an agreement with the requirements of Article XXIV on the basis of a complaint by a contracting party under Article XXIII:1(a). The Panel did not preclude that amongst the procedures available to CONTRACTING PARTIES, a panel could be established to give an advisory opinion on the conformity of an agreement or an interpretation of specific criteria under Article XXIV to assist CONTRACTING PARTIES in making findings or recommendations under Article XXIV:7(b). However, the Panel was of the view that irrespective of the procedure to be followed for this purpose, including a panel, this should be done clearly in the context of Article XXIV and not Article XXIII, as an assessment of all the duties, regulations of commerce and trade coverage as well as the interests and rights of all contracting parties were at stake in such an examination, and not just the interests and rights of one contracting party raising a complaint.

“The Panel considered that the practice, so far followed by the CONTRACTING PARTIES, never to use the procedures of Article XXIII:2 to make recommendations or rulings on the GATT-conformity of measures subject to special review procedures was sound. It felt that the purposes these procedures served and the balance of interests underlying them would be lost if contracting parties could invoke the general procedures of Article XXIII:2 for the purpose of requesting decisions by the CONTRACTING PARTIES, on measures to be reviewed under the special procedures. The panel therefore concluded that it should, in the

<sup>318</sup>7S/71, para. (f): see discussion at SR.13/15 p. 127-143, draft summing-up at Spec/321/58, drafts of conclusions at W.13/49 and Rev.1, debate and adoption of conclusions at SR.13/19, p. 187-202.

<sup>319</sup>SR.19/7, p. 89-90.

<sup>320</sup>C/M/159, C/M/160, C/M/161, C/M/162.

absence of a specific mandate by the Council to the contrary, follow this practice also in the case before it and therefore abstain from an overall examination of the bilateral agreements.”<sup>321</sup>

“The Panel further noted that in some of the conclusions on agreements, following their examination under Article XXIV:7, the CONTRACTING PARTIES had recalled that procedures for consultations under Article XXII had been accepted and had then noted that ‘the other normal procedures of the General Agreement would also be available to contracting parties to call into question any measures taken’ under the interim agreements (see Rome Treaty: BISD 7S/71; EFTA: BISD 9S/20; LAFTA: BISD 9S/21, and Finnish Association with EFTA: BISD 10S/24). The reference to ‘the other normal procedures of the General Agreement’, after the mention of Article XXII, can only be understood to mean the procedures of Article XXIII. The CONTRACTING PARTIES have established in the above conclusions that this procedure could be used to call into question ‘any measure’ taken by the parties to the agreements; they did not mention the possibility of calling into question the agreements as a whole, under the procedures of Article XXIII. Furthermore, the Panel noted that in the reports of the working parties relating to the respective EEC agreements with Egypt, Lebanon, and Jordan, it was specified that ‘as regards the possibility of consultations with the contracting parties concerning the incidence of the Agreement on their trade interests, which had been mentioned by some members of the Working Party, the spokesman for the European Communities stated that nothing prevented these countries from invoking the relevant provisions of the General Agreement, such as Articles XXII and XXIII’ (BISD 25S/119 para.15, 139 para.16, and 147 para.16).

“... a decision of the CONTRACTING PARTIES on the agreements would inevitably have amounted to a judgment on their conformity with Article XXIV. Had it been recognized that an agreement was in conformity with the requirements of Article XXIV, the implementation of this agreement could no longer be considered as nullifying or impairing benefits accruing under the General Agreement. On the other hand, had the agreement been considered by the CONTRACTING PARTIES as not being in conformity with the said requirements, its implementation would amount to a clear infringement of the provisions of the General Agreement which would constitute *prima facie* a clear case of nullification or impairment in the sense of Article XXIII:1(a).”<sup>322</sup>

The Panel’s conclusion “that in this particular situation the balance of rights and obligations underlying Articles I and XXIV of the General Agreement had been upset to the disadvantage of the contracting parties not parties to these agreements and that the United States was therefore entitled to offsetting or compensatory adjustment to the extent that the grant of the preferences had caused substantial adverse effects to its actual trade or its trade opportunities”<sup>323</sup> was disputed by several contracting parties in the GATT Council discussion of the Panel report, which has not been adopted.<sup>324</sup>

In this connection see also the unadopted panel reports from 1993 and 1994 respectively on “EEC - Member States’ Import Régimes for Bananas” and “EEC - Import Régime for Bananas”.<sup>325</sup>

Paragraph 12 of the Uruguay Round Understanding on the Interpretation of Article XXIV of the GATT 1994, which is incorporated into the GATT 1994, provides as follows: “The provisions of Articles XXII and XXIII as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas of interim agreements leading to the formation of a customs union or free-trade area.”<sup>326</sup>

## 10. Article XXIV:12

Paragraphs 13-15 of the Uruguay Round Understanding on the Interpretation of Article XXIV of the GATT 1994, which is incorporated into the GATT 1994, provide as follows:

<sup>321</sup>L/5776 (unadopted, dated 7 February 1985), paras. 4.15-4.16.

<sup>322</sup>*Ibid.*, paras. 4.18-4.19.

<sup>323</sup>*Ibid.*, para. 4.37; see also above at page 661.

<sup>324</sup>C/M/186, 187, C/W/462.

<sup>325</sup>DS32/R, paras. 364-372; DS38/R, paras. 157-164.

<sup>326</sup>Further concerning this provision, see MTN.TNC/W/125 and discussion thereof at SR.49/3 p. 16.

“13. Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.

“14. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a Member. When the Dispute Settlement Body has ruled that a provision of GATT 1994 has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.

“15. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of GATT 1994 taken within the territory of the former.”

See further under Article XXIV:12.

## 11. Article XXV:1

See material above at page 653 on the applicability of Article XXIII procedures to requests for rulings; material below at page 730 concerning interpretation by Panels of the provisions of decisions under Article XXV:1; and material below at page 719 concerning referral of disputes to the International Court of Justice. See also the material under Article XXV:1 on working parties under Article XXV:1.

## 12. Article XXV:5

The 1952 Report of the Working Party established to consider a waiver requested in respect of the European Coal and Steel Community notes that “the Working Party agreed that the adoption of the Decision would not debar any individual contracting party from having recourse to the provisions of Article XXIII if it considered that any benefit accruing to it under the Agreement was being nullified or impaired”.<sup>327</sup> Similarly, the Decision of 3 March 1955 on the “hard-core waiver” provided that “any concurrence given in accordance with this Decision does not preclude the right of contracting parties affected to have recourse to Article XXIII”<sup>328</sup> and the Decision of the same date granting a waiver to the United States “in connection with import restrictions imposed under Section 22 of the Agricultural Adjustment Act (of 1933) as amended” provides that “this Decision shall not preclude the right of affected contracting parties to have recourse to the appropriate provisions of Article XXIII”.<sup>329</sup> The 1955 Report of the Working Party, on “Import Restrictions Imposed by the United States under Section 22 of the U.S. Agricultural Adjustment Act”, which drafted the text of this waiver, notes:

“The purpose of reiterating in paragraph 4 that the obligations of the Agreement are waived without prejudice to the right of the affected contracting parties to have recourse to the appropriate provisions of Article XXIII, is to re-emphasize that point in relation to the imposition of restrictions on additional products and the extension or intensification of existing restrictions. As the first declaration clause indicates, the right of other contracting parties to have recourse to the provisions of Article XXIII is not limited to such cases only, but applies to the Decision as a whole”.<sup>330</sup>

On 1 November 1956, the CONTRACTING PARTIES adopted a Decision on “Guiding Principles to be Followed in Considering Applications for Waivers from Part I or Other Important Obligations of the Agreement”. These include a provision that “Any decision granting a waiver should include procedures for future consultation on specific action taken under the waiver, and, where appropriate, for arbitration by the CONTRACTING PARTIES. ...”.<sup>331</sup> Some waiver decisions other than those referred to above also explicitly provide for the

<sup>327</sup>G/35, adopted on 10 November 1952, 1S/85, 88, para.10.

<sup>328</sup>3S/38, 41, para. C.

<sup>329</sup>3S/32, 35.

<sup>330</sup>L/339, adopted on 5 March 1955, 3S/141, 144, para. 9.

<sup>331</sup>5S/25, adopted on 1 November 1956, para. (d).

possibility of “recourse to the appropriate provisions of Article XXIII”.<sup>332</sup> Other waiver decisions include special consultation and dispute settlement provisions without explicit reference to Article XXIII.<sup>333</sup> There have been some cases of invocation of such special dispute settlement procedures, for instance in connection with the waiver to the United Kingdom for items traditionally admitted duty-free from countries of the Commonwealth.<sup>334</sup>

The Protocol for the Accession of Switzerland<sup>335</sup> includes in paragraphs 4 and 5 reservations with regard to the application of Articles XI and XV:6; paragraph 6 of the Protocol provides that “Switzerland shall enter into consultations pursuant to Articles XXII and XXIII of the General Agreement upon request of any contracting party regarding the reservations mentioned in paragraphs 4 and 5 above ...”. When the text of this Protocol was submitted to the CONTRACTING PARTIES for approval, the Chairman stated that this reservation could be considered analogous to a waiver granted under Article XXV, paragraph 5, “in that such waivers normally contain a clause to the effect that the decision does not preclude the right of affected countries to have recourse to all the provisions of Article XXIII”.<sup>336</sup>

A footnote in the 1962 Panel Report on “Uruguayan Recourse to Article XXIII” provides:

“It is noted in this connexion that the status of a measure (that is, whether or not it is consistent with GATT) is not to be affected by a waiver decision taken subsequently. In fact, Decisions taken under Article XXV:5 granting waivers from GATT obligations have normally expressly provided for the continued validity of the procedures of Article XXIII in respect of the otherwise ‘waived’ obligations (cf. *inter alia*, BISD, Third Supplement, pages 35-41; Eighth Supplement, page 22)”.<sup>337</sup>

In Council discussion of the 1971 waiver for the Generalized System of Preferences, the “Chairman confirmed that the draft waiver was without prejudice to any article of the General Agreement other than Article I. Rights under Article XXIII of the General Agreement were, therefore, fully preserved”.<sup>338</sup> The waiver decision was adopted “without prejudice to any other Article of the General Agreement”.<sup>339</sup>

The 1990 Panel Report on “United States - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions”<sup>340</sup> examines the general issue of recourse to Article XXIII in relation to measures taken under a waiver granted under Article XXV:5, in the context of the specific claim of the EEC under Article XXIII concerning measures taken by the United States under the 1955 Waiver Decision referred to above for import restrictions and fees imposed under Section 22 of the US Agricultural Adjustment Act. Concerning the threshold claim of the United States that under the terms of the waiver, recourse to Article XXIII was “limited to ‘affected’ contracting parties and that the EEC is not affected by the measures taken under the Waiver” the Panel found that “the EEC had the right to an investigation of its complaint in accordance with Article XXIII:2 without having to demonstrate that it is ‘affected’ within the meaning of the Waiver”.<sup>341</sup>

“The Panel ... examined the claim by the EEC that the restrictions on imports of sugar-containing products, being inconsistent with Article XI, nullified or impaired benefits accruing to the EEC under the General Agreement, whether or not they meet the terms of the Waiver and that the United States therefore owes compensation. The argument of the EEC on this point essentially is that a waiver does not alter the legal status of a measure; it merely suspends the obligation to implement provisions of the General

<sup>332</sup>See also German Import Restrictions, Decision of 30 May 1959, 8S/31, 33; Caribbean Basin Economic Recovery Act, L/5779, Decision of 15 February 1985, 31S/20, 23.

<sup>333</sup>See, e.g., 7S/37, 39; 8S/29, 31; 10S/51, 53; 14S/37, 39.

<sup>334</sup>Waiver at 2S/20, amended at 3S/25; see disputes brought by Germany regarding an increase in the margin of preference on ornamental pottery, IC/SR/44, SECRET/44; and brought by Brazil regarding margin of preference on bananas, C/M/9, L/1749, C/M/10, SR.20/2.

<sup>335</sup>14S/6, 8.

<sup>336</sup>SR.23/7.

<sup>337</sup>L/1923, adopted on 16 November 1962, 11S/95, 100, para. 15. Concerning the meaning in context of this footnote, see the material following from the Panel Report on “United States - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions”, L/6631, adopted on 7 November 1990, 37S/228.

<sup>338</sup>C/M/69.

<sup>339</sup>L/3545, adopted on 25 June 1971, 18S/25.

<sup>340</sup>L/6631, adopted on 7 November 1990, 37S/228.

<sup>341</sup>*Ibid.*, 37S/255, para. 5.6.

Agreement. The presumption set forth in the Understanding on Dispute Settlement ... that a measure inconsistent with the General Agreement nullifies or impairs benefits accruing under that Agreement within the meaning of Article XXIII therefore applies independently of whether the measure is covered by a waiver. The EEC considers its position to be supported by a footnote in the panel report on the Uruguayan Recourse to Article XXIII which states that ‘... the status of a measure (that is, whether or not it is inconsistent with GATT) is not affected by a waiver decision’ (BISD 11S/100). The EEC, referring to a provision in the Understanding on Dispute Settlement which states that compensation should be resorted to only ‘as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement’ (BISD 26S/216), further claims that it is entitled to compensation as a temporary measure pending the withdrawal of the restrictions on imports of sugar-containing products.

“The Panel examined these arguments in the light of Article XXIII:1(a), which applies to claims of nullification or impairment of benefits accruing under the General Agreement as the result of ‘the failure of another contracting party to carry out its obligations under the General Agreement’. The Panel found that the restrictions on sugar-containing products, though inconsistent with the obligations of the United States under Article XI:1, conform to the terms of a decision of the CONTRACTING PARTIES waiving that obligation in accordance with Article XXV:5. Since both Article XI:1 and Article XXV:5 form part of the General Agreement, the imposition of the restrictions in conformity with the Waiver cannot constitute a ‘failure of [the United States] to carry out its obligations under this Agreement’ within the meaning of Article XXIII:1(a).

“The Panel then examined the implication of the note in the report on the Uruguayan Recourse to Article XXIII, according to which ‘... the status of a measure (that is, whether or not it is inconsistent with GATT) is not affected by a waiver decision ...’. The Panel noted that the panel which submitted this report had examined import restrictions imposed by Germany and that Germany had obtained a waiver for the restrictions but nevertheless insisted that they were covered by the existing legislation clause in the protocol by which it acceded to the General Agreement (BISD 8S/31 and 10S/126). Against this background the footnote can be understood to suggest that a decision by the CONTRACTING PARTIES to waive an obligation for a particular measure does not constitute a ruling by the CONTRACTING PARTIES that the measure is inconsistent with the General Agreement and that, consequently, a contracting party having obtained a waiver for a particular measure is not barred from arguing in proceedings under Article XXIII:2 that the measure would be consistent with the General Agreement even in the absence of the waiver. The footnote therefore does not support the conclusion that a contracting party imposing a measure inconsistent with a particular provision of the General Agreement but covered by the terms of a decision waiving the obligations under that provision in accordance with Article XXV:5 nevertheless fails to carry out its obligations under the General Agreement within the meaning of Article XXIII:1(a). The footnote can in the view of the Panel however be taken as an indication of the fact that a measure inconsistent with a particular provision of the General Agreement remains inconsistent with that particular provision even if the CONTRACTING PARTIES authorized in accordance with Article XXV:5 in exceptional circumstances the maintenance of the measure subject to specified conditions.

“The Panel then examined the EEC claim in the light of Article XXIII:1(b), which may be invoked in respect of the application of ‘any measure, whether or not it conflicts with the provisions of the General Agreement’, and consequently also in respect of any measure covered by a waiver. The CONTRACTING PARTIES confirmed this right when they declared in the Waiver that their decision ‘shall not preclude the right of affected contracting parties to have recourse to the appropriate provisions of Article XXIII’ (BISD 3S/35). The EEC considered that the CONTRACTING PARTIES had, when granting the Waiver, formally noted that measures taken under the Waiver constituted, in certain cases, an impairment of benefits under the General Agreement and that such impairment therefore does not have to be proven by it. The Panel noted that the CONTRACTING PARTIES, in the Waiver decision, declared that ‘they regret that the circumstances make it necessary for the United States to continue to apply import restrictions which, in certain cases, adversely affect the trade of a number of contracting parties, impair concessions granted by the United States and thus impede the attainment of the objectives of the General Agreement’ (BISD 3S/35). This declaration alone does not, in the view of the Panel, give adequate guidance as to the nature of those specific cases where concessions are impaired and, therefore it needs to be determined for each measure taken under the Waiver whether it causes such an impairment. The Panel therefore concluded

that the fact that the restrictions found to be inconsistent with Article XI:1 conform to the terms of the Waiver does not prevent the EEC from bringing a complaint under Article XXIII:1(b) of the General Agreement but it is up to the EEC to demonstrate that a nullification or impairment of benefits accruing to it under the General Agreement has resulted from these restrictions”.<sup>342</sup>

The Understanding in Respect of Waivers of Obligations under the GATT 1994, which is incorporated into the GATT 1994, provides that “Any Member who considers that a benefit accruing to it under GATT 1994 is being nullified or impaired as a result of: (a) the failure of the Member to whom the waiver was granted to observe the terms or conditions of the waiver; (b) the application of a measure consistent with the terms and conditions of the waiver, may invoke the provisions of Article XXIII...”.

### 13. Article XXVIII

In 1974, when Article XXIV:6 negotiations between Canada and the European Communities on the occasion of the accession to the EC of Denmark, Ireland and the United Kingdom did not produce a mutually satisfactory result, Canada referred the matter to the CONTRACTING PARTIES pursuant to paragraph 1(c) and 2 of Article XXIII. Canada requested that a panel of experts be appointed to investigate whether the new Schedules LXXII and LXXIIBis maintained a general level of reciprocal and mutually advantageous concessions between Canada and the European Communities, not less favourable to trade than that provided for in Schedules XL, XLbis, XIX, XXII and LXI.<sup>343</sup> The representative of the European Communities recalled “that the negotiations that had led to this new Schedule covered practically the whole of the customs tariffs in question and a difficult assessment of both a quantitative and qualitative character was therefore called for. The Community could not accept the proposal. The conciliation procedures of the GATT had hitherto mostly been used in cases of violations of the General Agreement; in the present case, a number of factors made this procedure inappropriate. Such an exercise would involve highly sophisticated assessments in complex trade fields where the criteria for reaching judgements were exceedingly imprecise ...”.<sup>344</sup> 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”.<sup>345</sup> The panel was established but was not convened as the two parties reached a bilateral agreement.

At the September 1992 Council meeting, Argentina noted its request for recognition of its principal supplying interest under Article XXVIII with respect to EEC concessions on soyabeans and soyacakes. Argentina requested the establishment of a panel to examine this claim so that the CONTRACTING PARTIES could determine this interest under Article XXVIII:1. At the November 1992 Council meeting, the EEC stated that “Argentina’s recourse to the dispute settlement mechanism in this case was inappropriate and improper” as in its view this was not a dispute between Argentina and the Community, but a dispute between Argentina and the CONTRACTING PARTIES. The matter was resolved as the EEC recognized Argentina’s claim.<sup>346</sup>

Negotiations under Article XXVIII have also been referred to as a possible resolution in the case of non-violation nullification or impairment: see the reference to Article XXVIII in the findings of the 1992 Report of the Members of the Original Oilseeds Panel on “Follow-up on the Panel Report ‘EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins’”, at page 683 above.

### 14. Article XXXVII

See the reference to consultations under Article XXXVII in paragraph 11 of the 1966 Procedures and at page 674 above.

<sup>342</sup>*Ibid.*, 37S/260-261, paras. 5.17-5.20.

<sup>343</sup>C/M/101, p. 7.

<sup>344</sup>C/M/101, p. 8.

<sup>345</sup>C/M/102, p. 4.

<sup>346</sup>C/M/260, p. 31.

---

## C. RELATIONSHIP BETWEEN ARTICLE XXIII AND OTHER AGREEMENTS

### 1. WTO Agreement

On 8 December 1994, the Preparatory Committee, meeting on the occasion of the Implementation Conference, adopted a Decision on “Transitional Co-existence of the GATT 1947 and the WTO Agreement”, which provides *inter alia*:

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

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

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

“2. The provisions of Article XXIII of the GATT 1947 shall not apply:

“(a) to disputes brought against a contracting party which is a Member of the WTO if the dispute concerns a measure that is identified as a specific measure at issue in a request for the establishment of a panel made in accordance with Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes in Annex 2 of the WTO Agreement and the dispute settlement proceedings following that request are being pursued or are completed; and

“(b) in respect of measures covered by paragraph 1 above.<sup>347</sup>

See also the material at the end of the chapter on Article VI *supra* on transitional decisions adopted on 8 December 1994 by the Committee on Anti-Dumping Practices, and the Committee on Subsidies and Countervailing Measures.

### 2. Tokyo Round Agreements

The dispute settlement provisions of the agreements on non-tariff barriers to trade negotiated in the Tokyo Round are not uniform and do not adopt a consistent approach to the interface between recourse to dispute settlement under these Agreements and recourse to Article XXIII of the General Agreement, nor to the applicability to disputes under these Agreements of procedures applying to disputes under Article XXIII.

Concerning the relationship between rights under these agreements and rights under the General Agreement, the Decision of 28 November 1979 on “Action by the CONTRACTING PARTIES on the Multilateral Trade Negotiations” provides, *inter alia*, that

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

“The CONTRACTING PARTIES also note that existing rights and benefits under the GATT of contracting parties not being parties to these Agreements, including those derived from Article I, are not affected by these Agreements”.<sup>348</sup>

---

<sup>347</sup>PC/12, L/7583, paras. 1-2.

<sup>348</sup>L/4905, 26S/201, paras. 2-3.

The 1985 Report of the Working Group on “MTN Agreements and Arrangements” includes the general observation that “Any contracting party which felt that an MTN agreement was implemented in a way contrary to the General Agreement could bring a complaint under Article XXIII of the General Agreement”.<sup>349</sup>

**(1) Use of Article XXIII procedures in disputes under the Tokyo Round agreements regarding obligations under those agreements**

Some of the Tokyo Round agreements provide for the application in disputes thereunder *mutatis mutandis* of the dispute settlement procedures practised under Article XXIII. The Agreement on Import Licensing Procedures contains a general reference to this effect in paragraph 2 of its Article 4:

“Consultations and the settlement of disputes with respect to any matter affecting the operation of this Agreement, shall be subject to the procedures of Articles XXII and XXIII of the GATT.”

The reference to Article XXIII in Article 8:8 of the Agreement on Trade in Civil Aircraft is confined to specific disputes related to that Agreement:

“Signatories agree that, with respect to any dispute related to a matter covered by this Agreement, but not covered by other instruments multilaterally negotiated under the auspices of the GATT, the provisions of Articles XXII and XXIII of the General Agreement and the provisions of the Understanding related to Notification, Consultation, Dispute Settlement and Surveillance shall be applied, *mutatis mutandis*, by the Signatories and the Committee for the purposes of seeking settlement of such dispute. These procedures shall also be applied for the settlement of any dispute related to a matter covered by this Agreement and by another instrument multilaterally negotiated under the auspices of the GATT, should the parties to the dispute so agree.”

Article 15:7 of the Agreement on Implementation of Article VI provides:

“Further to paragraphs 1-6 the settlement of disputes shall *mutatis mutandis* be governed by the provisions of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance. Panel members shall have relevant experience and be selected from Parties not parties to the dispute.”

**(2) Assignment of priority to dispute settlement under the Tokyo Round Agreements relative to recourse to Article XXIII**

Certain of the Tokyo Round agreements give priority to recourse to dispute settlement under these agreements when a dispute is between contracting parties to the GATT which are also parties to the agreement in question.

The Agreement on Implementation of Article VII, which relates to customs valuation, provides in Article 20.11:

“If a dispute arises between Parties relating to rights and obligations under this Agreement, Parties should complete the dispute settlement procedures under this Agreement before availing themselves of any rights which they have under the GATT, including invoking Article XXIII thereof.”

At the November 1983 meeting of the Committee on Customs Valuation a statement was made concerning the significance of these references where a party to a Tokyo Round Agreement is not a GATT contracting party: see at page 644 above.

Article 14.23 of the Agreement on Technical Barriers to Trade also provides that

“If disputes arise between Parties relating to rights and obligations of this Agreement, Parties should complete the dispute settlement procedures under this Agreement before availing themselves of any rights which they have under the GATT ...”.

---

<sup>349</sup>L/5832/Rev.1, p. 2, para. 4.

Similarly, a footnote to Article 15 of the Agreement on Implementation of Article VI, which relates to anti-dumping practices, provides as follows:

“If disputes arise between Parties relating to rights and obligations under this Agreement, Parties should complete the dispute settlement procedures under this Agreement before availing themselves of any rights which they have under the GATT”.

See the discussion at the October 1988 meeting of the Committee on Anti-Dumping Practices, on the request of Japan for conciliation under Article 15:3 of the Agreement concerning EEC Council Regulation (EEC) No. 1761/87 and its application in particular cases; on the EC's opposition to this request because the Council had already established a panel under Article XXIII on the measures in question; and on the interpretation of this footnote.<sup>350</sup>

The Agreement on Government Procurement and the Agreement on Interpretation and Application of Articles VI, XVI and XXIII do not explicitly regulate the relationship between their dispute settlement provisions and those of the General Agreement.

In Council discussion of Brazil's request for a panel on “United States - Denial of Most-favoured-nation Treatment as to Imports of Non-rubber Footwear from Brazil”, in relation to a measure concerning which Brazil had earlier pursued dispute settlement under the Agreement on Interpretation and Application of Articles VI, XVI and XXIII, the representative of Brazil stated that

“a contracting party could not be prevented from seeking a remedy before the GATT Council because it had also sought protection of its interests under a particular Code ... this would mean accepting that the Code Committees somehow bound the Council and the contracting parties, many of which were not signatories to the Codes. ... To lend further support to his arguments, he quoted from a letter of 11 April 1979 sent by the Chairman of the Tokyo Round sub-group on subsidies and countervailing measures to a certain number of negotiators, as follows: ‘The provisions of the Agreement on Subsidies and Countervailing Measures interpret and apply the provisions of the GATT in Article XXIII as among signatories to the Agreement with respect to disputes concerning subsidies and countervailing measures under the GATT and in this connection will be used by these signatories to resolve any such dispute. However, delegations pointed out that in their view rights and obligations of the contracting parties under Article XXIII of the GATT are not limited thereby.’ He recalled that several other Tokyo Round Codes contained similar provisions under which parties were to complete the dispute settlement procedure under the respective Codes before availing themselves of any rights under the General Agreement”.<sup>351</sup>

### **(3) Interpretation of Tokyo Round agreements in disputes under the General Agreement**

Article 14.23 of the Agreement on Technical Barriers to Trade further provides that “... Parties recognize that, in any case so referred to the CONTRACTING PARTIES, any finding, recommendation or ruling pursuant to Article 14, paragraphs 9 to 18 may be taken into account by the CONTRACTING PARTIES, to the extent they relate to matters involving equivalent rights and obligations under the General Agreement. When Parties resort to GATT Article XXIII, a determination under that Article shall be based on GATT provisions only”.

In November 1980, India sought recourse to the procedures of Article XXIII:2 and requested the establishment of a panel to examine the United States' imposition of countervailing duties on industrial fasteners imported from India without applying the injury criterion while extending this benefit to other contracting parties. This action had been taken by the United States after invoking Article 19:9 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII (“Subsidies Code”). The representative of the United States stated, *inter alia*, “that his delegation could not agree to the establishment of a GATT panel to examine those issues that related to interpretation of Code provisions. Nevertheless, it was still prepared to agree to the establishment of a panel under Article XXIII:2 but only to deal with problems related to rights and obligations

<sup>350</sup>ADP/M/24, p. 21-27. The measures were examined in the Panel Report on “EEC - Regulation on Imports of Parts and Components”, L/6657, adopted 16 May 1990, 37S/132.

<sup>351</sup>C/M/248, p. 15.

under provisions of the General Agreement”.<sup>352</sup> A panel was established under Article XXIII to examine the matter “under the relevant GATT provisions” but the proceedings were terminated as a result of a bilateral settlement.<sup>353</sup>

In 1987, the United States and India held joint consultations under Article XXIII:1 and Article 4:2 of the Agreement on Import Licensing Procedures, concerning quantitative restrictions on imports of almonds maintained by India and their operation. A panel was established under each agreement, with different panelists for each panel. However, the complaint was withdrawn in June 1988.<sup>354</sup>

In the panel proceeding on “EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins” the EEC argued that as between the parties that signed it, the Agreement on Interpretation and Application of Articles VI, XVI and XXIII created a expectation as to the criteria that would be used to judge a complaint of non-violation nullification or impairment of tariff concessions. The Panel Report adopted in 1990 provides:

“The Panel was established to make findings ‘in the light of the relevant GATT provisions’; it therefore does not have the mandate to propose interpretations of the provisions of the Subsidies Code which the Community invokes to justify its position. However, the following may be noted in this respect. ... The Panel noted that the purpose of the Subsidies Code is, according to its preamble, ‘to apply fully and interpret’ provisions of the General Agreement. In the view of the Panel this speaks in favour of interpreting Article 8:4 in conformity with the decisions of the CONTRACTING PARTIES rather than, as the Community suggests, revising these decisions in the light of a particular interpretation of a Code accepted by a portion of the contracting parties”.<sup>355</sup>

See also material starting at page 730 on the scope of the “relevant GATT provisions” interpreted by panels.

#### 4) *Relationship between suspension authorized under Article XXIII:2 and measures authorized under Tokyo Round agreements*

The Agreement on Interpretation and Application of Articles VI, XVI and XXIII provides in Article 18:9:

“The Committee shall consider the panel report as soon as possible and, taking into account the findings contained therein, may make recommendations to the parties with a view to resolving the dispute. If the Committee’s recommendations are not followed within a reasonable period, the Committee may authorize appropriate countermeasures (including withdrawal of GATT concessions or obligations) taking into account the nature and degree of the adverse effect found to exist.”

See also a Secretariat Note of 1983 on “Negotiating History of Article 18:9 and the Treatment of Reports of Working Parties and Panels under Article XXIII of the General Agreement”.<sup>356</sup>

The Agreement on Implementation of Article VI does not provide for panel recommendations nor for suspension of obligations or concessions: as noted above, Article 15:7 provides that “Further to paragraphs 1-6 the settlement of disputes shall *mutatis mutandis* be governed by the provisions of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance”. On 5 May 1980, the Committee on Anti-Dumping Practices decided, *inter alia*, that

“... paragraph 7 of Article 15 of the Agreement, is to be interpreted to mean that the measures which may be authorized by the Committee on Anti-Dumping Practices for the purpose of the Agreement may include all such measures as can be authorized under Articles XXII and XXIII of the General Agreement”.<sup>357</sup>

<sup>352</sup>C/M/144.

<sup>353</sup>Report of the “Panel on United States Countervailing Duties”, L/5192, adopted on 3 November 1981, 28S/113.

<sup>354</sup>See discussion of complaints at C/M/211-213, establishment of each panel at C/M/215, LIC/M/19; notice of withdrawal in C/154/Add.1, LIC/15.

<sup>355</sup>L/6627, adopted on 25 January 1990, 37S/131.

<sup>356</sup>SCM/W/48, dated 11 May 1983.

### 3. Arrangements on textile trade

In July 1972, Israel referred its complaint relating to the United Kingdom's import quotas on cotton textiles from Israel to the CONTRACTING PARTIES under Article XXIII:2 of the General Agreement. Israel considered the restrictions to be "clearly contrary to the provisions of the Long-Term Arrangement Regarding International Trade in Cotton Textiles and of the General Agreement". The representative of the United Kingdom took the view that "Articles 7:3 and 8(b) of the Long Term Arrangement clearly envisaged that divergence of views should first be referred to the Cotton Textiles Committee" and that "the criteria set forth by the Long-Term Arrangement for the reference of such disputes to the CONTRACTING PARTIES were, therefore, not met".<sup>358</sup> In a later Council meeting he also stated that a "Panel would be placed in a difficult position before the matter was examined according to the provisions of Article 7 of the Long-Term Arrangement, since it would have no authority to interpret the Long-Term Arrangement. Considerations like these justified the contention by the United Kingdom that the correct procedure would be to use Article 7 of the Long-Term Arrangement in the first instance. This arrangement would be quicker than setting up a panel since the Cotton Textiles Committee already existed and could be convened in a special session at any time". The representative of the United States "shared the view of the United Kingdom that to refer the matter to the Cotton Textiles Committee would not lead to delays. However, the procedure under the Long-Term Arrangement was not mandatory, contrary to the provisions of Article XXIII. He therefore felt that if Israel insisted on invoking the provisions of Article XXIII the United States delegation should support the setting up of a panel".<sup>359</sup> The Council agreed to establish a panel, the report of which was adopted on 5 February 1973.<sup>360</sup>

The Arrangement Regarding International Trade in Textiles (MFA), which entered into force on 1 January 1974, provides in paragraphs 4 and 5 of Article 11:

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

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

However, paragraph 6 of Article 1 provides that "The provisions of this Arrangement shall not affect the rights and obligations of the participating countries under the GATT". Accordingly, paragraphs 9 and 10 of Article 11 provide:

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

"Any recommendations and observations of the Textiles Surveillance Body would be taken into account should the matters related to such recommendations and observations subsequently be brought before the CONTRACTING PARTIES to the GATT, particularly under the procedures of Article XXIII of the GATT."<sup>361</sup>

In the December 1982 meeting of the Textiles Committee, the representative of Brazil referred to the 1982 Ministerial Declaration provisions on dispute settlement and stated that "although such a decision was not addressed to the TSB, it had, in his view, a bearing on the work of the TSB and on the way it would operate".<sup>362</sup>

<sup>357</sup>ADP/2, 27S/16, 18, para. 2. See also text circulated at the request of a number of delegations, MTN/NTM/W/232/Add.2 dated 11 April 1979.

<sup>358</sup>C/M/79, p. 15-16.

<sup>359</sup>C/M/81, p. 15.

<sup>360</sup>20S/237.

<sup>361</sup>21S/14.

<sup>362</sup>COM.TEX/31, p. 8.

Paragraphs 5 and 23 of the Conclusions of the Textiles Committee Adopted on 22 December 1981, which are attached to the Protocol Extending the Arrangement Regarding International Trade in Textiles dated 22 December 1981, provide:

“5. It was agreed that any serious problems of textile trade falling within the purview of the Arrangement should be resolved through consultations and negotiations conducted under the relevant provisions thereof.”

“23. It was felt that in order to ensure the proper functioning of the MFA, all participants should refrain from taking measures on textiles covered by the MFA, outside the provisions therein, before exhausting all the relief measures provided in the MFA.”<sup>363</sup>

Paragraph 23 was repeated as paragraph 26 of the Conclusions of the Textiles Committee Adopted on 31 July 1986, which are attached to the Protocol Extending the Arrangement Regarding International Trade in Textiles dated 31 July 1986.<sup>364</sup>

The relation between recourse to Article XXIII and dispute settlement carried out by the Textiles Surveillance Body (TSB) under the MFA was discussed at the February 1993 Council meeting in connection with a request for “good offices” by Brazil concerning United States restrictions on wool suits from Brazil. At that time the Director-General noted that “it was the right of any contracting party to request the activation of any dispute settlement procedure, including the procedures relating to the Director-General’s good offices.”<sup>365</sup>

#### 4. Other multilateral agreements

Article VIII of the International Convention to Facilitate the Importation of Commercial Samples and Advertising Material, which was drawn up at the Sixth and Seventh Sessions of the CONTRACTING PARTIES, provides that

“... Any dispute which is not settled by negotiation shall be referred to a person or body agreed between the Contracting Parties in dispute, provided that if they are unable to reach agreement, any of these Contracting Parties may request the President of the International Court of Justice to nominate an arbitrator.

“The decision of any person or body appointed under paragraph 2 of this article shall be binding on the Contracting Parties concerned.”<sup>366</sup>

The 1952 Working Party Report on this Convention notes with respect to Article VIII of the Convention: “The Working Party draws attention to the fact that under the terms of this Article it would be possible, and indeed appropriate, for two contracting parties to refer a dispute between them to the CONTRACTING PARTIES for settlement”.<sup>367</sup>

#### 5. General international law

In November 1974 the German Federal Government and four German Länder imposed a ban on direct landings of fresh fish by Icelandic trawlers in German ports, after the arrest of a German trawler by Icelandic authorities in disputed waters off the coast of Iceland. The German representative stated that in the light of a previous judgement of the International Court of Justice on the Icelandic fishery zone, and prior attempts at peaceful settlement of the dispute, this limited and temporary measure pending the continuation of negotiations was “a justified counter-measure fully in line with the general rules and principles of international law ... if the ban on direct landings was justified as a counter-measure under generally recognized rules of international law it could not be illegal under the GATT”. The representative of Iceland stated that its extension of its exclusive economic zone was not contrary to international law and “even if the extension of the fishery limits in question

<sup>363</sup>L/5276, 28S/3, 8.

<sup>364</sup>L/6030, 33S/7, 14.

<sup>365</sup>C/M/261, p. 15.

<sup>366</sup>221 UNTS 255, entered into force on 20 November 1955. As of 25 February 1994 the Convention had 6 signatories and 58 parties; see L/7411 and see further material on the Convention under Article VIII.

<sup>367</sup>G/33, adopted on 7 November 1952, 1S/94, 98, para. 24.

was contrary to international law, the measures which had been taken against Iceland constituted a breach of obligations under the General Agreement which was a law in itself".<sup>368</sup>

## 6. Referral of matters to the International Court of Justice

During the Third Session in 1949, Cuba requested that the CONTRACTING PARTIES declare reduction of m.f.n. duty rates by the United States to be invalid under GATT unless the prior and express consent of Cuba were obtained, in view of the effect of reduction of m.f.n. duty rates on margins of preference for Cuba guaranteed under a bilateral agreement with the United States. In response to the suggestion of Cuba that the CONTRACTING PARTIES submit the legal aspects in dispute to an international court, the Chairman noted that "he wished to explain that the CONTRACTING PARTIES were not an organization authorized by the United Nations to request advisory opinions from the International Court of Justice. Advisory opinions from the Court may only be sought by the United Nations and by specialized agencies authorized to do so by the Assembly of the United Nations". Following up on this comment, the Chairman later clarified that

"There was nothing in the General Agreement preventing reference to the Court. However, the CONTRACTING PARTIES acting jointly were precluded from presenting a case by the Statute of the Court itself. Article XXV of the Agreement provides for joint action by the CONTRACTING PARTIES and [the Chairman] interpreted the words 'with a view to facilitating the operation and furthering the objectives of this Agreement', in paragraph 1, as enabling the CONTRACTING PARTIES acting jointly to interpret the Agreement whenever they saw fit. It was open to any government disagreeing with an interpretation to take the dispute which had given rise to such an interpretation to the International Court, although neither a government nor the CONTRACTING PARTIES acting jointly could take a ruling of the CONTRACTING PARTIES to the Court".<sup>369</sup>

In discussions at the Nineteenth Session in 1961 concerning the interpretation of Article XXIV:5(a) in examination of the common external tariff of the EEC, the Executive Secretary said "where there had been a basic disagreement between parties to an international agreement as to the interpretation of one of its basic provisions ... it would be appropriate for the organization to refer the matter to the International Court of Justice for an advisory opinion, but this faculty was only available to certain international organizations, namely those which directly depended on the United Nations. ... the decision of the CONTRACTING PARTIES on this point ... was that it was within the functions of the CONTRACTING PARTIES, acting jointly under Article XXV, to interpret the Agreement whenever they saw fit. It would be open for any government which disagreed with an interpretation to take the dispute which had given rise to the interpretation to the International Court of Justice, although neither a government nor the CONTRACTING PARTIES acting jointly could take a ruling of the CONTRACTING PARTIES to the Court".<sup>370</sup>

## 7. Bilateral agreements

During the Third Session in 1949, Cuba requested that the CONTRACTING PARTIES declare reduction of m.f.n. duty rates by the United States to be invalid under GATT unless the prior and express consent of Cuba were obtained, in view of the effect that such a reduction of m.f.n. duty rates would have on the margins of preference for Cuba which had been guaranteed under a prior bilateral trade agreement with the United States. The Chairman noted during the discussion that "although the bilateral agreement between the United States and Cuba was outside the purview of the CONTRACTING PARTIES, since it was included in the statement [of Cuba] it could be referred to by delegations but could not be taken into consideration in reaching a decision. Any decision must be reached in the light of the provisions of the General Agreement itself".<sup>371</sup> A Decision on "Margins of Preference" was adopted on 9 August 1949, providing, *inter alia*:

"The determination of rights and obligations between governments arising under a bilateral agreement is not a matter within the competence of the CONTRACTING PARTIES<sup>1</sup>...

<sup>368</sup>C/M/103, p. 16; see, however, the Panel Decision on "United States - Prohibition of Imports of Tuna and Tuna Products from Canada", L/5198, adopted on 22 February 1982, 29S/91 (prohibition of tuna imports following seizures of tuna boats in fishing jurisdiction dispute; justification claimed under GATT Article XX(g)).

<sup>369</sup>GATT/CP.3/SR.37, statements by Chairman at p. 2, p. 5.

<sup>370</sup>SR.19/7, p. 88.

<sup>371</sup>GATT/CP.3/SR.37 p. 1-2.

“This decision does not preclude the possibility of resort to Article XXIII”.<sup>372</sup>

This Decision was subject to the following footnote:

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

When this Decision and its footnote were voted on, the question was asked whether such a decision would preclude the jurisdiction of the CONTRACTING PARTIES even in a case in which such a jurisdiction had been foreseen in a bilateral treaty; the Chairman replied that “obviously a bilateral treaty which made reference to the CONTRACTING PARTIES would entitle the CONTRACTING PARTIES to take note of such an agreement”.<sup>373</sup>

The 1950 Report of the Working Party on “The Use of Quantitative Restrictions for Protective and Commercial Purposes” notes *inter alia* that “misuse of import restrictions might appropriately provide a basis for recourse to the procedures laid down in the Agreement for the settlement of disputes. Moreover, it was not particularly relevant to the Agreement whether such practices were determined unilaterally or in the course of bilateral negotiations”.<sup>374</sup>

In a Note by the Executive Secretary of 1961 on “Questions Relating to Bilateral Agreements, Discrimination and Variable Taxes”<sup>375</sup> it was confirmed that a bilateral agreement providing for quotas may entail a violation of Articles XI and/or XIII with regard to other contracting parties.

The 1982 Report of the “Panel on Vitamins” also considered the legal implications of a bilateral Understanding concluded between the EEC and the United States relating to the conversion of tariff rates on Vitamin B12, and concluded “that the United States has not infringed its commitment under the General Agreement or under the ASP Chemical Products Understanding of 2 March 1979”.<sup>376</sup>

The 1990 Award of the Arbitrator on “Canada/European Communities Article XXVIII Rights”<sup>377</sup> dealt with the issue of Canada’s rights with respect to ordinary and quality wheat dating from the Article XXIV:6 negotiations Canada concluded with the Community on 29 March 1962 and the quality and ordinary wheat agreements concluded between the parties on the same day. After the conclusion of negotiations and of two bilateral agreements on wheat under Article XXIV:6 the question of their relationship to GATT arose and in particular “whether Canada may bring a claim based on a bilateral agreement under the multilateral procedures of the GATT”. On this question the arbitrator found that

“In principle a claim based on a bilateral agreement cannot be brought under the multilateral dispute settlement procedures of the GATT. An exception is warranted in this case given the close connection of this particular bilateral agreement with the GATT, the fact that the Agreement is consistent with the objectives of the GATT, and that both parties joined in requesting recourse to the GATT arbitration procedures”.<sup>378</sup>

The 1991 Report of the Working Party on the “Free-Trade Agreement between Canada and the United States” records that its members were concerned about possible conflict between the bilateral dispute settlement procedure under this free-trade agreement (FTA) and the multilateral dispute settlement procedure under the GATT. They feared this situation would result in either delays in the adoption of panel reports by CONTRACTING PARTIES or in panel reports not being adopted due to contradictory findings in the FTA’s bilateral dispute settlement process and the General Agreement multilateral process. In the view of one member “such obstruction of the proper functioning of the multilateral dispute settlement process was not in accordance with the obligations

<sup>372</sup>II/11.

<sup>373</sup>GATT/CP.3/SR.38, p. 7.

<sup>374</sup>GATT/CP.4/33 (Sales No. GATT/1950-3), para. 22.

<sup>375</sup>L/1636.

<sup>376</sup>L/5331, adopted on 1 October 1982, 29S/110, 117, para. 22(h).

<sup>377</sup>DS12/R, 37S/80.

<sup>378</sup>*Ibid.*, 37S/84.

of parties under the GATT”.<sup>379</sup> The representative of the United States “emphasized that the rights and the obligations of the FTA parties under the GATT remained unchanged”.<sup>380</sup>

#### D. PANEL PRACTICE UNDER ARTICLE XXIII

##### 1. Choice between working parties or panels

*Choice between a panel under Article XXIII:2 and a working party under Article XXIII:2:* Article XXIII:2 does not indicate whether disputes should be handled by a working party or by a panel. In the earliest years of the GATT, disputes were handled by working parties<sup>381</sup>, but the practice of referral to a panel of experts was developed beginning in the 1950s. Paragraph 6(ii) of the 1979 Understanding Annex on customary practice provides:

“In the case of dispute, the CONTRACTING PARTIES have established panels (which have been called by different names) or working parties in order to assist them in examining questions raised under Article XXIII:2. Since 1952, panels have become the usual procedure ...”.

In 1982, during Council discussion of the panel request by the United States in its dispute concerning EEC tariff treatment for imports of citrus fruit and products from certain Mediterranean countries, the representative of Spain requested the establishment of a working party instead of a panel to examine this matter. The representative of the United States responded that “paragraph 10 of the Understanding as well as standing GATT practice gave to the complaining party the choice of requesting either a panel or a working party”. A panel was established in this case.<sup>382</sup>

*Choice between a panel under Article XXIII:2 and a rule-making working party to interpret the General Agreement:* At the May 1973 Council meeting, in response to a panel request by the EEC on “United States Tax Legislation (DISC)”, the United States proposed that with reference to this and the three complaints of the United States on income practices maintained by France, Belgium and the Netherlands, “... the problems of these complaints would be better discussed in a rule-making context, such as a working party ... The working party would be charged with the duty of recommending the type of international rules which contracting parties could adopt to govern their income tax practices with respect to export sales. This would give to all interested contracting parties an opportunity to express their views and participate in the formation of such rules, an opportunity that was not adequate in Article XXIII:2 proceedings ...”. The EEC representative confirmed that the Communities preferred a procedure whereby a body of neutral experts would be set up to examine the question.<sup>383</sup> At the July 1973 Council meeting it was confirmed that the Community and the other parties concerned could not agree to the establishment of a general working party. Four panels were then established in these disputes.<sup>384</sup>

##### 2. Establishment of working parties and panels

Paragraph 10 of the 1979 Understanding states:

“It is agreed that if a contracting party invoking Article XXIII:2 requests the establishment of a panel to assist the CONTRACTING PARTIES to deal with the matter, the CONTRACTING PARTIES would decide on its establishment in accordance with standing practice. It is also agreed that the CONTRACTING PARTIES would similarly decide to establish a working party if were this requested by a contracting party invoking the Article. It is further agreed that such requests would be granted only after the contracting party concerned had had an opportunity to study the complaint and respond to it before the CONTRACTING PARTIES”.

<sup>379</sup>L/6927, adopted on 12 November 1991, 38S/47, 54, para. 22.

<sup>380</sup>*Ibid.*, 38S/55, para. 25.

<sup>381</sup>See, e.g., Report of the Working Party on “Brazilian Internal Taxes”, GATT/CP.3/42, adopted on 30 June 1949, II/181. There are a few later instances of use of working parties in disputes: see Report of the Working Party on “Canadian Import Quotas on Eggs”, L/4279, adopted on 17 February 1976, 23S/91.

<sup>382</sup>C/M/161, p. 7-8 (discussion), C/M/162, p. 12-15 (panel establishment). See also reference to this dispute at page 753.

<sup>383</sup>C/M/87, p. 4, 6.

<sup>384</sup>C/M/89, p. 10.

In Council discussions in 1974 on the dispute between Canada and the EEC relating to Article XXIV:6 negotiations (see above at page 712), many contracting parties supported the Canadian request for the establishment of a panel under Article XXIII and stated “that every contracting party had the right to seek conciliation in accordance with the relevant procedures of the General Agreement”.<sup>385</sup> The Council agreed to establish a panel notwithstanding objections made by the EEC.<sup>386</sup>

In March 1981 the Council adopted the Director-General’s report on a working party which had discussed with the EEC the possibility of limiting subsidization of sugar, subsequent to the Panel Reports on the complaints of Australia and Brazil on “EC - Refunds of Exports of Sugar”. At that time the Council adopted a compromise text providing for a later review by the Council upon further notification of the EEC sugar regulations.<sup>387</sup> At the July 1981 Council meeting, a number of delegations sought to have this review conducted by reconvening the working party. The representative of the United States “sought clarification on the following points: (1) In dealing with matters of a highly technical nature, had it been the practice of the Council to establish working parties? (2) If one or several contracting parties asked for the establishment of a working party, was it in the tradition of GATT to grant such a request? The Chairman replied that it had been the practice of the Council to establish working parties when dealing with matters of a highly technical nature, as well as in some cases with matters of a more general nature. As for the establishment of a working party, he stated that this was closely linked to the issue of the terms of reference for that working party”.<sup>388</sup> In the same discussion at the July 1981 Council meeting the representative of Australia, referring to paragraph 10 of the 1979 Understanding, “noted that ... the principle was clear: The CONTRACTING PARTIES would decide to establish a working party if this were requested by a contracting party. This view was supported by past GATT practice”.<sup>389</sup> “The representative of India endorsed the Australian view and said that it would set a very bad precedent if the Council decided not to set up a working party when a serious request for doing so had been made. He stressed that this would have a particularly adverse impact for contracting parties not possessing retaliatory power”. At its September 1981 meeting, the Council decided to establish a working party.<sup>390</sup>

During the Council discussion in 1982 on the United States’ request for a panel to examine its complaint concerning EEC imports of citrus fruits and products, several contracting parties referred to “the general right of a contracting party to a panel ... recognized in the Understanding”<sup>391</sup> or a “right to the formation of a panel”<sup>392</sup> and stated that any contracting party “could request the establishment of a panel and that a panel would be established”.<sup>393</sup> The view was expressed “that a contracting party had the right to a panel upon request, and that it was up to the complaining party to choose whether a panel or working party should be established”.<sup>394</sup> The representative of the European Communities “recognized that there were inherent rights for each contracting party to request the establishment of a panel”<sup>395</sup> but stated that “the Council could not establish panels automatically on a mechanical basis”. The Council agreed to establish a Panel at its November 1982 meeting.<sup>396</sup>

In the 1984 Council Discussion on Canada’s request for establishment of a Panel to review the unilateral reduction of the EEC tariff quota on imports of newsprint from Canada, the representative of the European Communities said that “it had been traditional GATT practice since discussion of the legal framework in 1979 not to refuse such a request (for establishment of a panel). The Community would therefore respect the tradition embodied in the 1979 Understanding ...”.<sup>397</sup>

<sup>385</sup>C/M/101, p. 10.

<sup>386</sup>C/M/102, p. 4.

<sup>387</sup>C/M/146, p. 20-21; discussion of L/5113, Director General’s report to the Council on Article XVI:1 discussions on “EEC - Refunds on Exports of Sugar”, adopted on 10 March 1981, 28S/80.

<sup>388</sup>C/M/149, p. 6.

<sup>389</sup>*Ibid.*, p. 8.

<sup>390</sup>C/M/150, p. 22.

<sup>391</sup>C/M/160, p. 18.

<sup>392</sup>*Ibid.*, p. 20.

<sup>393</sup>*Ibid.*, p. 19.

<sup>394</sup>C/M/162, p. 13.

<sup>395</sup>C/M/160, p. 19.

<sup>396</sup>C/M/162, p. 15.

<sup>397</sup>C/M/176, p. 3.

The 1989 Improvements provide in paragraph F(a) as follows.

“... If the complaining party so requests, a decision to establish a panel or working party shall be taken at the latest at the Council meeting following that at which the request first appeared as an item on the Council’s regular agenda, unless at that meeting the Council decides otherwise.\*”

The footnote to this sentence provides: “References to the Council, made in this paragraph as well as in the following paragraphs, are without prejudice to the competence of the CONTRACTING PARTIES, for which the Council is empowered to act in accordance with normal GATT practice (BISD 26S/215).”

At the 8-9 February 1989 Council meeting, in discussion of the request of Brazil for a panel under Article XXIII:2 in respect of “United States - Import Restrictions on Certain Products from Brazil”, “The representative of Australia noted that this matter was before the Council for the second time. He said that some form of precedent had been established whereby, although a panel did not have to be established at the first meeting when it was requested, it was customary to accede to the request at the second meeting. Australia therefore supported Brazil’s request”.<sup>398</sup> At the 21 February 1989 Council meeting, in consideration of the same panel request, the US representative stated that “in these circumstances, the United States would not join, but would not block, a consensus to establish a panel”. The representative of Brazil “said that it was incumbent on the Chairman to recognize the overwhelming support for Brazil’s request, and on the Council to agree to establish a panel. There was a clear precedent for such action in the 1974 case involving a dispute between Canada and the European Communities”.<sup>399</sup> Brazil had taken note that the United States would not block a consensus on this matter, and asked that a panel be established at the present time. The Chairman said that it was his conclusion, based on the discussion at the 8-9 February Council meeting and at the present meeting, that it was the Council’s wish to establish a panel in this matter. He therefore proposed that the Council take note of the statements, agree to establish a panel and authorize him to draw up the terms of reference and to designate the Chairman and members of the Panel in consultation with the parties concerned”.<sup>400</sup> The Council so agreed.

In 1991 and 1992 the meaning of paragraph F(a) of the 1989 Improvements was discussed by the Council and in informal consultations. Summing up this debate, the Chairman stated at the March 1992 Council meeting concerning the word “otherwise” in this paragraph that “it had been felt that there would be two circumstances in which the Council’s decision would be otherwise: (a) if there was a consensus not to establish a panel at the second Council meeting, and (b) if there was a consensus to postpone consideration of a request for a panel”.<sup>401</sup>

### **3. Composition of panels**

#### ***(1) Membership of panels***

The 1979 Understanding provides in paragraphs 11, 12 and 14:

“When a panel is set up, the Director-General, after securing the agreement of the contracting parties concerned, should propose the composition of the panel, of three or five members depending on the case, to the CONTRACTING PARTIES for approval. The members of a panel would preferably be governmental. It is understood that citizens of countries whose governments are parties to the dispute would not be members of the panel concerned with that dispute. The panel should be constituted as promptly as possible and normally not later than thirty days from the decision by the CONTRACTING PARTIES.

“The parties to the dispute would respond within a short period of time, i.e., seven working days, to nominations of panel members by the Director-General and would not oppose nominations except for compelling reasons.

<sup>398</sup>C/M/228, p. 14. Although the 1989 Improvements were formally adopted only in April 1989, a broad consensus on this decision had already been reached at the Midterm Review of the Uruguay Round held at Montreal in December 1988.

<sup>399</sup>Reference made to “Canada - Article XXIV:6 negotiations with the European Communities”, C/M/102, page 4.

<sup>400</sup>C/M/229, p. 3.

<sup>401</sup>See C/M/250, p. 41-44; C/M/251, p. 42; C/M/252 p. 35-36, summed up at C/M/255, p. 17-18.

“Panel members would serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments would therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and wide spectrum of experience”.<sup>402</sup>

Paragraph 6(ii) and (iii) of the Annex to the 1979 Understanding provide:

“... Members of the panel are usually selected from permanent delegations or, less frequently, from the national administrations in the capitals amongst delegates who participate in GATT activities on a regular basis. The practice has been to appoint a member or members from developing countries when a dispute is between a developing and a developed country.

“Members of panels are expected to act impartially without instructions from their governments. In a few cases, in view of the nature and complexity of the matter, the parties concerned have agreed to designate non-government experts. Nominations are proposed to the parties concerned by the GATT secretariat. The composition of panels (three or five members depending on the case) has been agreed upon by the parties concerned and approved by the GATT Council. It is recognized that a broad spectrum of opinion has been beneficial in difficult cases, but that the number of panel members has sometimes delayed the composition of panels, and therefore the process of dispute settlement”.

See also section F(c) of the 1989 Improvements, paragraph (iii) of the 1982 Ministerial Decision and the section on “Formation of Panels” in the 1984 Decision.

## **(2) Roster of non-governmental panelists**

Paragraph 13 of the 1979 Understanding provides: “In order to facilitate the constitution of panels, the Director-General should maintain an informal indicative list of governmental and non-governmental persons qualified in the fields of trade relations, economic development, and other matters covered by the General Agreement, and who could be available for serving on panels. For this purpose, each contracting party would be invited to indicate at the beginning of every year to the Director-General the name of one or two persons who would be available for such work”.<sup>403</sup>

Paragraph (iii) of the 1982 Ministerial Decision provides: “With reference to paragraph 13 of the Understanding, contracting parties will co-operate effectively with the Director-General in making suitably qualified experts available to serve on panels. Where experts are not drawn from Geneva, any expenses, including travel and subsistence allowance, shall be met from the GATT budget”. Paragraphs 1 and 2 of the section of the 1984 Decision on “Formation of Panels” provide that

“Contracting parties should indicate to the Director-General the names of persons they think qualified to serve as panelists, who are not presently affiliated with national administrations but who have a high degree of knowledge of international trade and experience of the GATT. These names should be used to develop a short roster of non-governmental panelists to be agreed upon by the CONTRACTING PARTIES in consultation with the Director-General. The roster should be as representative as possible of contracting parties.

“The Director-General should continue the practice of proposing panels composed preferably of governmental representatives but may also draw as necessary on persons on the approved roster ...”.

Finally, paragraph F(c)3 of the 1989 Improvements provides regarding the Roster: “The roster of non-governmental panelists shall be expanded and improved. To this end, contracting parties may nominate individuals to serve on panels and shall provide relevant information on their nominee’s knowledge of international trade and of the GATT”.

<sup>402</sup>The footnote to this paragraph provides: “A statement is included in the Annex describing the current practice with respect to inclusion on panels of persons from developing countries.”

<sup>403</sup>The footnote to this paragraph provides: “The coverage of travel expenses should be considered within the limits of budgetary possibilities.”

Nominations for the Roster were invited in February 1985 and the Roster was approved by the Council in November 1985. The Roster was extended annually for a one-year period in November 1986 through 1989. The Council decided in November 1990 to extend the Roster provisionally for a further period until the conclusion of the Uruguay Round negotiations on dispute settlement rules and procedures.<sup>404</sup> In June 1994, the Council agreed to extend the roster until the entry into force of the WTO Agreement, and agreed that the roster would henceforth be issued as an unrestricted document.<sup>405</sup>

At the November 1986 Council meeting in discussion on extension of the Roster, “The Director-General noted that the roster had been constituted on the basis of nominations by contracting parties. The Secretariat remained open to any further nominations to increase the number of available panelists ... if at a certain time the Secretariat thought it useful to call on [qualified experts], even if they were not on the roster, this would be proposed”.<sup>406</sup> Nominations for the Roster have been approved from time to time by the Council. An updated Roster list is circulated periodically by the Secretariat.<sup>407</sup>

### **(3) Completion of panel composition by the Director-General**

Paragraph F(c)5 of the 1989 Improvements provides that “If there is no agreement on the members within twenty days from the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the Council, shall form the panel by appointing the panelists whom he considers most appropriate, after consulting both parties. The Director-General shall inform the contracting parties of the composition of the panel thus formed no later than ten days from the date he receives such a request”. See also paragraph 3 of the section on “Formation of panels” in the 1984 Decision. As of March 1994 the Director-General had received a request under paragraph F(c)5, and completed the panel thereunder, in three instances: the formation in August 1992 of the Panel in the recourse to Article XXIII:2 by the EEC and the Netherlands on behalf of the Netherlands Antilles concerning “United States – Restrictions on Imports of Tuna Products”<sup>408</sup>, the formation of the Panel in the recourse to Article XXIII:2 by Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela concerning “EEC - Member States’ Import Régimes for Bananas”<sup>409</sup>, and the formation of the Panel in the recourse to Article XXIII:2 by Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela concerning “EEC - Import Régime for Bananas”.<sup>410</sup>

### **(4) Changes in panel composition**

The 1962 Panel Report on the “Uruguayan Recourse to Article XXIII” notes that “The original membership of the Panel ... comprised seven members in addition to the Chairman. Some of these members, owing to practical difficulties (such as transfer of duty station away from Europe, urgent duties elsewhere, etc.) found themselves unable to participate in the work and requested that their names be withdrawn from the Panel. In two cases, the Chairman of the CONTRACTING PARTIES, in accordance with established practice, has appointed a substitute”.<sup>411</sup>

The 1980 Panel Report on “EC - Refunds on Sugar - Complaint by Brazil” notes that as one of the panelists was unable to participate in the work of the Panel until its completion, a substitute was appointed.<sup>412</sup>

In introducing the 1983 Panel Report on “EEC - Subsidies on Export of Pasta Products”<sup>413</sup> in the Committee on Subsidies and Countervailing Measures, the Panel Chairman recalled that “originally, there were

<sup>404</sup>GATT/AIR/2103 (invitation for nominations for the roster), C/M/191 p. 46-47 (additional invitation by the Director-General), C/M/194 p. 6 (November 1985 approval), L/5906 (initial roster list), C/M/204 p. 26-27 (November 1986 extension), C/M/215 p. 36 (November 1987 extension), C/W/531 and Add. 1-2 (alterations proposed in November 1987), C/M/226 p. 20-21, SR.44/2 (November 1988 extension), C/M/237 p. 4-5, C/W/615, L/6602 (November 1989 extension), C/M/246 p. 22-23 and L/6763 (November 1990 extension).

<sup>405</sup>C/M/273.

<sup>406</sup>C/M/204, p. 26-27.

<sup>407</sup>The Roster list approved at the June 1994 Council appears in L/7493 and includes 67 names; additions to the Roster appear in addenda to L/7493.

<sup>408</sup>DS29/4, dated 25 August 1992, para. 1.3.

<sup>409</sup>DS32/10; see also DS32/R.

<sup>410</sup>DS38/9, dated 16 July 1993; see also DS38/R.

<sup>411</sup>L/1923, adopted on 14 November 1962, 11S/94, 96, para. 5.

<sup>412</sup>L/5011, adopted on 10 November 1980, 27S/69, 70, para. 1.5.

<sup>413</sup>SCM/43.

five panelists who together constituted the Panel. One resigned during the course of the examination. With the agreement of the parties, the Panel concluded its work with four panelists".<sup>414</sup>

**(5) Reconvening of a panel or working party**

When, during the July 1981 Council meeting, the question was raised of whether the Working Party on "European Communities - Refunds on Exports of Sugar" could be reconvened to resume its earlier discussions, even though its report<sup>415</sup> had been adopted on 10 March 1981, the Chairman of the Council responded

"that the existence of a working party was related to its terms of reference. In normal GATT practice, when a working party fulfilled its mandate, it ceased to exist when the Council adopted its report. However, when adopting a report, the Council could nevertheless decide to continue the existence of a working party with new or modified terms of reference. He recalled that, in the instance under discussion, the Director-General had been invited to organize discussions in a working party and to submit a report to the Council within a stated time period, which had been accomplished. He said that while the Council might not be able to revive a defunct working party in the strictly legal sense, clearly it could decide to establish a new working party with similar or identical terms of reference".<sup>416</sup>

See also discussion of this matter above at page 722.

In 1991, a Panel was established in response to the request of the United States on "Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies". By agreement between the parties, the composition of the Panel was the same as that of a different Panel which in 1988 examined a complaint of the EC relating to practices of Canadian provincial marketing agencies for alcoholic beverages.<sup>417</sup>

The 1992 Report of the Members of the Original Oilseeds Panel on "Follow-up on the Panel Report 'EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins'" includes "Introductory Comments" delivered by the Chairman of this body at the first meeting with the parties on 3-4 February 1992, which provide as follows concerning the nature of this body:

"... what I have referred to as 'this body', or as 'the Reconvened Members of the original Oilseeds Panel', is not the original Panel. That is clear since we have a different mandate. On the other hand we have a specific mandate from the CONTRACTING PARTIES and are required to exercise the functions of a Panel in the examination of certain matters and in making findings. As a practical matter it is therefore our intention to conduct these proceedings as a Panel on the basis of the established working practices and procedures that are designed to protect the interests of all parties concerned.

"Accordingly, if for convenience or other reasons we refer to ourselves as the Panel or the Reconvened Panel, I would trust that, in the light of my comments, this is understood to mean the members of the original Oilseeds Panel reconvened for the purposes decided by the CONTRACTING PARTIES in the context of the follow-up on the Report of the original Panel".<sup>418</sup>

See also the material on proceedings to examine implementation of particular recommendations, starting at page 687.

<sup>414</sup>SCM/M/18, p. 1.

<sup>415</sup>L/5113, adopted on 10 March 1981, 28S/80.

<sup>416</sup>C/M/149, p. 5.

<sup>417</sup>DS17/R, adopted on 18 February 1992, para. 1.4.

<sup>418</sup>DS28/R, dated 31 March 1992, Annex B, paras. 6-7.

#### 4. Determination of terms of reference

##### (1) *Standard terms of reference*

In establishing a Panel, the Council usually authorizes the Chairman of the Council, in consultation with the contracting parties concerned, to decide on appropriate terms of reference and to designate the Panel members. The Chairman then subsequently informs the Council of the terms of reference and of the composition of the Panel, and the Council takes note of this information.<sup>419</sup> The 1979 Understanding Annex on customary practice notes in its paragraph 6(ii):

“... The terms of reference are discussed and approved by the Council. Normally, these terms of reference are ‘to examine the matter and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or rulings provided for in paragraph 2 of Article XXIII’. When a contracting party having recourse to Article XXIII:2 raised questions relating to the suspension of concessions or other obligations, the terms of reference were to examine the matter in accordance with the provisions of Article XXIII:2.”<sup>420</sup>

The 1982 Ministerial Decision provides in paragraph (v) that:

“The terms of reference of a panel should be formulated so as to permit a clear finding with respect to any contravention of GATT provisions and/or on the question of nullification and impairment of benefits. In terms of paragraph 16 of the Understanding, and after reviewing the facts of the case, the applicability of GATT provisions and the arguments advanced, the panel should come to such a finding.”<sup>421</sup>

During the special meeting of the Council on 19 October 1988 on review of developments in the trading system the Director-General noted that “in almost all recent cases, standard terms of reference had been agreed. He said that if the terms of reference were narrowed, there was the risk of curtailing the complaining party’s right to a full examination of its case. If the terms of reference were expanded, the risk was that panels would be drawn into issues that fell outside the scope of Article XXIII. He therefore welcomed the trend towards using standard terms of reference.”<sup>422</sup>

The 1989 Improvements provide, in paragraphs 1 and 2 of section F(b):

“Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within twenty days from the establishment of the panel:

‘To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by (name of the contracting party) in document L/... and make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2’.

“In establishing a panel, the Council may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties subject to the provisions of the preceding paragraph. The terms of reference thus drawn up shall be circulated to all contracting parties. If other than standard terms of reference are agreed upon, any contracting party may raise any point relating thereto in the Council”.

Since entry into effect of the 1989 Improvements, there has been no instance in which the parties to a dispute have agreed to other than standard terms of reference, although there have been instances in which the parties have agreed on understandings regarding the manner in which the panel would carry out its work.<sup>423</sup>

<sup>419</sup>See, e.g., C/M/148, p. 12; C/M/149, p. 15; C/M/150, p. 24.

<sup>420</sup>26S/217, para.6(ii).

<sup>421</sup>29S/9, 14, para.(v).

<sup>422</sup>C/M/225, p.2.

<sup>423</sup>See understanding between the parties cited in the Panel Report on “Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes”. DS10/R, adopted on 7 November 1990, 37S/200, 201, para. 3, also recorded in C/M/241.

See also the material below at pages 734-737 concerning the interpretation by panels of the scope of their terms of reference.

## (2) *Special terms of reference*

In a number of instances before the entry into effect of the 1989 Improvements, the terms of reference of panels were specified in more detail, and were also at times accompanied by understandings on the manner in which the panel would carry out its work. See, for instance, the terms of reference and accompanying understanding in the 1985 Panel Report on “Canada - Measures Affecting the Sale of Gold Coins”<sup>424</sup>, the terms of reference in the 1986 Panel Report on “United States - Trade Measures Affecting Nicaragua”<sup>425</sup>, the terms of reference and accompanying understanding recorded in the 1985 Panel Report on “EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean”<sup>426</sup> and the understanding recorded in the 1989 Panel Report on “Norway - Restrictions on Imports of Apples and Pears”.<sup>427</sup>

## 5. Procedures for multiple complainants

Where two panel proceedings have taken place at or around the same time concerning the same measures, it has occurred that the same panelists have served on both panels. For example, the same panelists served on the 1979 Panel on the complaint brought by Australia on “European Communities - Refunds on Exports of Sugar” and the 1980 Panel in the complaint brought by Brazil (which was initially an interested third party in the Australian case) on “European Communities - Refunds on Exports of Sugar - Complaint by Brazil”.<sup>428</sup> Two out of three panelists were the same in the 1979 Panel on “Japanese Measures on Imports of Leather” and the 1980 Panel on “Japan’s Measures on Imports of Leather”.<sup>429</sup>

At its meeting of 4 February 1987 the Council dealt with requests for panels by Canada and the European Economic Community under Article XXIII:2 concerning the United States’ Superfund taxes on petroleum and petroleum products and on imported chemical derivatives, and a request by Mexico for the good offices of the Director-General under the 1966 Procedures (see page 765 below) concerning solely the Superfund tax on petroleum and petroleum products. The representative of the European Communities said “that a procedural solution should be found so that a single panel could deal with the three complaints, on the understanding that the Panel would look at the specific details of each complaint”. Agreement on terms of reference was subject to the following understanding on the organization of the Panel’s work:

“1. The Panel will organize its examination and present its findings to the Council in such a way that the procedural rights which the parties to the dispute would have enjoyed if separate panels had examined the complaints are in no way impaired. If one of the complainants so requests the panel will submit a separate report on the complaint of that party.

“2. The written submissions by each of the complainants will be made available to the other complainants and each complainant will have the right to be present when one of the other complainants presents its views to the Panel.”<sup>430</sup>

The Panel submitted a single Report in which the findings on each of the two tax measures in question were presented separately.<sup>431</sup>

At the Council meeting of May 1988, when, in response to requests by Australia and the United States, two panels were established concerning Korea’s beef import restrictions, it was decided that the Council Chairman would consult with the two Panels and with the Secretariat concerning the appropriate administrative

<sup>424</sup>C/M/185.

<sup>425</sup>L/6053 (unadopted), dated 13 October 1986; for terms of reference, see page 706 above.

<sup>426</sup>C/M/168, p. 5; L/5776, Report of the Panel (unadopted), para. 1.5; see also Council discussion at C/M/162, p. 12.

<sup>427</sup>L/6474, adopted on 22 June 1989, 36S/307.

<sup>428</sup>L/4833, adopted on 6 November 1979, 26S/290, and L/5011, adopted on 10 November 1980, 27S/69.

<sup>429</sup>L/4789, adopted on 6 November 1979, 26S/320 (complaint by the United States); and L/5042, adopted on 10 November 1980, 27S/118 (complaint by Canada).

<sup>430</sup>C/M/206, p. 13, 34S/137.

<sup>431</sup>L/6175, adopted on 17 June 1987, 34S/136.

arrangements; in consultations among the parties it was agreed that both Panels would have the same composition. A panel on the same import restrictions of Korea was established at the September 1988 Council meeting in response to a request by New Zealand, and it was agreed in consultations that it would have the same composition as well. The applicant party in each proceeding provided a submission as an interested third party in the other two proceedings. The Panels each submitted a separate report with essentially identical findings.<sup>432</sup>

At the Council meeting of May 1988, a panel was established concerning EEC restrictions on imports of dessert apples in response to a complaint by Chile. The Panel composition was notified to contracting parties on 5 August 1988. At the September Council meeting a panel was established in response to the complaint of the United States concerning the same restrictions. In October 1988 the members of the first Panel were designated as the members of the second Panel. The Panels submitted separate reports; where the issues argued were the same, the findings were the same.<sup>433</sup>

Paragraph F(d) of the 1989 Improvements on "Procedures for Multiple Complainants" provides:

"1. Where more than one contracting party requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all parties concerned. A single panel should be established to examine such complaints whenever feasible.

"2. The single panel will organize its examination and present its findings to the Council so that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel will submit separate reports on the dispute concerned. The written submissions by each of the complainants will be made available to the other complainants, and each complainant will have the right to be present when one of the other complainants presents its view to the panel.

"3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized."

On 11 March 1992, the EEC requested consultations under Article XXIII:1 on U.S. restrictions on importation of certain tuna products, and on 5 June 1992 the EEC requested a panel. On 3 July the Netherlands, acting on behalf of the Netherlands Antilles, asked for consultations concerning the same restrictions; the consultations were held on 13 July, the following day the Netherlands asked to be joined as co-complainant in a panel to be established pursuant to the EEC's request, and on 14 July the Council agreed to establish a panel with the EEC and the Netherlands as co-complainants.<sup>434</sup>

The Panel on "EEC-Member States' Import Regimes for Bananas" was established in 1993 in response to a complaint by Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela.<sup>435</sup> The Panel on "EEC - Restrictions on Imports of Bananas" was established later in 1993 in response to a complaint by the same five contracting parties.<sup>436</sup>

At the Forty-ninth Session in January 1994, a panel was established concerning "United States - Measures Affecting the Importation and Internal Sale and Use of Tobacco", pursuant to a complaint under Article XXIII:2 brought by Brazil, Canada, Chile, Colombia, El Salvador, Guatemala, Thailand and Zimbabwe. At its meeting on 22-23 February 1994, the Council agreed that Argentina's complaint concerning the same measures also be examined by the same panel. The terms of reference were amended to read as follows: "To examine, in the light of the relevant provisions of the General Agreement, the matter referred to the CONTRACTING PARTIES by Brazil,

<sup>432</sup>See paragraph 4 of each of these Panel Reports, all adopted on 7 November 1989: L/6503, 36S/269 (United States); L/6504, 36S/202 (Australia); L/6505, 36S/234 (New Zealand).

<sup>433</sup>See Panel Reports, both adopted on 22 June 1989, L/6491, 36S/93 (Chile), L/6513, 36S/135 (United States).

<sup>434</sup>DS29/1 (EEC consultation request); DS33/1 (Netherlands consultation request); DS29/2, DS29/3 (EEC and Netherlands panel requests); C/M/258, p. 28-31; DS29/R (panel report, unadopted, dated 16 June 1994).

<sup>435</sup>DS32/R (unadopted), dated 3 June 1993.

<sup>436</sup>DS38/R (unadopted), dated 11 February 1994.

Chile, Colombia, El Salvador, Guatemala, Thailand and Zimbabwe in document DS44/5 and Corr.1, by Canada in document DS44/6 and Corr. 1 and by Argentina in document DS44/8, and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2.”<sup>437</sup>

## 6. Scope of panel proceeding

### (1) *Scope of “the relevant GATT provisions”*

The 1979 Understanding notes in paragraph 16 that “The function of panels is to assist the CONTRACTING PARTIES in discharging their responsibilities under Article XXIII:2.” Paragraph 3 of the Annex thereto further notes that “The function of a panel has normally been to review the facts of a case and the applicability of GATT provisions and to arrive at an objective assessment of these matters”. The standard terms of reference for a panel provided in paragraph F(b) of the 1989 Improvements are “To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES ... and make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2”.

#### (a) *Provisions of Protocol of Provisional Application*

A number of Panels have interpreted the provisions of the Protocol of Provisional Application. See the chapter on the Protocol in this Index.

#### (b) *Provisions in Protocols of accession*

Provisions in Protocols of accession have been interpreted by panels and working parties on various occasions. The 1957 Working Party report on “Import Restrictions of the Federal Republic of Germany”<sup>438</sup> examined the obligations of Germany under the Torquay Protocol. The 1962 Panel Report on “Uruguayan Recourse to Article XXIII” includes an examination of the claims of three contracting parties that certain measures were permitted under their respective Protocols of Accession.<sup>439</sup> Also, during the 1962 examination of residual import restrictions, two contracting parties stated that they considered that certain restrictions they applied to certain agricultural products were covered by their respective Protocols of Accession.<sup>440</sup> The provisions of the Protocol of Accession of Thailand were interpreted in the 1990 Panel Report on “Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes”.<sup>441</sup>

#### (c) *Provisions of decisions of the CONTRACTING PARTIES under Article XXV:1 or Article XXV:5*

The Decision on “Differential and More Favourable Treatment, Reciprocity and Full Participation of Developing Countries” (the “Enabling Clause”), which is a decision of the CONTRACTING PARTIES under Article XXV:1, was interpreted as a “relevant GATT provision” by the Panel Report on “United States - Customs User Fee”<sup>442</sup>, the Panel Report on “United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil”<sup>443</sup> and the unadopted 1993 Panel Report on “EEC - Member States’ Import Régimes for Bananas”.<sup>444</sup>

Panels and Working Parties have interpreted the terms of waiver decisions under Article XXV:5 on numerous occasions. See the material above at page 709 on the relationship between Article XXIII and Article XXV:5, and the material under Article XXV:5 in this Index.

<sup>437</sup>DS44/R, adopted on 4 October 1994; DS44/9/Rev.1 (revised terms of reference).

<sup>438</sup>L/768, adopted on 30 November 1957, 6S/55, 60, para. 12.

<sup>439</sup>L/1923, adopted on 16 November 1962, 11S/95, 102-148; countries included Denmark (mixing regulation on bread grains), Federal Republic of Germany (import permits and quotas on meat and edible oils), and Italy (State trading on wheat and wheat flour).

<sup>440</sup>L/1769: Italy (restrictions on wheat and meslin, wheat flour, bananas and tobacco), and Sweden (various measures in meat, dairy, grains, sugar and fish sectors).

<sup>441</sup>DS10/R, adopted on 7 November 1990, 37S/200; see 37S/226-227, paras. 82-83.

<sup>442</sup>L/6264, adopted on 2 February 1988, 35S/245, 289-290, para. 122.

<sup>443</sup>DS18/R, adopted on 19 June 1992, 39S/128, 152-153, paras. 6.14-6.17.

<sup>444</sup>DS32/R, dated 3 June 1993, para. 363.

(d) *Past panel reports*

The 1989 Panel Reports on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile” and “EEC - Restrictions on Imports of Apples - Complaint by the United States” note in relation to the treatment of an earlier panel report:

“... In considering the facts and arguments relating to Article XI in particular, the Panel took note of the fact that a previous Panel, in 1980, had reported on a complaint involving the same product and the same parties as the present matter and a similar set of GATT issues. ... The Panel construed its terms of reference to mean that it was authorized to examine the matter referred to it by [Chile/the United States] in the light of all relevant provisions of the General Agreement and those related to its interpretation and implementation. It would take into account the 1980 Panel report and the legitimate expectations created by the adoption of this report, but also other GATT practices and Panel reports adopted by the CONTRACTING PARTIES and the particular circumstances of this complaint. The Panel, therefore, did not feel it was legally bound by all the details and legal reasoning of the 1980 Panel report”.<sup>445</sup>

See also the discussion of precedent below at pages 755-759.

(e) *Provisions of bilateral agreements*

Concerning invocation of bilateral agreements in disputes under Article XXIII, see at page 719.

(f) *Provisions of general international law other than the General Agreement; estoppel*

The Panel on “United States - Measures Affecting Imports of Softwood Lumber from Canada” examined the United States’ defense that a measure was a countervailing duty undertaking.

“The Panel considered that, for purposes of determining whether the MOU was covered by Article 4:5(a) of the Agreement, the key question was whether in concluding the MOU Canada and the United States had intended to act under this provision. In considering this question, the Panel considered the text of the MOU and actions of the parties subsequent to its conclusion.

“The Panel ... concluded that until April 1992, well after the dispute settlement proceeding before this Panel had been initiated, the United States had not referred to the MOU as an undertaking under Article 4:5(a) of the Agreement in its notifications to the Committee on Subsidies and Countervailing Measures. Furthermore, the United States had not treated the MOU as such an undertaking in the Federal Register notice of 5 January 1987 of the termination of the countervailing duty investigation on imports of softwood lumber from Canada. The United States also had not treated the MOU as such an undertaking in the notices of various actions taken under Section 301 of the Trade Act of 1974 with respect to the MOU in December 1986 and January 1987. The Panel further noted that in imposing the interim measures under Section 304 of the Trade Act of 1974, the United States made no reference to the enforcement of a countervailing duty action. The Panel found that these facts were relevant as evidence of the intention of the parties to the MOU with respect to the status of the MOU under the Agreement.

...

“The Panel noted the argument of the United States that a failure to meet procedural requirements with respect to notification could not defeat substantive rights of a signatory under the Agreement. The Panel did not consider, however, that in the present case it was faced with a situation in which the United States had inadvertently ‘failed’ to notify that on 5 January 1987 it had accepted an undertaking with respect to imports of softwood lumber from Canada; rather, the United States, in consistently refraining from notifying the MOU as an undertaking, had treated the conclusion of the MOU and the termination in January 1987 of the countervailing duty investigation on imports of softwood lumber from Canada as an action which did not constitute a countervailing duty action under the Agreement in the form of a

<sup>445</sup>L/6491 and L/6513, both adopted on 22 June 1989, 36S/93 and 36S/135, at 36S/123-124 and 36S/159, paras. 12.1 and 5.1.

termination of proceedings upon the acceptance of an undertaking. The Panel also recalled in this respect its views expressed in paragraph 19 on the characteristics of undertakings under Article 4:5(a) of the Agreement as alternatives to countervailing duties. The Panel's conclusion regarding the lack of evidence of an intention of Canada and the United States to act under Article 4:5(a) of the Agreement was therefore not based only on the lack of notification of the MOU as an undertaking."<sup>446</sup>

See also at page 718 above.

(g) *Elements other than "the relevant GATT provisions"*

The Panel on "EEC - Quantitative Restrictions against Imports of Certain Products from Hong Kong" in 1983 considered the argument of the EEC that "the Panel could not ignore that the General Agreement was an international agreement which had to be interpreted on the basis of generally accepted principles and practices of international law. An important principle of international law, namely the 'law-creating force derived from circumstances' could not be ignored by the Panel, on the sole ground that no GATT article provided for such a principle".<sup>447</sup>

"The Panel considered the arguments put forward by the European Community regarding the social and economic conditions which prevailed in the various product categories under examination. The European Community did not claim any corresponding GATT provision in justification for these arguments. The Panel was of the opinion that such matters did not come within the purview of Article XI and XIII of the GATT, and in this instance concluded that they lay outside its consideration ... .

"The Panel considered the argument put forward by the European Community that the principle referred to as 'the law-creating force derived from circumstances' could be relevant in the absence of law. It found, however, that in the present case such a situation did not exist, and the matter was to be considered strictly in the light of the provisions of the General Agreement ... .

"The Panel further noted that no GATT justification had been advanced for the quantitative restrictions ... and concluded that the relevant provisions of Article XI were not complied with".<sup>448</sup>

See also the discussion of justification of measures by subsequent practice or acquiescence, and estoppel against the complaining party, in the unadopted panel report of 1993 on "EEC - Member States' Import Régimes for Bananas".<sup>449</sup>

The 1984 Panel Report on "Japanese Measures on Imports of Leather" refers to arguments made by Japan in justification of quantitative restrictions on imports:

"... The Panel considered that the special historical, cultural and socio-economic circumstances referred to by Japan could not be taken into account by it in this context since its terms of reference were to examine the matter 'in the light of the relevant GATT provisions' and these provisions did not provide such a justification for import restrictions. It noted that a panel report adopted by the CONTRACTING PARTIES in 1983 had, in a similar situation, concluded 'that [such matters] did not come within the purview of Article XI and XIII of the GATT and ... lay outside its consideration'".<sup>450</sup>

The 1988 Panel Report on "Japan - Restrictions on Imports of Certain Agricultural Products" notes that "As regards the vital role the twelve items under consideration played in Japan's agriculture and regional economies and their underlying social and political background, the Panel - while aware of their significance in the Japanese

<sup>446</sup>SCM/162, adopted on 27 October 1993, paras. 319, 322, 313.

<sup>447</sup>L/5511, adopted on 12 July 1983, 30S/129, 134, para. 15.

<sup>448</sup>*Ibid.*, 30S/138-139, paras. 27, 29, 32.

<sup>449</sup>DS32/R, dated 3 June 1993, paras. 361-363.

<sup>450</sup>L/5623, adopted on 15/16 May 1984, 31S/94, 111, para. 44, referring to Hong Kong dispute cited above.

context - found that previous panels had established that such circumstances could not provide a justification for import restrictions under the General Agreement".<sup>451</sup>

The 1990 Panel Report on "EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins" notes that

"The Panel was established to make findings 'in the light of the relevant GATT provisions'; it therefore does not have the mandate to propose interpretations of the provisions of the Subsidies Code which the Community invokes to justify its position".<sup>452</sup>

In the panel proceeding in 1987 on "United States - Taxes on Petroleum and Certain Imported Substances", the EC argued that the border tax adjustments involved in the tax on certain imported chemical substances were inconsistent with the Polluter-Pays Principle adopted in the OECD. The Panel report notes that "The mandate of the Panel is to examine the case before it 'in the light of the relevant GATT provisions' ... The Panel therefore did not examine the consistency of the revenue provisions of the Superfund Act with the environmental objectives of that Act or with the Polluter-Pays Principle". The Panel Report also notes the existence of the Group on Environmental Measures and International Trade, and notes that the EC "would thus have a forum available in the GATT in which to pursue the environmental issues which the Panel, because of its limited mandate, could not address".<sup>453</sup> See also the discussion in the unadopted panel report of 1994 on "United States - Restrictions on Imports of Tuna" on the extent to which certain environmental and trade treaties other than the General Agreement are relevant in interpreting the General Agreement.<sup>454</sup>

## (2) *Measures as applied versus measures as such*

The 1989 Panel Report on "United States - Section 337 of the Tariff Act of 1930" notes that "The Panel's terms of reference refer both to the application of Section 337 in general and to its application in the case concerning Certain Aramid Fibre which prompted the European Economic Community to submit its complaint to the CONTRACTING PARTIES. During the course of the Panel's proceedings, the parties to the Certain Aramid Fibre case reached a settlement ... and thereafter the Community withdrew its request to the Panel to make findings in respect of that case. The Panel therefore limited its examination to Section 337 as such, plus the related Section 337a which the Council clearly intended to be covered by the Panel's terms of reference since it was the provision applicable in the Certain Aramid Fibre case ...".<sup>455</sup>

In the 1990 Panel Report on "EEC - Regulation on Imports of Parts and Components" the Panel examined an argument of Japan concerning an anti-circumvention provision in EEC anti-dumping legislation:

"Japan considers not only the measures taken under the anti-circumvention provision but also the provision itself to be violating the EEC's obligations under the General Agreement. Japan therefore asked the Panel to recommend to the CONTRACTING PARTIES that they request the EEC not only to revoke the measures taken under the provision but also to withdraw the provision itself. The Panel therefore examined whether the mere existence of the anti-circumvention provision is inconsistent with the General Agreement. The Panel noted that the anti-circumvention provision does not mandate the imposition of duties or other measures by the EEC Commission and Council; it merely authorizes the Commission and the Council to take certain actions. Under the provisions of the General Agreement which Japan claims to have been violated by the EEC contracting parties are to avoid certain measures; but these provisions do not establish the obligation to avoid legislation under which the executive authorities may possibly impose such measures. ...

"In the light of the above the Panel found that the mere existence of the anti-circumvention provision in the EEC's anti-dumping Regulation is not inconsistent with the EEC's obligations under the General Agreement. Although it would, from the perspective of the overall objectives of the General Agreement, be

<sup>451</sup>L/6253, adopted on 2 February 1988, 35S/163, 242, para. 5.4.1.4.

<sup>452</sup>L/6627, adopted on 25 January 1990, 37S/131.

<sup>453</sup>L/6175, adopted on 17 June 1987, 34S/136, 162, para. 5.2.6.

<sup>454</sup>DS29/R, dated 16 June 1994, paras. 5.18-5.20, 5.33.

<sup>455</sup>L/6439, adopted on 7 November 1989, 36S/345, 382-383, para. 5.1.

desirable if the EEC were to withdraw the anti-circumvention provision, the EEC would meet its obligations under the General Agreement if it were to cease to apply the provision in respect of contracting parties".<sup>456</sup>

In the 1992 Panel Report on "United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil," in examining certain legislation of the United States, "... the Panel ... found that these provisions as such, not merely their application in concrete cases, have to be consistent with Article I:1".<sup>457</sup>

See also under "discretionary legislation" above starting at page 645.

**(3) *Matters not raised in consultations, panel request and/or terms of reference***

The 1983 Panel Report on "EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong" notes with respect to a difference of opinion between the parties regarding the inclusion of one item among the product categories under examination by the Panel,

"... The Panel considered that just as the terms of reference must be agreed between the parties prior to the commencement of the Panel's examination, similarly the product coverage must be clearly understood and agreed between the parties to the dispute. The Panel considered that to allow the inclusion of an additional product item about which one party had not been formally advised prior to the commencement of proceedings would be to introduce an element of inequity".<sup>458</sup>

The 1984 Panel Report on "United States - Imports of Sugar from Nicaragua" notes that Nicaragua claimed in the panel proceeding that the United States sugar quota system was contrary to Article XI and not covered by the terms of a waiver granted to the US in 1955.

"... The Panel considered that its terms of reference defined the matter before it as 'the measures taken by the United States concerning imports of sugar from Nicaragua', and referred to document L/5492 in which Nicaragua had asked for consultations under Article XXIII:1 on 'the announcement by the United States Government of the modification regarding the allocation of the sugar import quota to Nicaragua'. The Panel concluded, therefore, that the task assigned to it by the Council was to examine not the United States sugar quota system as such but the reduction in the quota allocated to Nicaragua within that system, and that any consideration of the sugar quota system in the light of Article XI fell outside its terms of reference".<sup>459</sup>

The 1984 Panel Report on "Canada - Administration of the Foreign Investment Review Act" notes in relation to a terms of reference claim by Canada:

"The Panel considered that the examination of undertakings to *manufacture* goods which would be imported otherwise, as requested by the United States ... was not covered by its terms of reference which only refer to 'the *purchase* of goods in Canada and/or the *export* of goods from Canada'. Accordingly the Panel did not examine this question".<sup>460</sup>

The Panel Report on "EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region", which has not been adopted, notes that in this case, the United States challenged the conformity with Article I:1 of tariff preferences on certain citrus products extended under agreements between the EC and certain Mediterranean countries. The US had not made a specific claim of non-violation nullification or impairment in consultations nor in its request for a panel, and stated its claim under Article XXIII:1(b) in response to a question by the Panel.<sup>461</sup>

<sup>456</sup>L/6657, adopted on 16 May 1990, 37S/132, 198-199, para. 5.25-5.26.

<sup>457</sup>DS18/R, adopted on 19 June 1992, 39S/128, 152, para. 6.13.

<sup>458</sup>L/5511, adopted on 12 July 1983, 30S/129, 139, para. 30.

<sup>459</sup>L/5607, adopted on 13 March 1984, 31S/67, 73, para. 4.2.

<sup>460</sup>L/5504, adopted on 7 February 1984, 30S/140, 158, para. 5.3.

<sup>461</sup>L/5776, dated 7 February 1985 (unadopted), para. 3.33.

“... the Panel proceeded to examine in accordance with Article XXIII:1(b) whether and how a benefit accruing to the US directly or indirectly under Article I:1 had been nullified or impaired as a result of the EEC’s application of tariff preferences on citrus products from certain Mediterranean countries, whether or not these preferences conflicted with the provisions of the General Agreement ... The Panel considered that such an examination was in keeping with its terms of reference to examine the matter in the light of the relevant GATT provisions. The US, in its complaint, had not specified any particular provision of Article XXIII:1, and therefore the matter could also be considered under Article XXIII:1(b) .... Moreover the US had stated that even if the granting of tariff preferences was consistent with the General Agreement, Article XXIII:1(b) would justify the US complaint that GATT benefits were being nullified or impaired.”<sup>462</sup>

The 1989 Panel Report examining the complaint of Australia on “United States - Restrictions on Imports of Sugar” notes regarding a terms of reference claim by the United States:

“Australia claimed that the reallocation of a portion of Guyana’s sugar quota to Belize, Jamaica and Trinidad and Tobago in December 1988 was inconsistent with Article XIII:2 of the General Agreement. The United States argued that this matter was not covered by the Panel’s terms of reference because it had arisen after the establishment of the Panel by the Council in September 1988. The Panel considered that it had to interpret its terms of reference not only in the light of the interests of the parties to the dispute, but also in the light of the rights of third contracting parties. The Panel noted that, according to paragraph 15 of the Understanding on Dispute Settlement (BISD 26S/210), ‘any contracting party having a substantial interest in the matter before a Panel, and having notified this to the Council, should have an opportunity to be heard by the panel’. The Panel concluded from this that only those issues which interested third contracting parties could reasonably have expected to be part of the proceedings when the Panel was established by the Council could be considered to be part of the matter referred to the Panel by the Council. The issue raised by Australia involves directly two contracting parties (Jamaica and Trinidad and Tobago); it also has implications for other contracting parties. Since the matter raised by Australia had arisen only after the establishment of the Panel by the Council in September 1988, contracting parties had no reason to expect that the reallocation of the sugar quotas among Caribbean countries would be an issue before the Panel. The Panel therefore decided that this reallocation was not part of its mandate. The Panel however recalled in this context that it had found all restrictions imposed by the United States on the importation of sugar under the authority of the Headnote in the Tariff Schedules of the United States to be inconsistent with the General Agreement independent of the quota allocation to specific countries. It also recalled its finding that Article II:1(b) does not permit contracting parties to qualify their obligations under other provisions of the General Agreement and that this could not justify inconsistencies with any article of the General Agreement, including Article XIII.”<sup>463</sup>

However, a terms of reference claim was rejected in the 1989 Panel Report on “United States - Section 337 of the Tariff Act of 1930”:

“The United States suggested that the scope of the complaint was confined to matters of legal procedure, and that the issues raised by the Community concerning *in rem* general exclusion orders and the possibility of imported products being subject to simultaneous proceedings under Section 337 and in federal district courts are not matters of procedure. However, the Panel noted that its terms of reference refer without limitation to ‘the different rules applicable under Section 337’ to which imported products are subject. Accordingly, it determined that these issues fall within its terms of reference. The term ‘procedure’ is used hereinafter in a broad sense that encompasses these issues.”<sup>464</sup>

A request by Korea that the Panels on the complaints of Australia, New Zealand and the United States on “Korea - Restrictions on Imports of Beef” rule on the admissibility of claims relating to Article XVIII, on the basis that these claims had been improperly brought under Article XXIII and not under Article XVIII:12(d), was rejected: the reasons given were that Korea was a party to the consensus to set up these panels, the terms of reference referred to the matters referred to the CONTRACTING PARTIES by Australia and the United States

<sup>462</sup>*Ibid.*, para. 4.25.

<sup>463</sup>L/6514, adopted on 22 June 1989, 36S/331, 343-344, para. 5.8.

<sup>464</sup>L/6439, adopted on 7 November 1989, 36S/345, 383, para. 5.5.

respectively (which included the claims regarding application of Article XVIII), and “The terms of reference do not give the Panels authority to rule on admissibility of the respective claims.”<sup>465</sup>

The 1992 Panel Report on “United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil” includes an examination and ruling concerning a terms of reference claim.

“The Panel recalled that in their first submissions to the Panel, Brazil and the United States disagreed on the proper scope of the proceeding. In addition to its presentation on Article I:1, Brazil made arguments to the Panel concerning the administration of United States’ countervailing duty laws under Article X and non-violation nullification and impairment under Article XXIII:1(b) and (c). Brazil considered these latter issues to be within the standard terms of reference of the Panel. The United States claimed that these issues had not been raised by Brazil in consultations or in its request for the establishment of a panel. They were therefore outside the terms of reference. The United States did not address these issues on the merits in its submission to the Panel and it requested the Panel to make a ruling on the matter.

“On 18 September 1991, the Panel made the following ruling:

‘Having heard and considered the arguments of Brazil and the United States as to whether or not the Panel should consider presentations on Articles X and XXIII:1(b) and (c), the Panel rules as follows:

‘*Article X.* The Panel notes that its terms of reference are limited to the matters raised by Brazil in its request for the establishment of this Panel, that is document DS18/2. In its request, Brazil referred to the discrimination in the United States’ countervailing duty laws as applied to Brazil, not however to any discrimination resulting from the administration of United States’ countervailing duty laws. The Panel therefore considers that the matter raised by Brazil in its submission relating to Article X:3(a) is not part of its terms of reference. The Panel would like to emphasize however that it is ready to consider any arguments on the issue of discrimination, taking into account its terms of reference.

‘*Article XXIII:1(b) and (c).* The Panel further notes that in its request for a Panel, Brazil claimed that the United States had acted inconsistently with the General Agreement. Brazil did not claim that benefits accruing to it under the General Agreement were nullified or impaired as a result of a measure or situation of the type referred to in Article XXIII:1(b) and (c). The Panel therefore considers that the matters raised by Brazil relating to these provisions were not covered by its terms of reference.’<sup>466</sup>

The 1992 Panel Report on “United States - Measures Affecting Alcoholic and Malt Beverages” includes a ruling by the Panel on preliminary objections by the United States.

- “1. The Panel noted that both parties agreed that the Panel should examine only those practices on which consultations under Article XXIII:1 were held.
- “2. At its meeting on 29-30 May 1991, the Council agreed that the terms of reference of the Panel were to examine ‘the matter referred to the CONTRACTING PARTIES by Canada in document DS23/2’ unless the Parties agreed on other terms of reference. The Panel noted that, as set out in the Note by the Chairman of the Council (DS23/4), the parties agreed that the terms of reference of the Panel should include reference to documents DS23/1 to 3. Document DS23/3 considerably narrows the scope of the complaint outlined in DS23/1 and 2.
- “3. The Panel decided to examine all United States measures specified in document DS23/3 and in the submission, dated 23 July 1991, presented by Canada to the GATT Panel.
- “4. Document DS23/3, page 2, declares that Canada ‘reserves the right to raise any new measure which may come into effect during the Panel’s deliberations’. The Panel considers that its terms of reference

<sup>465</sup>L/6504, L/6505 and L/6503, all adopted on 7 November 1989, 36S/202, 234 and 269, at 203-204, 235-236 and 270, para. 10 in each instance.

<sup>466</sup>DS18/R, adopted on 19 June 1992, 39S/128, 147-148, paras. 6.1-6.2.

do not permit it to examine 'any new measure which may come into effect during the Panel's deliberations'.

- "5. The Panel noted that Canada no longer requests the Panel to make a finding on the labelling practices of certain states."<sup>467</sup>

The 1994 Panel Report on "United States - Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon" includes a lengthy discussion of terms of reference claims raised by the United States:

"The Panel considered ... these objections in the light of the provisions of Article 15:2 through 15:7 of the Agreement concerning consultation, conciliation and panel proceedings. The Panel noted that in each paragraph the drafters of the text had chosen to refer to the subject matter of the dispute in identical terms as 'the matter'. Consultations would be requested under Article 15:2 'with a view to reaching a mutually satisfactory resolution of *the matter*' if a Party considered that such consultations failed to achieve a mutually agreed solution it could refer '*the matter*' to the Committee for conciliation; in conciliation, the Committee would meet 'to review the matter'; and if no mutually agreed solution emerged, a panel had to be established 'to examine *the matter*' if any party to the dispute so requested. This choice of words reflected, in the view of the Panel, the decision to establish a three-step process of settlement of a dispute between Parties concerning a single 'matter' and the individual claims of which a matter is composed, in which panel examination of a matter would be preceded by consultations concerning that same matter and conciliation concerning that same matter.

"The Panel further observed that at the consultation phase, the parties to a dispute were required to consult and thereby provide at least an opportunity for reaching a mutually satisfactory resolution of the matter in dispute. At the conciliation phase, during the Committee's review of the matter, the parties to the dispute were required to go further and 'make their best efforts to reach a mutually satisfactory solution throughout the period of conciliation.' The Panel therefore considered that the Agreement provided that before a party to a dispute could request a panel concerning a matter, the parties to the dispute had to have been given an opportunity to reach a mutually satisfactory resolution of the matter. This condition would not be meaningful unless the matter had been raised in consultations and conciliation.

"The Panel noted that Paragraph 4 of the Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance, which applies *mutatis mutandis* to disputes under the Agreement by virtue of Article 15:7 of the Agreement, provided that 'Any requests for consultations should include the reasons therefor'. The Panel however considered that whereas the greatest degree of precision could be expected in the definition of specific claims in a panel request, the complaining Party could not be expected to define its specific claims with the same degree of precision at the time of its request for consultations.

"With reference to conciliation, the Panel further noted the provisions of Footnote 15 to Article 15:3, that 'the Committee may draw Parties' attention to those cases in which, in its view, there are no reasonable bases supporting the allegations made'. The Panel also noted that Article 15:5 referred to a 'detailed examination by the Committee under paragraph 3'. The Panel considered that these provisions implied that the conciliation process envisaged was one which would examine legal claims and their bases and in which each member of the Committee would be able to express its views on these legal issues. Such a process would not be possible unless the request for conciliation identified the matter and the claims composing it. Furthermore, the requirement to make best efforts 'throughout' the conciliation period to reach a mutually satisfactory solution to the matter could not be fulfilled unless the matter had been identified at the start of the conciliation period. The Panel therefore concluded that a matter, including each claim composing that matter, could not be examined by a panel under the Agreement unless that same matter and claim had been referred to the Committee for conciliation in accordance with Article 15:3.

"The Panel then examined the relation between the scope of the matter before it and the terms of reference. The Panel considered that terms of reference served two purposes: definition of the scope of a panel proceeding, and provision of notice to the defending Party and other Parties that could be affected by

<sup>467</sup>DS23/R, adopted on 19 June 1992, 39S/206, 227-228, para. 3.5.

the panel decision and the outcome of the dispute. The notice function of terms of reference was particularly important in providing the basis for each Party to determine how its interests might be affected and whether it would wish to exercise its right to participate in a dispute as an interested third party. The Panel observed that terms of reference often were standard terms of reference, as in the present dispute, in which the definition of the matter had been supplied by a written statement prepared entirely by the complaining Party. In the light of these considerations, the Panel concluded that a matter, including each claim composing that matter, could not be examined by a panel under the Agreement unless that same matter was within the scope of, and had been identified in, the written statement or statements referred to or contained in its terms of reference. The Panel further observed that Article 15:5 provided that the Committee ‘shall ... establish’ a panel based on such a written statement, and considered that it could therefore not be assumed that the Committee by establishing this Panel with standard terms of reference had decided that the Panel should examine any claim in the written statement, regardless of whether that claim had been the subject of consultations between the parties and conciliation in the Committee.

“In the view of the Panel the foregoing conclusions were particularly appropriate in view of the nature of disputes concerning antidumping actions, relative to the powers accorded to panels by the Agreement. The requirement to engage in consultations and conciliation served an essential purpose in clarifying the facts and arguments in dispute, and framing the dispute concerning the matter in terms which a panel would be best equipped to resolve.

“In light of the foregoing considerations, the Panel was of the view that, for a claim to be properly before the Panel, it had to be within the Panel's terms of reference and it had to have been identified during prior stages of the dispute settlement process.”<sup>468</sup>

See also the treatment of terms of reference claims in the unadopted panel report of 1993 on “EEC - Member States’ Import Régimes for Bananas”.<sup>469</sup>

In its report adopted in 1994, the panel on “Brazil - Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community” notes that while before the panel the EEC based a particular claim *inter alia* on Article 6.2 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII, no reference to that provision appeared in paragraph 13 of SCM/155, the panel request. However, Brazil had not argued that the issues raised by the EEC under this provision were not within the scope of the panel's terms of reference. The panel did analyze the claim in question in relation to Article 6.2.<sup>470</sup>

#### **(4) *Change in the subject matter of a proceeding***

##### **(a) *Change in measures***

The 1962 Panel Report on “Uruguayan Recourse to Article XXIII” notes in paragraph 18 that

“Whilst the Panel was conducting its consultations, the EEC introduced its Regulation on cereals under the common agricultural policy, replacing the measures included in the original submission by Uruguay. The Panel noted the statement by the delegation of Uruguay that those new measures (which are described in COM.II/134) would have a significant impact on Uruguay's cereals trade. However, since the measures did not form part of Uruguay's original submission and since they were under consideration by the CONTRACTING PARTIES with the active participation of Uruguay, the Panel considered that it would not be appropriate for it to examine the compatibility or otherwise of the measures applied under that Regulation

<sup>468</sup> paras. 332-338; see also detailed analysis of Norway's claims at *ibid.* paras. 339-

<sup>469</sup> DS32/R, dated 3 June 1993, paras. 324-325.

<sup>470</sup> SCM/179, adopted on 28 April 1994, paras. 208, 305-322, 348-350.

with the General Agreement. The Panel also noted that the measures applying to certain other products might be replaced shortly with the extension of the application of the common agricultural policy, but in the absence of any definite indication in that regard, the Panel deemed it advisable to treat such measures as they now existed”.<sup>471</sup>

When the same Panel was reconvened in 1964, its terms of reference on that occasion included the examination of “the question of compatibility with the GATT referred to in paragraphs 16-18” of its 1962 Report. The Report of the reconvened Panel notes that the Panel had advised the Uruguayan delegation “that the Panel would now be in a position to examine any specific cases which the Government of Uruguay wished to present, assuming it could also show at that time that bilateral consultations had been tried unsuccessfully”.<sup>472</sup>

The 1989 Panel Report on “United States - Section 337 of the Tariff Act of 1930” notes that “During the course of the Panel’s work, Section 337 was amended by the Omnibus Trade and Competitiveness Act of 1988. The Panel’s findings are based on Section 337 as it was at the time that the Panel was established by the Council, in October 1987”.<sup>473</sup>

On 14 July 1992 a panel was established in the dispute brought by the EEC and the Netherlands on behalf of the Netherlands Antilles against the United States concerning U.S. restrictions on imports of tuna. In October and November 1992 the U.S. Congress amended the statutes at issue. In October the EEC and the Netherlands requested a pause in the panel procedures, and the chairman then announced a suspension of the panel’s work by agreement between the parties until further notice.<sup>474</sup> On 18 and 25 November 1992, the EEC and the Netherlands respectively proposed supplementary consultations under Article XXIII:1 on the changes to the United States legislation.<sup>475</sup> The United States agreed to this request, explicitly reserving the question whether these were supplementary consultations or initial consultations under a new dispute settlement proceeding. These consultations took place on 16 December 1992. As a result of the consultations, the parties to the dispute, without prejudice to the rights of any party to the dispute, reached an understanding specifying the U.S. legislative provisions enacted in October 1992 that could be considered in the course of the Panel proceeding. The Panel agreed with the parties that the amendments could be considered by the Panel.<sup>476</sup>

(b) *Change in legal basis for measures under the General Agreement*

In 1964 the Panel on the “Uruguayan Recourse to Article XXIII” was reconvened for a second time to consider, *inter alia*, new measures applied since it was first reconvened in 1963. The Report of the Panel observed that “... most of the measures [cited by Uruguay in its submission] were not new measures applied since its latest [1963] report, but measures which had already been dealt with in its first report [of 1962]. The one case in which measures previously considered might now be regarded as new is that in which the situation of the country applying the restrictions has subsequently altered, as, for example, by disinvocation of Article XII”.<sup>477</sup>

The 1980 Panel Report on “Norway - Restrictions on Imports of Certain Textile Products” notes that after Norway imposed unilateral control measures on Hong Kong textiles effective 1 January 1978, the United Kingdom acting on behalf of Hong Kong and Norway held consultations in May 1978. The United Kingdom (for Hong Kong) requested a panel on 1 June 1978 and the Council decided on 6 June 1978 that its Chairman should establish a panel if no solution were reached by 30 June 1978. On 20 July 1978 Norway informed the CONTRACTING PARTIES that it had decided to invoke Article XIX. At the Council meeting of 24 July 1978 the United Kingdom (for Hong Kong) stated that as a result, the legal basis for its complaint had changed and that it might decide to seek consultations with Norway under Article XIX. The Chairman of the Council thereupon stated that he would not take any further steps toward establishment of a Panel. After further consultations, the

<sup>471</sup>L/1923, adopted on 16 November 1962, 11S/95, 100-101, para. 18.

<sup>472</sup>L/2278, adopted on 3 March 1965, 13S/45, 48, para. 14.

<sup>473</sup>L/6439, adopted on 7 November 1989, 36S/345, 383, para. 5.2.

<sup>474</sup>DS29/5, dated 16 November 1992.

<sup>475</sup>DS29/6, 29S/7.

<sup>476</sup>DS29/R, unadopted, dated 10 June 1994, para. 1.4.

<sup>477</sup>L/2278, adopted on 3 March 1965, 13S/45, 47, para. 9.

United Kingdom (for Hong Kong) on 13 July 1979 again took recourse to Article XXIII:2 and the Council established a Panel on 25 July 1979.<sup>478</sup>

(c) *Use of updated information concerning the same measures*

The 1978 Panel Report on “Canada - Withdrawal of Tariff Concessions” notes that “The Panel does not consider that full statistics for the applicable base period must be available at the very beginning of the negotiations [under Article XXVIII], provided these data become available later in the negotiations and the latter are not unduly delayed”.<sup>479</sup> This finding was referred to in the 1980 Panel Report on the complaint brought Australia regarding “EC - Refunds on Exports of Sugar,” in which the Panel examined the issue of share of world export trade in sugar taking into account data for 1978; “... the Panel felt that this year constituted a special case, for the following two reasons: at the time when Australia presented its complaint, the year 1978 had not yet ended and the date for that year were not formally finalized at the time the Panel drew its conclusions; 1978 was also the year in which the International Sugar Agreement, 1977, came into operation. ... Despite these facts the Panel nevertheless felt that the year 1978 should be taken into consideration, be it on the basis of preliminary data noting that this would be in conformity with earlier practice”.<sup>480</sup> The same approach was taken in the Panel Report of 1980 on “EC - Refunds on Exports of Sugar - Complaint by Brazil,” in which “... the Panel ... noted that Brazil had presented its complaint before final data for 1978 were available and that it would even at the conclusion of its work only have preliminary data for 1979 at its disposal. The Panel nevertheless felt that it was appropriate to include not only 1978, but to the extent possible, also 1979 in its considerations, as the Community export system with respect to sugar had remained the same as in previous years and the effects of the application of the system may have been even more significant than previously. Furthermore, the complaint by Brazil also covered threat of serious prejudice. The Panel therefore felt it appropriate to take into consideration any available information about developments in recent periods and that this would be in conformity with earlier practice”.<sup>481</sup>

The three Panel Reports which examined the complaints of Australia, New Zealand and the United States on “Korea - Restrictions on Imports of Beef” indicate that the US and Australian panels were established in April 1988 and the New Zealand panel in September 1988; the panel requests referred to in the terms of reference referred to restrictions imposed under Article XVIII. The Panel’s examination of the application of Article XVIII took into account balance-of-payments data up to the end of 1988 and information provided by the International Monetary Fund on the Korean balance-of-payments situation as of early 1989.<sup>482</sup>

(5) *Claims not raised by the applicant contracting party*

In the 1980 Panel Report on “Norway - Restrictions on Imports of Certain Textile Products”

“the Panel noted that ... Hong Kong had limited its formal request to a finding on Norway’s Article XIX action. The Panel at the same time noted and consequently based its decision on the statements by Hong Kong that the latter was prepared to assume that Norway had the necessary justification for taking this action and that a finding concerning the exclusion from the quotas of the EEC and EFTA countries was not necessary”.<sup>483</sup>

The Chairman of the Panel explained that the “Panel, therefore, had not questioned the validity of the action by Norway under Article XIX; and the Panel’s conclusions did not take into account and were without prejudice to any Article XXIV aspects of the case”.<sup>484</sup>

<sup>478</sup>L/4959, adopted on 18 June 1980, 27S/119, 120-121, para. 5.

<sup>479</sup>L/4636, adopted on 17 May 1978, 25S/42, 48, para. 17.

<sup>480</sup>L/4833, adopted on 6 November 1979, 26S/290, 309, para. 4.13. A footnote to this paragraph refers to 25S/48.

<sup>481</sup>L/5011, adopted on 10 November 1980, 27S/69, 89, para. 4.8. A footnote to this paragraph refers to panel reports at 25S/48 and 26S/309, para. 4.13.

<sup>482</sup>L/6504, L/6505 and L/6503, all adopted on 7 November 1989, 36S/202, 234 and 269, at 228, 264-265, and 303-304, paras. 99-101, 115-117, 121-123.

<sup>483</sup>L/4959, adopted on 18 June 1980, 27S/119, 125, para. 14(a).

<sup>484</sup>C/M/141, p. 4.

In the 1984 Panel Report on “Japanese Measures on Imports of Leather”,

“The Panel noted that some of the delegations which had indicated an interest in the matter before it and which had made statements to the Panel had argued that Japan’s import régime on leather contained discriminatory elements and therefore contravened Article XIII:1 and 2. The Panel did not make a finding on this matter as it had not been raised by the United States and was not, therefore, within its terms of reference ...”.<sup>485</sup>

The 1984 Panel Report on the “United States Manufacturing Clause” includes the following paragraph:

“The Panel noted that the United States had argued that, even if the Panel were to find nullification or impairment of a benefit accruing to the European Communities under the General Agreement, the circumstances would not be serious enough to justify authorization of a suspension of obligations or concessions under Article XXIII:2, since the European Communities had suffered no economic harm. The Panel decided not to examine this argument, because the complaining party, the European Communities, had not requested the Panel to make findings concerning the authorization of suspension of obligations or concessions under Article XXIII”.<sup>486</sup>

In introducing this Panel Report in the Council, the Chairman of the Panel said, *inter alia*:

“Questions relating to possible compensation, which had been raised in the Council during discussion on setting up the Panel, had not been examined, since the Panel had been established to examine a matter raised by the European Communities, and the Community had asked the Panel during the course of its work not to look into these questions.”<sup>487</sup>

In the 1984 Panel Report on “EEC - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes”, which has not been adopted,

“The Panel noted that the United States had presented its complaint to the Panel as a case of a ‘non-violation’ nullification and impairment. It was the Panel’s understanding that the United States had not contended that the EC production aid system on the four products in question had violated any specific provisions of the General Agreement. The Panel considered that in these circumstances it was not for the Panel to examine the consistency of the EC production aid system with the provisions of the General Agreement. Having noted this the Panel then proceeded to an examination as to whether the EC production aids had nullified or impaired the tariff concessions granted on canned peaches, canned pears, canned fruit cocktail and dried grapes”.<sup>488</sup>

The 1988 Panel Report on “United States Customs User Fee” also notes the argument raised by India which, as an intervening party, “requested the Panel to consider whether the exemption contained in the merchandise processing fee legislation in favour of imports from least developed countries was consistent with the MFN obligations of Article I:1”. The issue was also raised by Australia and Singapore as intervening parties, but not by the applicant parties Canada and the EC, which reserved their rights on the issue and did not object to the Panel dealing with it. The Panel refrained from a formal finding on the issue, in accordance with GATT practice, which it considered sound legal practice, to make findings only on those issues raised by the parties to the dispute.<sup>489</sup>

The 1989 Panel Report on “United States - Restrictions on Imports of Sugar”, concerning a dispute in which Australia was the applicant party, notes concerning a claim made by the EEC:

“The Panel noted that the EEC, in its submission as an interested third party, argued that the restrictions on the importation of sugar were contrary to the terms of the waiver granted in 1955 by the CONTRACTING PARTIES in connection with import restrictions imposed under Section 22 of the United States

---

<sup>485</sup>L/5623, adopted on 15/16 May 1984, 31S/94, 114, para. 58.

<sup>486</sup>L/5609, adopted on 15/16 May 1984, 31S/74, 91, para. 41.

<sup>487</sup>C/M/176, p. 22.

<sup>488</sup>L/5778, para. 48.

<sup>489</sup>L/6264, adopted on 2 February 1988, 35S/245, 289, para. 121.

Agricultural Adjustment Act (of 1933) as amended (BISD 3S/32). The Panel noted that the matter referred to the CONTRACTING PARTIES by Australia were restrictions maintained under the authority of the Headnote in the Tariff Schedules of the United States, and not restrictions taken under Section 22 ... Therefore the issue raised by the EEC could not be examined by the Panel. The Panel also recalled in this context that the practice has been for panels to make findings only on those issues raised by the parties to the dispute, not on those raised solely by third parties ...”<sup>490</sup>

The EEC claim referred to by this Panel was then made by the EEC in the dispute recorded in the 1990 Panel Report on “United States - Restrictions on the Importation of Sugar and Sugar-containing Products applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions”.<sup>491</sup>

The 1992 Panel on “United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil” notes that

“... the Panel did not consider it appropriate in the context of this case to address the issues raised in India’s third party submission in respect of the non-applicability of the PPA. It was not clear to the Panel how India’s arguments respecting the non-applicability of the PPA directly affect Brazil’s case before this Panel. GATT practice has been for panels to make findings only on the issues raised by the parties to the dispute.<sup>492</sup> The Panel believed that this was sound legal practice and should also be followed in the present case. It was of course open to any contracting party which wished to raise this issue to commence consultation and dispute settlement proceedings in its own right under the General Agreement”.<sup>493</sup>

In the 1994 panel report on “United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco”, the panel examined a fee charged for inspection of tobacco:

“The Panel ... noted that Article VIII does not apply to taxes within the purview of Article III. The Panel then recalled that no party to the dispute had requested the Panel to examine the consistency of these inspection fees with Article III. Indeed, all parties had argued that the Section 1106(c) inspection fees should be examined in the light of Article VIII. The Panel noted that the consistency of Section 1106(c) could present itself differently under Article III in that the focus of the examination would then be on the inspection fees as internal charges and on whether or not national treatment was accorded in respect of such charges. However, in view of the fact that the parties to the dispute had argued the Section 1106(c) inspection fees in terms of Article VIII, the Panel proceeded to examine this legislative provision under that Article.”<sup>494</sup>

Claims advanced by a third party have been considered when the applicant party has explicitly associated them with its claims.<sup>495</sup>

See also the material below at page 745 on treatment of proceedings in the event of partial settlement and withdrawal of some claims by the applicant party.

#### **(6) Defences not raised by the respondent contracting party**

In the 1983 Panel Report on “EEC - Quantitative Restrictions against Imports of Certain Products from Hong Kong” the Panel “recognized that situations might exist in which the maintenance of quantitative restrictions would be justified under the relevant GATT provisions. It noted, however, that no such provisions had

<sup>490</sup>L/6514, adopted on 22 June 1989, 36S/331, 344, para. 5.9.

<sup>491</sup>L/6631, adopted on 7 November 1990, 37S/228.

<sup>492</sup>The footnote to this sentence refers to the Panel Report on “United States - Customs User Fee”, adopted on 2 February 1988, 35S/245, 290.

<sup>493</sup>DS18/R, adopted on 19 June 1992, 39S/128, 154, para. 6.19.

<sup>494</sup>DS44/R, adopted on 4 October 1994, para. 117.

<sup>495</sup>See Panel Report on “Japan - Trade in Semi-conductors”, L/6309 adopted on 4 May 1988, 35S/116, 123, para. 32 (EEC adoption of additional claims regarding Articles I and XVII:1(c) in Canadian third-party submission; EEC requested that the Panel take these claims into consideration).

been invoked by the European Community in the matter. It decided that in such circumstances it was not for the Panel to establish whether the present measures would be justified under any GATT provision or provisions".<sup>496</sup>

The 1984 Panel Report on "US - Imports of Sugar from Nicaragua" includes the following findings: "The Panel noted that the United States had not invoked any of the exceptions provided for in the General Agreement permitting discriminatory quantitative restrictions contrary to Article XIII. The Panel therefore did not examine whether the reduction in Nicaragua's quota could be justified under any such provision".<sup>497</sup>

In the 1984 Panel Report on "Japanese Measures on Imports of Leather"

"The Panel noted that Article XI:1 prohibits the use of quantitative restrictions. It recognized that situations might exist in which the maintenance of such restrictions would be justified under the relevant GATT provisions. It noted, however, that Japan had not invoked any provision of the General Agreement to justify the maintenance of the import restrictions on leather. The Panel decided that in such circumstances it was not for it to establish whether the present measures would be justified under any GATT provision or provisions ...".<sup>498</sup>

The 1989 Panel Report on "EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile" notes that in this proceeding, Chile argued that, noting the Commission's responsibility for EEC trade policy, and that member States' import licensing systems were determined by EEC legislation, the Commission should be held responsible for ensuring that its member States administered such licensing in accordance with Article X; the EEC stated that it understood Article XXIV:12 to be an exception and that since the Community had not invoked it in the present case, it saw no grounds for the Panel to examine the EEC's obligations thereunder. The Panel examined the licensing systems in question in relation to Article X and did not examine the applicability of Article XXIV:12.<sup>499</sup>

In the 1990 Panel Report on "EEC - Regulation on Imports of Parts and Components"

"... The Panel ... noted that the United States, as an interested third party, had argued that Article VI of the General Agreement provided to a certain extent a legal basis for measures to prevent what it considered to be circumvention of anti-dumping duties. At one point in the proceedings the EEC stated that, if the Panel were to find that the anti-circumvention duties were justifiable under Article VI, 'it would not disagree' with such an approach ... However, the EEC presented no arguments in support of a justification of its measures under Article VI; on the contrary, in the subsequent proceedings the EEC continued to present various arguments to the effect that measures under Article 13:10 were 'necessary' within the meaning of Article XX(d) because Article VI did *not* provide a basis for the application of measures to prevent circumvention of anti-dumping duties ... In conformity with the practice of panels not to examine exceptions under the General Agreement which have not been invoked by the contracting party complained against ... and not to examine issues brought only by third parties ... the Panel decided not to examine whether the anti-circumvention duties could be justified under Article VI of the General Agreement".<sup>500</sup>

## ***(7) Treatment of proceedings and panel report in the event of a mutually agreed solution***

### ***(a) Treatment of proceedings and report***

In past disputes it has occurred that a mutually agreed solution to a dispute has been reached during the course of the Panel's work and before it had advised the parties of its conclusions<sup>501</sup> or after the Panel had

<sup>496</sup>L/5511, adopted on 12 July 1983, 30S/129, 138, para. 26.

<sup>497</sup>L/5607, adopted on 13 March 1984, 31S/67, 74, para. 4.4.

<sup>498</sup>L/5623, adopted on 15/16 May 1984, 31S/94, 111, para. 44.

<sup>499</sup>L/6491, adopted on 22 June 1989, 36S/93, 133, para. 12.30; arguments at *ibid.*, 36S/118, paras. 7.1-7.2.

<sup>500</sup>L/6657, adopted on 16 May 1990, 37S/132, 194, para. 5.11; see also EEC comments on this Panel Report at L/6676.

<sup>501</sup>See, e.g., Panel Reports on "Japanese Measures on Imports of Leather" (complaint by United States), L/4789, adopted on 6 November 1979, 26S/320, 321, para. 5; "Japan's Measures on Imports of Leather" (complaint by Canada), L/5042, 27S/118; "Japanese Restraints on Imports of Manufactured Tobacco from the United States", L/5140, adopted on 11 June 1981, 28S/100, 102, paras. 11-13; "EEC - Restrictions on Exports of Copper Scrap", DS5/R, adopted on 20 February 1990, 37S/200.

advised the parties of its conclusions informally but before circulation of the final panel report to the contracting parties.<sup>502</sup> In such cases panels have usually recommended that proceedings under Article XXIII:2 be terminated. While the panel has submitted a report for adoption including information on the nature of the complaint, the establishment, composition and dates of meetings of the panel, the report does not include legal findings or recommendations and has typically included statements similar to the following.

“Since the terms of reference of the Panel were to make such findings as would assist the CONTRACTING PARTIES in making recommendations or rulings in accordance with paragraph 2 of Article XXIII, the Panel draws the attention of the Council to the fact that the parties have arrived at a bilateral solution. Consequently, the Panel considers that it is unnecessary to undertake further investigation of this matter.”<sup>503</sup>

“The Panel drew the attention of the Council to the fact that agreement between [ ---- ] and [ ---- ] had been reached and recommends that the proceedings under Article XXIII:2 be terminated.”<sup>504</sup>

The 1982 Panel Report on “United States - Prohibition of Imports of Tuna and Tuna Products from Canada” refers to this practice: “... the Panel noted that according to prevailing GATT practice when a bilateral settlement to a dispute had been found, panels had usually confined their reports to a brief description of the case indicating that a solution had been reached.”<sup>505</sup> The report in such instances has sometimes also mentioned the withdrawal of the complaint by the applicant contracting party.<sup>506</sup> If at that point the bilateral solution to the dispute had not yet been implemented, Panel reports have sometimes noted that the disputants have reserved their rights and might re-open the Article XXIII:2 procedure. See, e.g., the 1980 Panel Report on the complaint of Canada regarding “Japan’s Measures on Imports of Leather”:

“The two parties have reserved their rights under the GATT; should the conclusions of the discussions not be put into practice to the satisfaction of either government, it is understood that the matter may be subject to further GATT proceedings. The two parties intend to provide the substance of the agreement reached to other interested delegations upon request.”<sup>507</sup>

Mutually agreed solutions have also occurred after establishment of the panel and before composition of the panel or agreement on terms of reference. In 1988, the complaints of the United States concerning “Japan - Imports of Beef and Citrus Products” and of Australia and New Zealand concerning “Japan - Imports of Beef” were withdrawn in the light of measures agreed by Japan, after panels had been established with respect to the US and Australian complaints, and before the panels were composed.<sup>508</sup> As the panels had not been composed, they did not submit reports.

In the 1993-94 panel proceeding brought by Chile on EEC - Restrictions on Imports of Apples, Chile requested and was granted a suspension of panel proceedings for bilateral negotiations which resulted in a mutually satisfactory settlement.<sup>509</sup> In the 1993 panel proceeding on Australia - Imposition of Countervailing

<sup>502</sup>See Panel Report on “Japan Measures on Imports of Thrown Silk Yarn”, L/4637, adopted on 17 May 1978, 25S/107, 108-109, para. 6-7 (oral presentation of findings by Panel to parties with invitation to advise if a bilateral settlement would be possible by a specified date); Interim and Final Reports of Panel on “United Kingdom - Dollar Area Quotas”, L/3843, L/3891, both adopted on 30 July 1973, 20S/230 and 236, 236-237, paras. 4-6 (presentation of interim panel report recommending that bilateral solution be reached and stating that panel will make recommendations if no such solution reached by specified date).

<sup>503</sup>See, e.g., Panel Report on “Japan - Measures on Imports of Thrown Silk Yarn”, L/4637, adopted on 17 May 1978, 25S/107, para. 8; Panel Report on “Japan - Measures on Imports of Leather”, L/5042, adopted on 10 November 1980, 27S/118, para. 6; Panel Report on “United Kingdom Import Restrictions on Cotton Textiles”, L/3812, adopted on 5 February 1973, 20S/237, para. 7.

<sup>504</sup>Report of the “Panel on United States Countervailing Duties”, L/5192, adopted on 3 November 1981, 28S/113, para. 6.

<sup>505</sup>L/5198, adopted on 22 February 1982, 29S/91, 106, para. 4.3. A footnote to the sentence cited refers to the Panel Reports on “Japan - Measures on Imports of Thrown Silk Yarn”, 25S/107; “Japanese Measures on Imports of Leather”, 26S/320; “Japanese Restraints on Imports of Manufactured Tobacco from the United States”, L/5140, 28S/100; “EC - United Kingdom Application of EEC Directives to Imports of Poultry from the United States”, L/5155, 28S/90; “Panel on United States Countervailing Duties”, L/5192, 28S/113.

<sup>506</sup>*Ibid.*, para. 5; also Panel Report on “Japanese Restraints on Imports of Manufactured Tobacco from the United States”, L/5140, adopted on 11 June 1981, 28S/100, 102, paras. 12, 13.

<sup>507</sup>L/5042, adopted on 10 November 1980, 27S/118, 119, para. 5.

<sup>508</sup>C/M/223, p. 20-23 (discussion of notifications of Japanese measures and withdrawal of complaints); see also L/6370 (Japanese announcement of market-opening measures), L/6322 and Add.1 (complaint and withdrawal by US), L/6333 and Add.1 (same for Australia), L/6355 and Add.1 (same for New Zealand), C/M/220 p. 3-7 (establishment of panels with respect to US and Australian complaints).

<sup>509</sup>DS39/R; settlement details set out in DS39/4.

Duties on Imports of Glacé Cherries from France and Italy in Application of the Australian Customs Amendment Act 1991, the EEC requested and was granted a suspension of the proceedings, and then withdrew its complaint. The Panel then considered its proceedings to be terminated.<sup>510</sup> The panel proceeding on “United States - Measures Affecting the Export of Pure and Alloy Magnesium from Canada” was also suspended and later withdrawn.<sup>511</sup>

In the event of partial settlement and withdrawal of some but not all of the claims, the proceeding has continued while taking the partial withdrawal of claims into account. The Panel Report on “United States - Section 337 of the Tariff Act of 1930” notes that “The Panel’s terms of reference refer both to the application of Section 337 in general and to its application in the case concerning Certain Aramid Fibre which prompted the European Economic Community to submit its complaint to the CONTRACTING PARTIES. During the course of the Panel’s proceedings, the parties to the Certain Aramid Fibre case [E.I du Pont de Nemours and Company and Akzo N.V.] reached a settlement ... and thereafter the Community withdrew its request to the Panel to make findings in respect of that case. The Panel therefore limited its examination to Section 337 as such, plus the related Section 337a which the Council clearly intended to be covered by the Panel’s term of reference since it was the provision applicable in the Certain Aramid Fibre case”.<sup>512</sup>

Mutually agreed solutions have also occurred after circulation of the panel report but before its adoption. See the discussion below at page 760 of the treatment of the 1991 Panel Report on “United States - Restrictions on Imports of Tuna”.

See also the material above starting at page 649 concerning measures no longer in effect, and the material at pages 738-740 concerning changes in the subject matter of a dispute.

(b) *Transparency concerning settlements*

Paragraphs 17 and 19 of the 1979 Understanding provide:

“... Where a bilateral settlement of the matter has been found, the report of the panel may be confined to a brief description of the case and to reporting that a solution has been reached.

“If a mutually satisfactory solution is developed by the parties to a dispute before a panel, any contracting party with an interest in the matter has a right to enquire about and be given appropriate information about that solution in so far as it relates to trade matters”.

See also similar statements in paragraphs 6(v) and (vi) in the 1979 Understanding Annex on customary practice.

The 1989 Improvements provide in paragraph B that “Mutually agreed solutions to matters formally raised under GATT Articles XXII and XXIII, as well as arbitration awards within GATT, must be notified to the Council where any contracting party may raise any point relating thereto”.

## 7. Panel procedure

Paragraphs 6(iv), (vi) and (vii) of the 1979 Understanding Annex on customary practice provide as follows:

“(iv) Panels set up their own working procedures. The practice for the panels has been to hold two or three formal meetings with the parties concerned. The panel invited the parties to present their views either in writing and/or orally in the presence of each other. The panel can question both parties on any matter which it considers relevant to the dispute. ... Written memoranda submitted to the panel have been considered confidential, but are made available to the parties to the dispute.

---

<sup>510</sup>SCM/178, dated 28 Oct 1993.

<sup>511</sup>SCM/174, dated 9 August 1993.

<sup>512</sup>L/6439, adopted on 7 November 1989, 36S/345, 382-383, para. 5.1; see also *ibid.* at 36S/353-354, para. 2.9 on the private party settlement.

- “(vi) The reports of panels have been drafted in the absence of the parties in the light of the information and the statements made.
- “(vii) To encourage development of mutually satisfactory solutions between the parties and with a view to obtaining their comments, each panel has normally first submitted the descriptive part of its report to the parties concerned, and also their conclusions, or an outline thereof, a reasonable period of time before they have been circulated to the CONTRACTING PARTIES.”

Paragraphs F(f)1-2 of the 1989 Improvements provide that

“1. Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.

“2. Panels shall follow the Suggested Working Procedures found in the July 1985 note of the Office of Legal Affairs unless the members of the panel agree otherwise after consulting the parties to the dispute ...”.

**(1) Time deadlines for panels**

The 1966 Procedures provide for complaints by a less-developed contracting party against a developed contracting party that upon referral to a panel after completion of good offices, “the panel shall, within a period of sixty days from the date the matter was referred to it, submit its findings and recommendations to the CONTRACTING PARTIES or to the Council, for consideration and decision”. See the discussion of this deadline at the March 1993 Council meeting.<sup>513</sup>

See also paragraph 20 of the 1979 Understanding and paragraph 6(ix) of its Annex on customary practice, paragraph (vi) of the 1982 Ministerial Decision, and the section on “Completion of panel work” in the 1984 Decision. Paragraphs F(f)(2) through (6) of the 1989 Improvements provide that

“2. ... After consulting the parties, the panel members shall, as soon as practicable and whenever possible within one week after the composition and terms of reference of the panel have been agreed upon, fix the timetable for the panel process at least until its first substantive meeting.

“3. In determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions.

“4. Each party to the dispute shall deposit its written submissions with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute. The complaining party shall submit its first submission in advance of the responding party's first submission unless the panel decides, in fixing the timetable referred to in the second paragraph of this section and after consultations with the parties to the dispute, that the parties should submit their first submissions simultaneously. When there are sequential arrangements for the deposit of first submissions, the panel shall establish a firm time period for receipt of the responding party's submission. Any subsequent written submissions shall be submitted simultaneously.

“5. In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the time the composition and terms of reference of the panel have been agreed upon to the time when the final report is provided to the parties to the dispute, shall, as a general rule, not exceed six months ...

“6. When the panel considers that it cannot provide its report within six months, or within three months in cases of urgency, it shall inform the Council in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case should the period from the establishment of the panel to the submission of the report to the contracting parties exceed nine months”.

<sup>513</sup>C/M/262, p. 18-23.

As of March 1994 there had been two instances in which the Council was informed of reasons for delay under this provision.<sup>514</sup>

### **(2) Urgent cases**

The 1962 Panel Report on “Exports of Potatoes to Canada”, adopted on 16 November 1962, examined the introduction on 16 October 1962 of “values for duty” (and therefore an additional charge) under the Canadian Customs Act, on imports of potatoes into Western Canada. Similar measures had been taken once before in the previous year and withdrawn at the end of the marketing season.

“The Canadian delegation stated that a representation had been received from the United States regarding the value for potatoes only a few days before the session of the CONTRACTING PARTIES. ... The Panel noted that the United States Government had made representations to the Canadian Government when action in respect of potatoes had been taken for the first time in 1961. It noted further that when action had been taken on 16 October 1962, i.e. in the week preceding the present session of the CONTRACTING PARTIES, the United States Government had again made representations to the Canadian Government, but at the same time had referred the question to the CONTRACTING PARTIES at very short notice. The Panel noted the United States’ explanation that, because of the seasonal character of such action, the present session offered the only opportunity for consideration of the matter by the CONTRACTING PARTIES.”<sup>515</sup>

The Panel found that the measure was inconsistent with Article II; the report notes that the Panel did not consider the question of whether the circumstances were “serious enough”, in view of the circumstances and because trade statistics were not available.<sup>516</sup>

Paragraph 20 of the 1979 Understanding provides on this subject: “... In cases of urgency the panel would be called upon to deliver its findings within a period normally of three months from the time the panel was established”.

In 1985, in connection with the United States request for establishment of a panel under Article XXIII:2 on leather footwear to apply the findings of the 1984 Report of the “Panel on Japanese Measures on Imports of Leather”, the United States also requested that the panel proceeding be conducted on an expedited basis as provided under paragraph 20 of the 1979 Understanding, and that, in the light of the narrow scope of such a panel’s inquiry, the panel deliver its findings not later than three months from the date of its establishment.<sup>517</sup>

The 1989 Improvements provide, in paragraph F(f)(5), that “In cases of urgency, including those relating to perishable goods, the panel shall aim to provide its report to the parties within three months”.

Requests have been made under these “urgency” provisions in connection with the 1993 panel request by Colombia, Costa Rica, Guatemala, El Salvador and Venezuela in their dispute concerning the EEC import régime for bananas, a 1993 request by Chile for consultations on EEC restrictions on imports of apples, and a 1994 request by Argentina for Article XXIII:1 consultations on EEC countervailing charges on lemons.<sup>518</sup>

### **(3) Confidentiality and privacy of proceedings**

Paragraph 6(viii) of the 1979 Understanding Annex on customary practice provides that “... The opinions expressed by the panel members on the matter are anonymous and the panel deliberations are secret.” Paragraph (i) of the 1982 Ministerial Decision provides, with reference to the good offices procedures provided therein, that

---

<sup>514</sup>DS23/5, Panel on “United States - Measures affecting Alcoholic and Malt Beverages”, dated 27 February 1992 (citing large number of measures examined and lack of agreement between parties on factual aspects); statement of Council Chairman at October 1993 Council meeting relaying communication from the Panel in the dispute brought by the EC and the Netherlands on “United States - Restrictions on Imports of Tuna”, C/M/267, p. 20 (suspension of proceedings was not counted against the six-month deadline).

<sup>515</sup>L/1927, 11S/88, 91-92, paras. 10-11.

<sup>516</sup>*Ibid.*, 11S/93-94, paras. 18-20.

<sup>517</sup>C/M/191, p. 39.

<sup>518</sup>DS38/6, DS39/1, and DS45/2 respectively.

“... Conciliation proceedings, and in particular positions taken by the parties to the dispute during consultations, shall be confidential ...”.

#### **(4) *Role of Secretariat***

Paragraph 6(iv) of the 1979 Understanding Annex on customary practice notes that “Panels may seek advice or assistance from the secretariat in its capacity as guardian of the General Agreement, especially on historical or procedural aspects. The secretariat provides the secretary and technical services for panels”. Paragraph (iv) of the 1982 Ministerial Decision provides that “The secretariat of GATT has the responsibility of assisting the panel, especially on the legal, historical and procedural aspects of the matters dealt with”. See also the reference in paragraph H.1 of the 1989 Improvements that “the Secretariat assists contracting parties in respect of dispute settlement at their request” and to provision of technical assistance to developing contracting parties “in a manner ensuring the continued impartiality of the Secretariat”.

### **8. Sources and treatment of information**

#### **(1) *Right of panel to seek information***

Paragraph 15 of the 1979 Understanding provides: “Each panel should have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a State it shall inform the government of that State. Any contracting party should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate ...”. Paragraph 6(iv) of the 1979 Understanding Annex on customary practice notes:

“... The practice for the panels has been to hold two or three formal meetings with the parties concerned. The panel invited the parties to present their views either in writing and/or orally in the presence of each other. The panel can question both parties on any matter which it considers relevant to the dispute. ... Panels often consult with and seek information from any relevant source they deem appropriate and they sometimes consult experts to obtain their technical opinion on certain aspects of the matter”.

#### **(2) *Use of experts***

The “Good Offices Report by the Personal Representative of the Director-General on the Dispute between the EC and Japan Concerning Certain Pricing and Trading Practices for Copper in Japan” of 1988 notes that an independent expert on the copper market was hired in this dispute in accordance with an understanding between the two parties. “As a first step the Director-General was asked to establish the factual situation. To this end an independent expert, Mr. Martin Thompson, was retained by the parties. His study was completed in October 1988, and was submitted to and commented on by the parties. It has been of great help in preparing this report”.<sup>519</sup> The Personal Representative also met with the parties.

The 1990 Panel Report on “Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes” notes that on the basis of a Memorandum of Understanding between the parties and in pursuance of Thailand’s request, the Panel asked the World Health Organization (WHO) to present its conclusions on technical aspects of the case, such as the health effects of cigarette use and consumption, and on related issues for which the WHO was competent; the parties to the dispute also commented on the submission of the WHO.<sup>520</sup>

See also references at page 689 concerning consultation with other intergovernmental organizations.

See also Article 14.8-14.13 and Annex 2 of the Agreement on Technical Barriers to Trade, and Article 20.2-20.5 and paragraph 5 of Annex III of the Agreement on Implementation of Article VII.

<sup>519</sup>L/6456, 36S/199, 200-201, para. 2.

<sup>520</sup>DS10/R, adopted on 7 November 1990, 37S/200, 216-220, paras. 50-62.

**(3) Presumptions and burden of proof**

**(a) Burden of production of information regarding consistency with the General Agreement**

The Panel Report on “Uruguayan Recourse to Article XXIII” notes as follows concerning the procedures used by that Panel:

“In a number of cases, the contracting party concerned maintained (a) that certain measures applied by it were consistent with the provisions of GATT, or (b) that the measures, while not consistent with the provisions of the General Agreement, were permitted under the terms of the Protocol of Provisional Application, the Annecy Protocol or the Torquay Protocol on account of their being applied pursuant to ‘existing legislation’. In most of these cases, the contention was not questioned by the Uruguayan delegation. For practical purposes, the Panel has taken the position that in cases where the contention has not been challenged and is not contradicted by the available records of the CONTRACTING PARTIES, it would be beyond its competence to examine whether the contention was or was not justified”.<sup>521</sup>

The 1992 Panel Report on “Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies” examined the facts concerning the conditions imposed by each of these agencies (“liquor boards”) for listing imported beer for sale - facts which were contested between the parties.

“The Panel noted that the United States had claimed that the listing and delisting practices which had been found to be inconsistent with Canada’s obligations under Article XI of the General Agreement by the Panel that had examined these practices in 1988 at the request of the EEC, had not been fully eliminated by Canada ... Canada claimed that this issue had been fully settled by its 1988 agreement with the EC, which was being applied on a most-favoured-nation basis, and that all the provincial liquor boards acted in accordance with the principles of non-discrimination set out in this agreement ... .

“The Panel noted that, with the exception of the listing and delisting practices in Ontario, the parties did not agree on the listing and delisting practices actually pursued by the liquor boards. The Panel also noted that the United States had, on 17 July 1991, specifically requested the Panel not to prolong its proceedings. The Panel therefore decided not to schedule another meeting with the parties to permit the United States to submit further evidence on this issue. For these reasons, the Panel had to *conclude* that, with the exception of the listing and delisting practices in Ontario, the United States had not substantiated its claim that Canada still maintained listing and delisting practices inconsistent with Article XI of the General Agreement”.<sup>522</sup>

See also the finding in the 1994 Panel Report on “United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco” that “the evidence did not support the complainants’ claim that the DMA’s penalty provisions were separate taxes or charges within the meaning of Article III:2.”<sup>523</sup>

**(b) Presumption of prima facie nullification or impairment**

See the material starting at page 655 concerning *prima facie* nullification or impairment.

In respect of certain trade measures such as import permit requirements, mixing regulations, quotas and maximum or minimum price systems, the Panel in the Uruguayan Recourse to Article XXIII considered “that insofar as it has not been established that these measures are being applied consistently with the provisions of the General Agreement or are permitted by the terms of the protocol under which [name of contracting party concerned] applies the GATT, it has to proceed on the assumption that their maintenance can nullify or impair the benefits accruing to Uruguay under the Agreement”.<sup>524</sup>

<sup>521</sup>L/1923, adopted on 16 November 1962, 11S/95, 100, para. 16.

<sup>522</sup>DS17/R, adopted on 18 February 1992, 39S/27, 74-75, paras. 5.2-5.3.

<sup>523</sup>DS44/R, adopted on 4 October 1994, para. 82.

<sup>524</sup>L/1923, adopted on 16 November 1962, 11S/95, 105, 108, 123, 127, 130, 136, 138, 141.

(c) *Burden of proof regarding exceptions and narrow interpretation of exceptions*

Statements have been made in panel and working party reports regarding the burden of coming forward with evidence that the requirements of a claimed exception have been met, in relation to Articles VI, XI:2(c) and XX and the Protocol of Provisional Application. For more context, see references to the cases cited in this Index under the provision concerned.

*Article VI:* The 1955 Panel Report on “Swedish Anti-Dumping Duties” examined a Swedish Decree imposing a basic price scheme under which an anti-dumping duty was levied on imports of nylon stockings whenever the invoice price was lower than a minimum price fixed by the Swedish Government. As regards the burden of proof of facts justifying the imposition of anti-dumping duties, the Panel Report notes that “... it was clear from the wording of Article VI that no anti-dumping duties should be levied unless certain facts had been established. As this represented an obligation of the contracting party imposing such duties, it would be reasonable to expect that that contracting party should establish the existence of these facts when its action is challenged”.<sup>525</sup> The 1989 Panel Report on “United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada” notes that “the Panel found that Article VI:3, as an exception to basic principles of the General Agreement, had to be interpreted narrowly and that it was up to the United States, as the party invoking the exception, to demonstrate that it had met the requirements of Article VI:3”.<sup>526</sup>

*Article XI:2(c):* The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” notes that the Panel “considered ... that the burden of providing the evidence that all the requirements of Article XI:2(c)(i), including the proportionality requirement, had been met must remain fully with the contracting party invoking that provision”.<sup>527</sup> See also a similar reference in the 1989 Panel Report on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile”.<sup>528</sup> In the 1989 Panel Report on “Canada - Import Restrictions on Ice Cream and Yoghurt”.<sup>529</sup>

“The Panel recalled that it had previously been concluded that a contracting party invoking an exception to the General Agreement bore the burden of proving that it had met all of the conditions of that exception.”<sup>530</sup> It also noted, as had previous panels, that exceptions were to be interpreted narrowly and considered that this argued against flexible interpretation of Article XI:2(c)(i).<sup>531</sup> The Panel was aware that the requirements of Article XI:2(c)(i) for invoking an exception to the general prohibition on quantitative restrictions made this provision extremely difficult to comply with in practice.<sup>532</sup> However, any change in the burden of proof could have consequences equivalent to amending Article XI, seriously affecting the balance of tariff concessions negotiated among contracting parties, and was therefore outside the scope of the Panel’s mandate”.<sup>533</sup>

*Article XX:* The 1984 Panel Report on “Canada - Administration of the Foreign Investment Review Act” notes that “Since Article XX(d) is an exception to the General Agreement it is up to Canada, as the party invoking the exception, to demonstrate that the purchase undertakings are necessary to secure compliance with the Foreign Investment Review Act”.<sup>534</sup> The 1989 Panel Report on “United States - Section 337 of the Tariff Act of 1930” provides that “... it is up to the contracting party seeking to justify measures under Article XX(d) to demonstrate that those measures are ‘necessary’ within the meaning of that provision”.<sup>535</sup> The 1991 Panel Report

<sup>525</sup>L/328, adopted on 26 February 1955, 3S/81, 85-86, para. 15.

<sup>526</sup>DS7/R, adopted on 11 July 1991, 38S/30, 44, para. 4.4.

<sup>527</sup>L/6253, adopted on 2 February 1988, 35S/163, 227, para. 5.1.3.7.

<sup>528</sup>L/6491, adopted on 22 June 1989, 36S/93, 124, para. 12.3.

<sup>529</sup>L/6568, adopted on 5 December 1989, 36S/68.

<sup>530</sup>The footnote to this sentence refers to: Panel Report on “Canada - Administration of the Foreign Investment Review Act”, 30S/140, 164, para. 5.20; Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”, 35S/163, 227, para. 5.1.3.7; Panel Report on “European Economic Community - Restrictions on Imports of Dessert Apples - Complaint by Chile”, 36S/93, 124, para. 12.3.

<sup>531</sup>The footnote to this sentence refers to, e.g. Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”, L/6253, 35S/163, 226-27, para. 5.1.3.7, and Panel Report on “EEC - Restrictions on Imports of Apples - Complaint by the United States”, L/6513, 36S/135, 164, para. 5.13.

<sup>532</sup>The footnote to this sentence refers to, e.g., the Panel Report on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile”, L/6491.

<sup>533</sup>36S/84-85, para. 59.

<sup>534</sup>L/5504, adopted on 7 February 1984, 30S/140, 64, para. 5.20.

<sup>535</sup>L/6439, adopted on 7 November 1989, 36S/345, 393, para. 5.27.

on “United States - Restrictions on Imports of Tuna”, which has not been adopted, notes that “... previous panels had established that Article XX is a limited and conditional exception from obligations under other provisions of the General Agreement, and not a positive rule establishing obligations in itself.”<sup>536</sup> Therefore, the practice of panels has been to interpret Article XX narrowly, to place the burden on the party invoking Article XX to justify its invocation,<sup>537</sup> and not to examine Article XX exceptions unless invoked.<sup>538</sup> In the 1992 Panel Report on “United States - Measures Affecting Alcoholic and Malt Beverages”, “... The Panel ... noted the practice of the CONTRACTING PARTIES of interpreting these Article XX exceptions narrowly, placing the burden on the party invoking an exception to justify its use.”<sup>539</sup>

*Protocol of Provisional Application:* The 1957 Working Party Report on “Import Restrictions of the Federal Republic of Germany” notes the view of a number of delegations that “Should the Federal Government seek to maintain its claim that the Marketing Laws in fact require the maintenance of restrictions inconsistent with GATT provisions, the German delegation should produce the text of the Laws and particulars of the parliamentary discussions and explanatory material relating to the legislation in question to bear out its contention.”<sup>540</sup> The 1992 Panel Report on “United States - Measures affecting Alcoholic and Malt Beverages”, in examining a US claim under the “existing legislation” clause of the Protocol of Provisional Application, “noted that the United States, as the party invoking the PPA, has the burden of demonstrating its applicability in the instant case.”<sup>541</sup>

Reference to interpretation of exceptions was also made in the 1992 Panel Report under the Agreement on Government Procurement concerning “Norway - Procurement of Toll Collection Equipment for the City of Trondheim” which provides regarding the provisions on single tendering in Article V:16: “The Panel agreed with the view that Article V:16 must be regarded as an exceptions provision containing, as made clear in the last sentence of Article V:1, a finite list of the circumstances under which Parties could deviate from the basic rules requiring open or selective tendering. Since Article V:16(e) was an exceptions provision, its scope had to be interpreted narrowly and it would be up to Norway, as the Party invoking the provision, to demonstrate the conformity of its actions with the provision.”<sup>542</sup>

(d) *Arguments in the alternative*

The 1991 Panel Report on “United States - Restrictions on Imports of Tuna”, which has not been adopted, includes the following finding regarding the presentation of arguments to a panel concerning both the positive prescriptions of the General Agreement and the exceptions in Article XX:

“The Panel noted that the United States had argued that its direct embargo under the MMPA could be justified under Article XX(b) or Article XX(g), and that Mexico had argued that a contracting party could not simultaneously argue that a measure is compatible with the general rules of the General Agreement and invoke Article XX for that measure. ... the Panel considered that a party to a dispute could argue in the alternative that Article XX might apply, without this argument constituting *ipso facto* an admission that the measures in question would otherwise be inconsistent with the General Agreement. Indeed, the efficient operation of the dispute settlement process required that such arguments in the alternative be possible.”<sup>543</sup>

<sup>536</sup>Note 38 to DS21/R refers to the Panel Report on “United States - Section 337 of the Tariff Act of 1930”, adopted 7 November 1989, 36S/345, 385, para. 5.9.

<sup>537</sup>Note 39 to DS21/R refers to the Panel reports on “Canada - Administration of the Foreign Investment Review Act”, adopted 7 February 1984, 30S/140, 164, para. 5.20; and “United States - Section 337 of the Tariff Act of 1930”, adopted 7 November 1989, 36S/345, 393 para. 5.27. “

<sup>538</sup>DS21/R (unadopted), 39S/155, 197, para. 5.22. Note 40 to this sentence in DS21/R refers to *e.g.*, the panel report on ‘EEC - Regulation of Parts and Components’, L/6657, adopted 16 May 1990, 37S/132, para. 5.11.

<sup>539</sup>DS23/R, adopted on 19 June 1992, 39S/206, 282, para. 5.41.

<sup>540</sup>L/768, adopted on 30 November 1957, 6S/55, 61, para. 13.

<sup>541</sup>DS23/R, adopted 19 June 1992, 39S/206, 284, para. 5.44.

<sup>542</sup>GPR/DS.2/R, adopted on 13 May 1992, para. 4.5.

<sup>543</sup>DS21/R (unadopted), 39S/155, 197, para. 5.22.

#### **(4) Protection of confidential information**

Paragraph 15 of the 1979 Understanding provides: "... Confidential information which is provided should not be revealed without formal authorization from the contracting party providing the information". Paragraph 6(iv) of its Annex on customary practice provides: "... Written memoranda submitted to the panel have been considered confidential, but are made available to the parties to the dispute ...". See also provisions on protection of confidential information submitted to panels in the Tokyo Round agreements.<sup>544</sup>

#### **9. Participation by third contracting parties not party to the dispute**

Paragraph 15 of the 1979 Understanding provides that "Any contracting party having a substantial interest in the matter before a panel, and having notified this to the Council, should have an opportunity to be heard by the panel ...". Paragraph 6(iv) of the Annex thereto on customary practice notes: "... Panels have also heard the views of any contracting party having a substantial interest in the matter, which is not directly party to the dispute, but which has expressed in the Council a desire to present its views ...".

Section F(e) of the 1989 Improvements provides:

- "1. The interests of the parties to the dispute and those of other contracting parties shall be fully taken into account during the panel process.
- "2. Any third contracting party having a substantial interest in a matter before a panel, and having notified this to the Council, shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.
- "3. At the request of the third contracting party, the panel may grant the third contracting party access to the written submissions of the panel by those parties to the dispute which have agreed to the disclosure of their submission to the third contracting party".

At the December 1972 Council, when the Panel on "United Kingdom - Dollar Area Quotas" was established, it was noted that the panel would wish to hear from representatives of Jamaica, Trinidad and Tobago, and Cuba on this matter.<sup>545</sup> The 1973 Panel Report in this case notes that besides the parties to the dispute, the Panel heard from and consulted with the delegations of the Commonwealth Caribbean countries and territories and Cuba, and received a submission from Israel.<sup>546</sup> The 1978 Panel Report on "EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables" notes that "Australia, having requested Article XXIII:1 consultations with the EEC concerning the same measures, submitted a written presentation to the Panel outlining Australia's interest in the matter and supporting the United States allegation that these measures were not in accordance with the Community obligations under the GATT".<sup>547</sup> These are the first recorded instances of third-party participation in panel proceedings. As noted in the 1989 Improvements, the recent practice has been to present in the panel report a complete record of the panel proceedings, including any third-party arguments.

At the June 1994 Council meeting, the Council agreed to the following practices to be applied in the future with respect to third-party participation in panels:

- "1. Delegations in a position to do so, should indicate their intention to participate as a third party in a panel proceeding at the Council session which establishes the panel. Others who wish to indicate a third party interest should do so within the next ten days.

<sup>544</sup>Agreement on Implementation of Article VI (Article 15:6), Agreement on Implementation of Article VII (Annex III para. 3), Agreement on Technical Barriers to Trade (Annex 3, para. 2), Agreement on Government Procurement (Article VII:9).

<sup>545</sup>C/M/83, p. 4.

<sup>546</sup>L/3843, adopted on 30 July 1973, 20S/230, 231, para. 3; L/3891, adopted on 30 July 1973, 20S/236, 237, para. 4.

<sup>547</sup>L/4687, adopted on 18 October 1978, 25S/68, 69, para. 1.4. The arguments presented by Australia are not recorded in the report.

- “2. Further to paragraph F(e) (3) of the Decision of 12 April 1989 (BISD 36S/61) and to the Decision of 22 February 1994 (L/7416), it is the understanding of the Council that third parties shall receive the submissions of the parties to the dispute to the first meeting of a panel established by the Council.”<sup>548</sup>

In 1983, as part of the agreement on terms of reference for the Panel on “EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region”, an understanding was also agreed which provided, *inter alia*, that “Given the special nature of this matter, in that the tariff treatment which is to be examined by the Panel is an element of Agreements entered into by the European Community with certain Mediterranean countries, it is expected that the Panel ... in setting up its own working procedures, will provide adequate opportunities for these countries to participate in the work of the Panel as appropriate.”<sup>549</sup>

At the Council meeting of 15 April 1987, the following Chairman’s proposal was made for an Understanding related to the terms of reference of the Panel on “Japan - Trade in Semi-conductors”:

“Given the special nature of the matter to be examined by the Panel, which is related to certain aspects of the arrangement between Japan and the United States concerning trade in semi-conductor products (L/6076), it is understood that in setting up its own working procedures, the Panel will provide adequate opportunity for the United States to participate in the work of the Panel as necessary and appropriate”.

The representative of the United States stated that his delegation “could reluctantly agree to the proposed formulation, provided that all contracting parties were clear on one point: ‘adequate opportunity to participate’ had to be interpreted by the Panel in the same way as this phrase was interpreted in an earlier dispute” [the Citrus dispute referred to directly above]. The representative of the EC stated that “it was up to the complaining country to decide on this matter, including what party was being complained against” and that the Community agreed with the interpretation which the United States wished to give to the Chairman’s proposal, including the reference to the earlier dispute.<sup>550</sup> The representative of Canada “viewed the US request to participate in the Panel as unique and did not want to see such a request become an established practice of the Council without further discussion and agreement among the contracting parties and suggested that this might be done within the Uruguay Round negotiating group on dispute settlement”. The Council agreed to the Chairman’s proposal.<sup>551</sup>

During discussion of the dispute concerning “EEC - Member States’ Import Régimes for Bananas” concerning which a Panel was established at the February 1993 Council meeting, a number of banana-exporting countries in the process of accession to GATT requested the right to participate as observers in the work of the Panel. The Chairman pointed out that the right to participate in panel proceedings was reserved for contracting parties.<sup>552</sup> At the March 1993 Council meeting, the applicant parties in the dispute concerning “EEC - Member States’ Import Régimes for Bananas” noted that the parties to the dispute had agreed *inter alia* that the representatives of the Governments of Cameroon, Côte d’Ivoire, Jamaica, Madagascar and Senegal would be invited to all Panel meetings at which the parties were present, and stated that in view of the specific nature of this agreement, in which the parties had accepted conditions beyond those provided for in GATT dispute settlement procedures, this agreement did not create any obligations which could be invoked as a binding precedent in the future. Certain other delegations questioned this agreement.<sup>553</sup>

The 1993 Panel Report on “EEC - Member States’ Import Régimes for Bananas”, which has not been adopted, notes that the parties to the dispute had agreed (i) that representatives of the Governments of Cameroon, Côte d’Ivoire, Jamaica, Madagascar and Senegal (which had expressed in the Council their wish to participate) would be invited to all Panel meetings at which the parties were present; (ii) that these contracting

<sup>548</sup>C/COM/3, dated 24 June 1994; C/M/273.

<sup>549</sup>C/M/168, p. 5; L/5776, Report of the Panel (unadopted), para. 1.5; see also Council discussion at C/M/162, p. 13.

<sup>550</sup>C/M/208, p. 14.

<sup>551</sup>*Ibid.*, p. 15.

<sup>552</sup>C/M/261.

<sup>553</sup>C/M/262, p. 15-16. See also DS38/R, the unadopted 1994 Panel Report on “EEC - Import Régime for Bananas”, on similar issues concerning participation in the panel process.

parties would have to make a submission if they were to attend Panel meetings and that submissions made by such contracting parties should be made in writing, or if made orally, would also be made available in writing; (iii) that the representatives of these contracting parties present at Panel meetings would receive all submissions of the parties; and (iv) that these same contracting parties would be invited by the Panel to speak as appropriate. In light of the above the Panel considered, in the interest of transparency among participants in the Panel process, that it would be reasonable to invite such countries to meetings of the Panel at which the parties were present. The Panel was of the view that this procedure should not be considered a precedent for future panels in light of the very special circumstances of this case. On 5 April 1993, the Panel received a letter from Belize, requesting formally that the Panel suspend its proceedings and with immediate effect request the parties to commence consultations on the issues raised by the complaining parties. Belize also requested that it be admitted as full participant in the Panel proceedings. The Panel informed Belize that the Panel had been established by the GATT Council in accordance with the 1966 Decision, the rules of which obliged the Panel to finish its work and present its findings within 60 days. It was, therefore, not in a position to accept Belize's request for suspension. As concerns the request for full participation in the proceedings, the Panel informed Belize that, on its own, the Panel was not authorized to accept the participation of any country in the Panel process, but that such participation could possibly be agreed between the parties to the dispute. Since the parties were not able to reach such an agreement in the short time available for consultations on this issue before the Panel proceedings commenced, the Panel informed Belize that it could not be admitted as a full participant in the proceedings of the Panel.<sup>554</sup>

Participation of this nature occurred as well in the 1993-94 panel proceeding on "EEC - Import Régime for Bananas". The 1994 Panel Report, which has not been adopted, notes that at the June 1993 Council meeting, representatives of Antigua and Barbuda, Barbados, Belize, Cameroon, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Jamaica, Madagascar, Senegal, St Lucia, St Vincent and the Grenadines, Suriname, Tanzania, Trinidad and Tobago and Uganda expressed their respective governments' wish to participate in the work of the Panel. While the Council took note of these statements, there was no consensus on such participation. Subsequently, the Panel considered, and the Parties agreed that, in the interest of transparency among contracting parties having a substantial interest in the trade of bananas, it would be reasonable to invite such countries to meetings of the Panel. The Panel, therefore, invited the representatives of the governments of Belize, Brazil, Cameroon, Côte d'Ivoire, Dominica, Dominican Republic, Jamaica, Madagascar, the Philippines, St Lucia, St Vincent and the Grenadines and Suriname to the Panel meetings at which the parties were present. Submissions by such contracting parties were to be made in writing, or if made orally, were to be made available in writing. The representatives of these contracting parties present at Panel meetings received all submissions of the parties. These same contracting parties were also invited by the Panel to make oral statements at the Panel meetings. The Panel, however, was of the view that this procedure should not be considered a precedent for future panels.<sup>555</sup>

See also the material above concerning "Arguments not raised by the applicant contracting party" and "defences not raised by the respondent contracting party".

## 10. Panel reports

Paragraphs 6(v)-(vii) of the 1979 Understanding Annex on customary practice provide that

"... Panel reports have normally set out findings of fact, the applicability of relevant provisions, and the basic rationale behind any findings and recommendations that it has made.

"The reports of panels have been drafted in the absence of the parties in the light of the information and the statements made.

"To encourage development of mutually satisfactory solutions between the parties and with a view to obtaining their comments, each panel has normally first submitted the descriptive part of its report to the

---

<sup>554</sup>DS32/R (unadopted), dated 3 June 1993, paras. 7-10.

<sup>555</sup>DS38/R, dated 11 June 1994, paras. 7-8.

parties concerned, and also their conclusions, or an outline thereof, a reasonable period of time before they have been circulated to the CONTRACTING PARTIES”.

See also the material starting at page 675 under the heading “the CONTRACTING PARTIES ... shall make appropriate recommendations ... or give a ruling”.

**(1) Dissenting opinions**

Paragraph 6(viii) of the 1979 Understanding Annex on customary practice provides that “... The opinions expressed by the panel members on the matter are anonymous and the panel deliberations are secret”. Only in a very few exceptional cases has a panel report referred to the existence of a dissenting opinion by a member of the Panel.<sup>556</sup> During the discussion in the Committee on Subsidies and Countervailing Measures of the 1983 Panel Report on “EEC Subsidies on Export of Pasta Products”<sup>557</sup>, which sets out the dissenting opinion of one member of the Panel, it was stated that

“the existence of a dissenting opinion did not alter the Committee’s responsibilities under Articles 18:9 and 13:4 to consider the Panel report as soon as possible and, where the Committee concluded that an export subsidy was being granted in a manner inconsistent with the Code, to make recommendations to resolve the issue. There was nothing in the language of, or customary practice under, the GATT or Code which suggested that only unanimous panel reports could be acted upon”.<sup>558</sup>

**(2) Precedential effect of findings in panel reports with regard to later consideration of the same measures**

Very many panel reports have referred to and followed the interpretations of the General Agreement in other panel reports. However, on occasion panel findings applying legal rules to facts have not been followed.

For instance, the 1978 Panel Report on “EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables” examined the EEC’s minimum import price and associated additional security system for tomato concentrates, in relation to Article XI:2(c)(i) and (ii), and found, *inter alia*: “The Panel considered that tomato concentrate was perishable because after a certain time it would decline in quality and value. The Panel also considered that tomato concentrate could compete directly with fresh tomatoes insofar as a large number of end-uses were concerned. Therefore, the Panel concluded that tomato concentrate qualified as an ‘agricultural or fisheries product, imported in any form’ within the meaning of Article XI:2(c)”.<sup>559</sup> However, the 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” found that tomato juice, paste and ketchup were not products with respect to which import restrictions could be maintained under Article XI:2(c).<sup>560</sup>

The 1978 Panel Report on “EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables” also examined the EEC’s supply management scheme for fresh tomatoes, and noted with respect to the requirements of Article XI:2(c) that “... the intervention system for fresh tomatoes did not qualify as a governmental measure which operated ‘to restrict the quantities of the like domestic product permitted to be marketed or produced’, or ‘to remove a temporary surplus of the like domestic product by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level’, within the meaning of Article XI:2(c)(i) and (ii)”.<sup>561</sup> The 1980 Panel Report on “EEC Restrictions on Imports of Apples from Chile” then found with regard to the EEC domestic supply management scheme on apples that “As regards XI:2(c)(i) ... The Panel considered that the EEC did restrict quantities of apples permitted to be marketed, through its system of intervention purchases by member States and

<sup>556</sup>See Panel Report on “EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables”, L/4687, adopted on 18 October 1978, 25S/68, 99, para. 4.9; 103, para. 4.14; 104, para. 4.16. Each of these paragraphs note the conclusions of the Panel and the contrary conclusions of one of its five members, but the overall conclusions under Article XXIII follow the earlier conclusions of the Panel; see 25S/107, para. 4.22.

<sup>557</sup>SCM/43, unadopted.

<sup>558</sup>SCM/M/18, p. 3.

<sup>559</sup>L/4687, adopted on 18 October 1978, 25S/68, 100, para. 4.10.

<sup>560</sup>L/6253, adopted on 2 February 1988, 35S/163, 240, para. 5.3.12.2.

<sup>561</sup>L/4687, adopted on 18 October 1978, 25S/68, 102-103, para. 4.13.

compensation to producer groups for withdrawing apples from the market”.<sup>562</sup> The 1989 Panel Reports on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile” and “EEC - Restrictions on Imports of Apples - Complaint by the United States” then for a third time examined EEC measures for horticultural crops in relation to Article XI:2(c)(i). These Reports noted as follows:

“... In considering the facts and arguments relating to Article XI in particular, the Panel took note of the fact that a previous Panel, in 1980, had reported on a complaint involving the same product and the same parties as the present matter and a similar set of GATT issues. The Panel noted carefully the arguments of the parties concerning the precedent value of this Panel’s and other previous Panels’ recommendations, and the arguments on the legitimate expectations of contracting parties arising out of the adoption of Panel reports. The Panel construed its terms of reference to mean that it was authorized to examine the matter referred to it by Chile in the light of all relevant provisions of the General Agreement and those related to its interpretation and implementation. It would take into account the 1980 Panel report and the legitimate expectations created by the adoption of this report, but also other GATT practices and Panel reports adopted by the CONTRACTING PARTIES and the particular circumstances of this complaint. The Panel, therefore, did not feel it was legally bound by all the details and legal reasoning of the 1980 Panel report.”<sup>563</sup>

Both of the 1989 apple Reports also noted that the intervention system for horticultural crops had been examined in 1978 and in 1980 with opposite conclusions as regards consistency with Article XI:2(c). Each of the 1989 apple Reports provided that “While taking careful note of the earlier panel reports, the Panel did not consider they relieved it of the responsibility, under its terms of reference, to carry out its own thorough examination on this important point.”<sup>564</sup> These Reports then found that “the EEC measures taken under the intervention system for apples did not constitute marketing restrictions of a type which could justify import restrictions under Article XI:2(c)(ii)”.<sup>565</sup>

At the July 1985 Council meeting, the United States requested that the Council, on behalf of the CONTRACTING PARTIES, apply the conclusions of the 1984 Report of the “Panel on Japanese Measures on Imports of Leather” to quantitative restrictions on leather footwear maintained by Japan, since “the same administrative and legal scheme was used to restrict imports of leather footwear as was used for leather”. Other delegations expressed “reservations regarding the proposal that one panel’s recommendation could be applied to another dispute; surely only a panel could determine whether the cases in question were totally identical”. The Council agreed to establishment of a panel under Article XXIII:2.<sup>566</sup>

The 1983 Panel Report on “United States - Imports of Certain Automotive Spring Assemblies” examined claims by Canada regarding an exclusion order issued by the U.S. International Trade Commission (ITC) under Section 337 of the Tariff Act of 1930, including arguments that the exception under Article XX(d) did not justify trade restrictive measures taken pursuant to Section 337 on two grounds: “(1) differential treatment of foreign products involving a separate adjudicating process was not ‘necessary’ to secure compliance with United States patent laws, and (2) the law with which compliance was sought (Section 337) was ‘inconsistent with the provisions of this agreement’, i.e. Article III of the GATT”.<sup>567</sup> The Panel found that “the exclusion order issued by the ITC under Section 337 of the United States Tariff Act of 1930 was ‘necessary’ in the sense of Article XX(d) to prevent the importation and sale of automotive spring assemblies infringing the patent, thus protecting the patent holder’s rights and securing compliance with United States patent law.”<sup>568</sup> The Panel Report was adopted “on the understanding that this shall not foreclose future examination of the use of Section 337 to deal with patent infringement cases from the point of view of consistency with Articles III and XX of the General Agreement”.<sup>569</sup> The 1989 Panel Report on “United States - Section 337 of the Tariff Act of 1930” again examined the use of Section 337 in connection with patent enforcement and found that “the system of

<sup>562</sup>L/5047, adopted on 10 November 1980, 27S/98, 112, paras. 4.5-4.6.

<sup>563</sup>L/6491 and L/6513, both adopted on 22 June 1989, 36S/93 and 36S/135, at 36S/123-124 and 36S/159, paras. 12.1 and 5.1.

<sup>564</sup>L/6491 and L/6513, both adopted on 22 June 1989, 36S/93 and 36S/135, at 36S/127 and 36S/162, paras. 12.10 and 5.10.

<sup>565</sup>*Ibid.*, 36S/129, para. 12.17, 36S/165, para. 5.17.

<sup>566</sup>C/M/191, p.37-38, discussing communication from the United States at L/5826.

<sup>567</sup>L/5333, adopted on 26 May 1983, 30S/107, 120, para. 37.

<sup>568</sup>*Ibid.*, 30S/126, paras. 58, 60.

<sup>569</sup>C/M/168, p. 10.

determining allegations of violation of United States patent rights under Section 337 of the United States Tariff Act cannot be justified as necessary within the meaning of Article XX(d) so as to permit an exception to the basic obligation contained in Article III:4 of the General Agreement”.<sup>570</sup>

In discussion at the March 1991 Council meeting of Brazil’s request for a Panel on “United States - Denial of Most-favoured-nation Treatment as to Imports of Non-rubber Footwear from Brazil” the representative of the United States stated “that this matter had already been adjudicated” against Brazil under the Subsidies Code in October 1988 and that “re-adjudication would violate the fundamental jurisprudential principle of *res judicata* - a final decision on a matter constituted an absolute bar to subsequent action thereon”. He also said that “to permit a panel to be established in the present instance would set a bad precedent, namely that if a contracting party lost a panel case, all it needed to do was block adoption and seek a second panel in another forum. He reiterated his Government’s position that the earlier Panel had taken all of Brazil’s arguments into account in reaching its decision, as had been made clear by its Chairman”.<sup>571</sup> The panel was established at the following Council meeting.<sup>572</sup>

In the panel proceeding in 1992 concerning “Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies”, certain of the measures concerned were measures which the 1988 Panel on “Canada - Import, Distribution and Sale of Alcoholic Drinks by Provincial Marketing Agencies”<sup>573</sup> had found were inconsistent with Articles II:4 and XI:1 of the General Agreement, and specifically, discriminatory practices relating to listing, mark-ups and points of sale. The United States requested that, with respect to these practices, the 1992 Panel make its findings and recommendations before considering the status under the General Agreement of the other practices covered by its 1992 complaint, and stated that Canada had not fulfilled its obligation “to take such reasonable measures as may be available to it to ensure observance of the provisions of Articles II and XI of the General Agreement by the provincial liquor boards in Canada”. Canada argued that the United States could not assert rights automatically under the 1988 Panel report since it had not been a complaining party, and that substantial change had occurred since 1988. The Panel Report contains the following Decision of the Panel on this issue.

“The Panel gave careful consideration to the United States’ request for expedited proceedings, i.e. for the Panel to make an immediate determination that benefits accruing to the United States under the General Agreement had been nullified or impaired as a result of the practices maintained by the Canadian provincial marketing agencies and examined by the 1988 Panel. In 1988, the Panel had indeed found that certain provincial practices were contrary to the provisions of the General Agreement. Following its recommendation, the CONTRACTING PARTIES had requested Canada to take ‘such reasonable measures as may be available to it to ensure observance of the provisions of Articles II and XI of the General Agreement by the provincial liquor boards in Canada’. However, as noted in paragraphs 4.21 and 4.25 of the Panel’s report, it had not made a detailed factual analysis of the practices complained against. The present Panel had now been informed by Canada that changes had occurred with respect to most of the matters dealt with by the Panel in 1988. It, therefore, believed that, before it could make the immediate determination sought by the United States, it would have to make this detailed factual analysis before it could consider whether the Government of Canada had, since 1988, taken such reasonable measures as were available to it to have the provincial agencies bring their practices into line with the 1988 Panel’s findings. In other words, it could not proceed on an expedited basis with respect to the measures addressed in the 1988 Panel report. Under these circumstances, it would accede to the request made by the United States, namely to issue findings and recommendations jointly concerning any and all Canadian provincial liquor board practices which were identified in the submissions of the United States.”<sup>574</sup>

<sup>570</sup>L/6439, adopted on 7 November 1989, 36S/345, 393-396, para. 5.35; see further under Article XX.

<sup>571</sup>C/M/248, p. 10; reference is to Report of Panel under Committee on Subsidies and Countervailing Measures, on “United States - Countervailing Duties on Non-rubber Footwear from Brazil”, SCM/94, dated 4 October 1989, unadopted.

<sup>572</sup>C/M/249, p. 23-25.

<sup>573</sup>L/6304, adopted on 22 March 1988, 35S/37.

<sup>574</sup>DS17/R, adopted on 18 February 1992, 39S/27, 37, para. 3.4.

**(3) *Legal nature of panel reports and precedential nature of panel interpretation of GATT provisions***

The 1979 Understanding provides in paragraph 16 that “The function of panels is to assist the CONTRACTING PARTIES in discharging their responsibilities under Article XXIII:2”. Paragraph 3 of the Annex thereto provides further that “The function of a panel has normally been to review the facts of a case and the applicability of GATT provisions and to arrive at an objective assessment of these matters.” Paragraph (x) of the 1982 Ministerial Decision provides that “It is understood that decisions in this process [of dispute settlement] cannot add to or diminish the rights and obligations provided in the General Agreement”.

In the Review Session Working Party on Organizational and Functional Questions in 1954-55 the text of an Agreement on the Organization for Trade Cooperation was agreed upon. Article 3 of this Agreement on “Functions” provided in part that “no decision or other action of the Assembly or any subsidiary body of the Organization shall have the effect of imposing on any Member any new obligation which the Member has not specifically agreed to undertake”. In this connection, the Report of the Working Party notes that “It was ... agreed that an obligation arising from the operation or interpretation of a specific provision of the General Agreement ... including an interpretation that a particular obligation thereunder had become applicable, would not be the imposition of a ‘new obligation’ within the meaning of this paragraph”.<sup>575</sup> See also generally the material under Article XXV:1 on interpretation of the General Agreement.

In Council discussion in 1981 on the Panel Report on “Spain - Measures concerning Domestic Sale of Soyabean Oil,” the United States representative stated that “There was ... [an] aspect to any panel report that was perhaps more important than the resolution of a particular dispute: panel reports, explicitly and of necessity, interpreted Articles of the General Agreement. He said that when the Council adopted a report, those interpretations became GATT law. His delegation could not agree to the adoption of this report because it interpreted important GATT provisions in a manner that would allow protectionist actions contrary to the language, history and tradition of the provisions in question ...”.<sup>576</sup> This Panel Report was noted and not adopted; see below at page 762.

During the discussion at the February 1984 on the adoption of the Panel Report on “Canada - Administration of the Foreign Investment Review Act”,<sup>577</sup> the representative of India, supported by the delegations of Brazil, Chile, Pakistan, the Philippines, Colombia, Nicaragua and Peru, stated India’s view “that the Panel’s report could not be taken to provide an opening for the introduction of new themes, such as investments, in the GATT. His delegation also emphasized that the dispute concerned two developed contracting parties. Adoption of the report could not in any way contribute to the evolution of case law applying to less developed contracting parties. The Panel’s report had acknowledged in its paragraph 5.2 that in disputes involving less developed contracting parties, full account should be taken of the special provisions in the General Agreement and dispensations relating to such countries, such as Article XVIII:C. Thus it was clear that the provisions and arguments invoked against Canada in this case could not be legitimately invoked against less developed contracting parties ...”.<sup>578</sup>

At the February 1988 Council meeting, during consideration of adoption of the Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”,<sup>579</sup> the representative of the EC, supporting adoption of the report, stated that “The report made clear that the Panel’s findings were limited to the specific measures under examination”.<sup>580</sup>

At the same Council meeting in February 1988, during consideration of adoption of the Panel Report on “United States - Customs User Fee”, the representative of the US, in supporting adoption of the report, stated that “A number of other contracting parties maintained ad valorem user fees, most of which were considerably higher than the US fee. ... As the United States implemented its own conversion to a transaction-based fee system, it would be inquiring into the progress of other countries maintaining ad valorem user fees in bringing

<sup>575</sup>L/329, adopted on 28 February, 5 and 7 March 1955, 3S/231, 235, para. 9(e).

<sup>576</sup>C/M/152, page 8; concerning this matter see further at page 762 below.

<sup>577</sup>L/5504, adopted on 7 February 1984, 30S/140.

<sup>578</sup>C/M/174, p. 16.

<sup>579</sup>L/6253, adopted on 2 February 1988, 35S/163 (adoption date appearing in BISD is incorrect).

<sup>580</sup>C/M/217, p. 20.

these fee systems into conformity with Article VIII of the General Agreement as interpreted by this Panel report. His delegation hoped and expected that formal GATT dispute settlement procedures would not be necessary”.<sup>581</sup> The representative of Hong Kong, which had appeared as a third party in the panel proceeding supporting the use of systematic devices for the collection of user fees whether on a flat rate or an ad valorem basis, “noted that the scope of the report was limited to the GATT consistency of the US customs user fee and that the findings should be interpreted in that light”.<sup>582</sup> In Council discussions in 1991 on the implementation of this Panel Report, the representative of the United States stated “that its customs user fee had been revised to address the Panel’s findings and recommendations ... and ... met the criteria of Article VIII ... The United States also hoped that other contracting parties currently applying customs fees substantially identical to the US fee, as it had been prior to the changes mentioned, would also alter their own fees to bring them into conformity with Article VIII”.<sup>583</sup>

At the October 1989 Council meeting, the representative of Korea stated that his government could not agree at that time to adoption of the Panel reports on the complaints of Australia, New Zealand and the United States on “Republic of Korea - Restrictions on Imports of Beef” because these reports “were not limited to Korea’s beef import régime only, but would, once adopted, constitute a precedent with regard to the invocation of Article XVIII:B by a number of developing contracting parties”.<sup>584</sup>

A request for consultations in 1989 by the EEC concerning “Chile - Internal Taxes on Spirits” states that “The Government of Chile levies an additional sales tax of 70% on imported whisky, compared with the rate of 25% for pisco. In the view of the European Communities this situation constitutes a breach of Chile’s obligations under Article III:2 ... Whisky and pisco, while they may not be ‘like products’, are directly competitive or substitutable products, and in this connection the panel on Japanese customs duties, taxes etc. on alcoholic drinks (L/6216) has made very clear findings and constitutes a precedent applicable in the present instance to Chilean taxation of spirits”.<sup>585</sup>

See also the material at page 760 on treatment of the 1991 Panel Report on “United States - Restrictions on Imports of Tuna”. See also the material above concerning “recommendations” under Article XXIII:2.

#### **(4) Consideration and action on panel reports**

##### *(a) Consideration of panel reports*

The 1979 Understanding provides in paragraph 21 that “Reports of panels and working parties should be given prompt consideration by the CONTRACTING PARTIES. The CONTRACTING PARTIES should take appropriate action on reports of panels and working parties within a reasonable period of time. If the case is one brought by a less-developed contracting party, such action should be taken in a specially convened meeting, if necessary”. Paragraph (vii) of the 1982 Ministerial Decision provides that “Reports of panels should be given prompt consideration by the CONTRACTING PARTIES. Where a decision on the findings contained in a report calls for a ruling or recommendation by the Council, the Council may allow the contracting party concerned a reasonable specified time to indicate what action it proposes to take with a view to the satisfactory settlement of the matter, before making any recommendation or ruling on the basis of the report”. Paragraph G of the 1989 Improvements provides:

“1. In order to provide sufficient time for the members of the Council to consider panel reports, the reports shall not be considered for adoption by the Council until thirty days after they have been issued to the contracting parties.

---

<sup>581</sup>C/M/217, p. 15.

<sup>582</sup>*Ibid.*, p. 16.

<sup>583</sup>C/M/248, p. 8. See also L/6741 (US notification of “a revision of the U.S> customs user fee, in response to the panel report adopted on February 2, 1988).

<sup>584</sup>C/M/236.

<sup>585</sup>DS9/1, communication dated 31 October 1989.

“2. Contracting parties having objections to panel reports shall give written reasons to explain their objections for circulation at least ten days prior to the Council meeting at which the panel report will be considered.

“3. The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the Council, and their views shall be fully recorded ...

“4. The period from the request under Article XXII:1 or Article XXIII:1 until the Council takes a decision on the panel report shall not, unless agreed to by the parties, exceed fifteen months. The provisions of this paragraph shall not affect the provisions of paragraph 6 of Section F(f)”.

The Panel Report in the recourse by Mexico to Article XXIII:2 on “United States - Restrictions on Imports of Tuna” was circulated on 3 September 1991. The parties to the dispute then requested that the report not be placed on the agenda of the next or subsequent Council meetings. At the February 1992 Council meeting, many contracting parties nevertheless made statements supporting adoption of this Panel Report.<sup>586</sup> At the March 1992 Council meeting, at which the Report was on the agenda at the request of the EC, the two parties to the dispute discussed measures taken by them toward a solution of the dispute through a bilateral agreement to limit incidental dolphin mortality in tuna fishing in the Eastern Tropical Pacific Ocean. The representative of the United States

“noted that this was the first time that a contracting party not party to a dispute had called for adoption of a panel report by placing it on the Council’s agenda. The United States believed that this was not appropriate and that it would fundamentally change the customary role of third parties in the GATT dispute settlement process. In fact, in the United States’ view, there was no basis in the GATT for such a request. It was perhaps important to note that according to past practice under the GATT, a panel report served only to define, for purposes of the particular dispute, the obligations of the contracting parties that were parties to the dispute. Prior to the adoption of the April 1989 improvements to the GATT dispute settlement rules and procedures, the United States had sought to put forward the position that, upon adoption, panel reports should be treated as a binding interpretation of GATT rules binding upon and applying to all contracting parties. That proposal had been vigorously opposed by many contracting parties, not least of which was the Community, which had maintained that adoption of a report did not constitute a legal precedent and that panel reports had no precedential value with respect to non-parties ... . In the absence of such an understanding among contracting parties, he would note that, in the United States’ view, this report was not on the agenda of the Council for adoption at the present meeting, and that there would be no support from his delegation for adoption”.<sup>587</sup>

The EC representative said in response that “the purpose of the debate at the present meeting had not been to define whether or not a third party had the right to request adoption of a panel report, and that the Community was not asking to innovate in this sense. Indeed, the reason why the Community had had recourse to its own Article XXIII:1 proceedings was precisely because this was an area where there was perhaps some doubt”.<sup>588</sup>

In discussion at the June 1992 Council meeting of the EC’s request for a panel with regard to “United States - Restrictions on Imports of Tuna - Recourse by the EC”, “the Chairman reminded Council members that the adoption of the Panel report on Mexico’s complaint was not the subject of discussion under this agenda item. That report had been discussed at earlier Council meetings and it was clear that as long as the two parties concerned did not want that report to be adopted, it could not be so done”.<sup>589</sup>

---

<sup>586</sup>C/M/254, p. 21-35

<sup>587</sup>C/M/255, p. 13.

<sup>588</sup>*Ibid.*

<sup>589</sup>C/M/257, p. 34.

*(b) Procedure for adoption of panel reports*

The Decision of the CONTRACTING PARTIES establishing the Council in 1960 provided that the Council would “consider matters arising between sessions of the CONTRACTING PARTIES which require urgent attention, and to report thereon to the CONTRACTING PARTIES with recommendations as to any action which might appropriately be taken by them at the next regular session. ...”. Accordingly, from 1960 until 1968, decisions on matters under Article XXIII:2, including the adoption of panel reports, were made by the CONTRACTING PARTIES, acting on recommendations agreed by the Council.<sup>590</sup> In 1968 the CONTRACTING PARTIES agreed to expand the Council’s authority to cover “all matters of concern to the CONTRACTING PARTIES other than final decisions under paragraph 5 of Article XXV”.<sup>591</sup> Since that time, panel reports have been adopted by the Council (acting for the CONTRACTING PARTIES) or have been adopted at the annual Session of the CONTRACTING PARTIES when this would afford more timely action. A general footnote to paragraph F of the 1989 Improvements notes that references to the Council in sections F through I thereof “are without prejudice to the competence of the CONTRACTING PARTIES, for which the Council is empowered to act in accordance with normal GATT practice”.

At the March 1981 Council meeting, in concluding the debate on adoption of the Director-General’s report on working party discussions between the CONTRACTING PARTIES and the European Communities under Article XVI:1 of the possibility of limiting EEC subsidization of sugar exports, and on a draft decision proposed by Australia, the Council Chairman noted that

“in matters of this kind the Council normally proceeded on the basis of consensus. In his view, consensus was understood in GATT to mean that no delegation maintained its objections to a text or attempted to prevent its adoption. He felt that such a consensus did not presently exist in the Council on this matter. He noted that the ten contracting parties in the European Communities were not in agreement with the draft decision as presented by Australia. At the same time, however, he was also very conscious of the weight of opinion expressed by the delegations which had supported either the Australian text as such or its general sense; and he concluded that there was a general desire to arrive at a decision at this meeting. ...”<sup>592</sup>

A compromise text was adopted providing for a later review by the Council upon further notification of the EEC sugar regulations.<sup>593</sup> See also references to this matter above at pages 722 and 726.

In Council discussion in 1982 on the follow-up on the Panel Report on “United States Tax Legislation (DISC)”, which was adopted in December 1981, the representative of Canada “stated that it was not GATT practice to allow a contracting party maintaining an offending measure to block a Council recommendation addressed to it”. This statement was supported by the EC representative who said “that in GATT practice it was not usual that one contracting party should block a Council recommendation calling for it to come into line with the provisions of the General Agreement”.<sup>594</sup>

Paragraph (x) of the 1982 Ministerial Decision provides that “The CONTRACTING PARTIES reaffirmed that consensus will continue to be the traditional method of resolving disputes; however, they agreed that obstruction in the process of dispute settlement shall be avoided”.<sup>595</sup> Paragraph G(3) of the 1989 Improvements provides: “... The practice of adopting panel reports by consensus shall be continued, without prejudice to the GATT provisions on decision-making which remain applicable. However, the delaying of the process of dispute settlement shall be avoided”. See also the material on consensus and decisionmaking by the Council and the CONTRACTING PARTIES, in the chapter of this Index on Institutions.

<sup>590</sup>See, e.g., reference to adoption by the CONTRACTING PARTIES of Panel reports, and recommendations made by the CONTRACTING PARTIES to contracting parties, on “Exports of Potatoes to Canada”, “French Import Restrictions”, and “Uruguayan Recourse to Article XXIII”, at 11S/55-56; each of these decisions expressly authorizes the Council to deal with certain follow-up issues.

<sup>591</sup>SR.25/9, p. 176-177.

<sup>592</sup>C/M/146, p. 20.

<sup>593</sup>*Ibid.*, p. 20-21.

<sup>594</sup>C/M/160, p. 5, 8.

<sup>595</sup>The footnote to this sentence provides: “This does not prejudice the provisions on decision making in the General Agreement.”

*(c) Adoption of panel reports subject to conditions*

At the Forty-third Session of the CONTRACTING PARTIES in December 1987, in connection with consideration of the Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”<sup>596</sup>, the representative of Japan noted his government’s strong objections to some parts of the Panel Report, and stated that “Since 12 different items were at issue, it would not have been unnatural to set up 12 separate panels. There was no logical need to treat the 12 items in one set ... Japan could accept adoption of the Panel Reports except the parts concerning certain dairy products and starch, and state-trading”.<sup>597</sup> Nine other delegations spoke supporting adoption of the report in its entirety. The US representative stated that “Legally, GATT treated panel reports as units; parties could not pick and choose which findings to accept. Partial adoption of a report was unprecedented in GATT. The dispute settlement process would be meaningless if the defendant could pick and choose for adoption only the favourable parts of a panel’s report”.<sup>598</sup>

At the next Council meeting, on 2 February 1988, the representative of Japan noted that “Regrettably, many contracting parties had opposed Japan’s position on the grounds that partial adoption of a panel report should not be established as a precedent ... As a contracting party, Japan fully recognized the importance of assuring the effective functioning of dispute settlement procedures, the basic structure of which was conciliatory rather than adjudicatory in nature. Japan recognized the importance of expeditious adoption of the report in its entirety in order to ensure the effective functioning of dispute settlement procedures. He said that, therefore, Japan would not oppose a consensus to adopt the report in its entirety at the present meeting, provided the Council took note of and put on record his statement in its entirety”.<sup>599</sup> The representative of Uruguay stated that “... acceptance of the report as a whole implied acceptance of all elements contained in it, particularly the conclusions, which Uruguay hoped would be respected in accordance with the provisions of the General Agreement”.<sup>600</sup> The report was adopted.

In some instances a panel report has been adopted subject to an understanding. For instance, the four Panel Reports on “Income Tax Practices Maintained by France”, “Income Tax Practices Maintained by Belgium”, “Income Tax Practices Maintained by the Netherlands”, and “United States Tax Legislation (DISC)” were adopted in 1982 subject to an understanding regarding interpretation of the findings; adoption was followed by a Chairman’s statement.<sup>601</sup> The Panel Report on “United States - Imports of Certain Automotive Spring Assemblies” was adopted in 1983 subject to an understanding that its adoption “shall not foreclose future examination of the use of Section 337 to deal with patent infringement cases from the point of view of consistency with Articles III and XX of the General Agreement”.<sup>602</sup> Section 337 was later examined by the Panel on “United States - Section 337 of the Tariff Act of 1930”, the report of which was adopted in 1989.

*(d) Action on a panel report other than adoption*

In 1981, the Council considered the Panel Report on “Spain - Measures concerning Domestic Sale of Soyabean Oil”. The representative of the United States said that his government, “while disappointed with the result in this case, was not asking the Council to undertake a new examination of the particular Spanish measures that were at issue, not was it asking the Council to make findings or recommendations to Spain in this proceeding ... this was not a case where a party was seeking to block adoption of a report against its own practices. In the view of his authorities, adoption of the Report could contribute nothing more to the settlement of that particular dispute, but would only establish damaging precedents for the interpretation of GATT provisions. The United States believed that the Council should take note of the Panel Report and of the comments made, including the written comments previously submitted”.<sup>603</sup> In the ensuing discussion many contracting parties criticized the legal findings and conclusions in the Panel Report and their implications for

<sup>596</sup>L/6253, adopted on 2 February 1988, 35S/163.

<sup>597</sup>SR.43/4, p. 2.

<sup>598</sup>*Ibid.*, p. 7.

<sup>599</sup>C/M/217, p. 17; statement of Japan also appears in C/W/538.

<sup>600</sup>*Ibid.*, p. 21.

<sup>601</sup>Reports at L/4423, 23S/114; L/4424, 23S/127; L/4425, 23S/137; L/4422, 23S/98; adoption at C/M/154 p. 5-9; understanding and Chairman’s statement in L/5271.

<sup>602</sup>L/5333, adopted on 26 May 1983, C/M/168, p. 10-12.

<sup>603</sup>C/M/152, p. 8-10.

future interpretation of Article III. At the end of the debate the Council took note of the Panel Report and of the statements made by the parties and in the Council.<sup>604</sup>

During this debate, “the Chairman of the Council said that, generally speaking, panel reports had been adopted, although there were five exceptions to this practice, the Council having adopted one report in principle and having taken note of four other reports. Generally speaking, it was for the Council itself to decide in each case how to proceed”.<sup>605</sup>

At the May 1990 Council meeting, in discussion of the Panel Report on “United States - Restrictions on the Importation of Sugar and Sugar-containing Products Applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions”<sup>606</sup> the EEC suggested that the Council take note of the Panel report, including its conclusions. The Special Adviser to the Director-General, in response to an inquiry by the EEC, stated that “to his knowledge there had been only one such precedent where the Council had taken note of a panel report, and that this had involved a dispute between the United States and Spain regarding certain Spanish regulations concerning vegetable oil.”<sup>607</sup> The United States had not agreed to adoption of the report and its opinion had been shared by many other contracting parties”. The representative of the United States stated that “his own delegation’s research had shown that 24 contracting parties in [the Soyabean Oil] case had expressed fundamental disagreement with the Panel’s reasoning and had therefore urged that the Council do no more than note the report. In the present dispute, it was clear that 23 other contracting parties had not joined the Community in questioning the report and arguing that it not be adopted; nor had ten, or even five -- in fact, none had done so”.<sup>608</sup> The report was adopted on 7 November 1990.

## 11. Disputes involving developing contracting parties

Paragraph 5 of the 1979 Understanding provides that “During consultations, contracting parties should give special attention to the problems of less-developed contracting parties”. Paragraph 6(ii) of the 1979 Understanding Annex on customary practice provides that “The practice has been to appoint a [panel] member or members from developing countries when the dispute is between a developing and a developed country”.

Concerning disputes in which a developing contracting party is the applicant party and a developed country is the respondent party, see the 1966 Procedures and paragraph 8 of the 1979 Understanding regarding availability of the good offices of the Director-General in such disputes if requested by the developing contracting party.

Concerning disputes involving measures taken by developing contracting parties, see paragraph F(f)7 of the 1989 Improvements providing extension of time periods for consultations and requiring that sufficient time be provided in examining complaints against such contracting parties for them to prepare and present argumentation.

Paragraph H.1 of the 1989 Improvements provides that “While the Secretariat assists contracting parties in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing contracting parties. To this end, the Secretariat shall make available a qualified legal expert within the Technical Co-operation Division to any developing contracting party which so requests. This expert shall assist the developing contracting party in a manner ensuring the continued impartiality of the Secretariat”.

See also paragraphs 21 and 23 of the 1979 Understanding concerning action by the CONTRACTING PARTIES on reports of panels and working parties, and paragraph I.4 of the 1989 Improvements.

---

<sup>604</sup>L/5142, dated 17 June 1981, noted by the Council on 3 November 1981; C/M/152, p. 7-19.

<sup>605</sup>C/M/152, p. 13.

<sup>606</sup>L/6631, adopted on 7 November 1990, 37S/228.

<sup>607</sup>Spain - Measures concerning domestic sale of soyabean oil (L/5142 + Corr.1). For Council discussion and action on this report, see C/M/149, 151 and 152.

<sup>608</sup>C/M/241

## E. SPECIAL PROCEDURES FOR SETTLEMENT OF DISPUTES UNDER THE GATT

### 1. 1966 Decision on Procedures to be followed in consultations between a less-developed and a developed contracting party

#### (1) *Background and interpretation*

The text of the 1966 Procedures appears above at page 641.

The 1966 Procedures emerged from proposals first put forward in the Committee on the Legal and Institutional Framework of GATT during the negotiation of Part IV of the General Agreement. After the conclusion of negotiations on Part IV, the Committee on Trade and Development was established and was given the task of pursuing outstanding proposals for the amendment of Article XXIII, in the light of Part IV, to take account of difficulties experienced by less-developed countries in using that Article. These discussions took place in 1965-66 in the Committee's Ad Hoc Working Group on Legal Amendments, and are summarized in the Committee's 1966 Report.<sup>609</sup> The 1966 Report notes that the decision text "embodied the agreement reached in the Committee on procedures for more speedy and efficient use of the provisions of Article XXIII by less-developed contracting parties".<sup>610</sup> The Report also records that "The Committee agreed that the phrase 'shall consider what measures' in paragraph 10 of the Decision "is intended to mean that the CONTRACTING PARTIES shall consider the matter with a view to finding appropriate solution".<sup>611</sup> In this connection, the Report also notes that the Chairman of the Committee, in presenting the draft decision to the CONTRACTING PARTIES for adoption, asked to be placed on record the following understanding regarding its adoption:

"1. In consultations to be carried out by the Director-General under paragraph 3 of the draft decision, the Director-General would, in addition to the entities mentioned, be free to consult such experts as he considered would assist him in studying the facts and in finding solutions.

"2. With respect to paragraph 6 of the draft decision, the CONTRACTING PARTIES may provide more particular terms of reference for any such panel in order to assist them to assess the relative impact of the measures complained of on the economies of the contracting parties concerned and to consider the adequacy of any measures which those contracting parties would be prepared to take to remedy the situation. In establishing such particular terms of reference, the CONTRACTING PARTIES or the Council should bear in mind the desirability of having such panels appraise, in particular, the following elements:

"(a) the damage incurred through the incidence of the measures complained of upon the export earnings of the export earnings and economic effort of the less-developed contracting party;

"(b) the compensatory or remedial measures which the contracting party whose measures are complained of would be prepared to take to make good the damage inflicted by their application;

"(c) the effects of such measures as the injured contracting party would be prepared to take in relation to the contracting party whose measures have nullified or impaired the benefits deriving from the General Agreement which the former contracting party is entitled to expect."<sup>612</sup>

In this connection see also paragraphs 21 and 23 of the 1979 Understanding and paragraph I.4 of the 1989 Improvements.

Paragraph 7 of the 1979 Understanding provides that "The CONTRACTING PARTIES reaffirm that the customary practice includes the procedures for the settlement of disputes between developed and less-developed countries adopted by the CONTRACTING PARTIES in 1966 ... and that these remain available to less-developed

<sup>609</sup>L/2614, adopted on 5 April 1966, 14S/129, 139-140, paras. 41-47; see also interim report of the Ad Hoc Group, COM.TD/F/4; and first report of the Committee, L/2410, adopted on 25 March 1965, 13S/77, 83-84, paras. 27-32.

<sup>610</sup>*Ibid.*, 14S/140, para. 44.

<sup>611</sup>*Ibid.*, 14S/140, para. 47.

<sup>612</sup>*Ibid.*, 14S/140-141, at footnote 2.

contracting parties wishing to use them". Paragraph 2 of its Annex on customary practice describes the 1966 Procedures. Paragraph 4 of the 1989 Improvements provides that "All the points set out in this Decision shall be applied without prejudice to any provision on special and differential treatment for developing contracting parties in the existing instruments on dispute settlement including the CONTRACTING PARTIES' Decision of 5 April 1966".

The applicability of the 1966 Procedures was discussed at the March 1993 meeting of the Council.<sup>613</sup>

**(2) *Invocations of good offices under 1966 Procedures***

Paragraphs 1 through 3 of the 1966 Procedures, which provide for "good offices" by the Director-General, have been invoked in the following instances.

- In May 1978, after bilateral consultations between Chile and the EEC relating to EEC refunds on exports of malted barley did not arrive at a mutually satisfactory solution, "the matter was referred by Chile to the Director-General under the Decision of 5 April 1966 so that, acting in an *ex officio* capacity, the Director-General might use his good offices with a view to facilitating a solution".<sup>614</sup>
- In 1979, India invoked the 1966 Procedures with regard to Japanese import restrictions on leather. The parties agreed to a mutually satisfactory solution in bilateral consultations initiated by the GATT Secretariat.
- In 1986, Mexico requested consultations with the United States under Article XXIII:1 concerning taxes on petroleum levied under the Superfund Amendments and Reauthorization Act of 1986; the matter was referred to the Director-General on 13 January 1987, a panel was established on 4 February 1987 which consolidated the complaints of Mexico, Canada and the EC, and the panel submitted a report to the parties to the dispute on 27 May 1987.<sup>615</sup>
- In November 1987, Brazil requested consultations with the United States concerning the disruption of trade caused by an announcement of intended tariff increases on imports from Brazil and prohibitions of imports of certain computers from Brazil. In December 1987 Brazil requested the good offices of the Director-General.<sup>616</sup>
- In September 1992, Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela requested the good offices of the Director-General "in order to facilitate a satisfactory solution to the dispute over measures to restrict the import of bananas currently applied by some member States of the EC". These measures had been the subject of consultations under Article XXII:1.<sup>617</sup> At the beginning of December 1992 the Director-General suggested, and the parties agreed, that the formal good offices procedure be suspended until 15 January 1993, during which time the Director-General would pursue informal consultations. However, the informal consultations were terminated on 13 January 1993 and the two-month period for their completion started running again as of 14 January, and terminated on 10 February 1993.<sup>618</sup>
- At the February 1993 Council meeting, Brazil requested the good offices of the Director-General in relation to its dispute with the United States concerning the application of a bilateral textile agreement concluded under the Arrangement Regarding International Trade in Textiles.<sup>619</sup>

<sup>613</sup>C/M/262, p. 18-23.

<sup>614</sup>C/M/125. The complaint was withdrawn following consultations between the two parties with the participation of secretariat representatives; see L/5623, para. 38.

<sup>615</sup>L/6093 (request for consultations), L/6114 (referral), Panel Report on "United States - Taxes on Petroleum and Certain Imported Substances", L/6175, adopted on 17 June 1987, 34S/136.

<sup>616</sup>L/6274 dated 27 November 1987 (Article XXIII:1 request), L/6274/Add.1 (request for good offices).

<sup>617</sup>DS32/3. See also DS32/8.

<sup>618</sup>SR.48/2; C/M/261, p. 34.

<sup>619</sup>C/M/261, p. 11-16; see also C/M/262, p. 5-6.

See also paragraph 8 of and paragraph 2 of the Annex to the 1979 Understanding, and paragraph (i) of the 1982 Ministerial Decision.

### (3) *Application of paragraphs 4 and 5 of the 1966 Procedures*

Paragraphs 4 and 5 of the 1966 Procedures, which provide for submission of a report by the Director-General to the Council and appointment of a panel of experts, were invoked for the first time in February 1993 in connection with the dispute between Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela on the one hand and the EC on the other, concerning restrictions on imports of bananas applied by member States of the EC. The five applicant contracting parties requested the Director-General to refer the matter to the Council.<sup>620</sup> In discussion of this matter at the 10 February 1993 meeting of the Council, the Chairman said that although the good offices process would not end until midnight that day, the Director-General was prepared to present his formal report to the Council now, at the request of the Latin American banana-exporting countries.<sup>621</sup>

Upon presentation of the report by the Director-General, the Chairman noted that under paragraph 5 of the 1966 Procedures, the Council had to proceed to establish a panel upon receipt of the Director-General's report. The Council agreed to establish a panel in principle, on the understanding that the sixty-day period for the submission of its findings would only begin once its terms of reference and composition had been agreed, and that this would not be taken as a precedent for the interpretation of the 1966 Procedures. Furthermore, as provided in the 1989 Improvements, the panel would have standard terms of reference unless the parties to the dispute agreed otherwise within the following 20 days. It was noted by one delegation that nothing that was agreed at that meeting would constitute an interpretation of general application regarding the conjunction between the 1989 and 1966 procedures.<sup>622</sup> The Panel Report on "EEC - Member States' Import Régimes on Bananas", which has not been adopted, was submitted to the parties to the dispute on 19 May 1993 and was issued on 3 June 1993.<sup>623</sup>

## 2. Good offices and conciliation

The 1966 Procedures refer to referral of certain matters "to the Director-General, so that, acting in an *ex officio* capacity, he may use his good offices with a view to facilitating a solution"; see above. However, "good offices" are available for other disputes as well. Paragraph 8 of the 1979 Understanding provides as follows:

"If a dispute is not resolved through consultations the contracting parties concerned may request an appropriate body or individual to use their good offices with a view to the conciliation of the outstanding differences between the parties. If the unresolved dispute is one in which a less-developed contracting party has brought a complaint against a developed contracting party, the less-developed contracting party may request the good offices of the Director-General who, in carrying out his tasks, may consult with the Chairman of the CONTRACTING PARTIES and the Chairman of the Council".

"Good offices" of the Director-General were resorted to at the July 1982 Council meeting by the United States and the EEC, at the suggestion of a number of other contracting parties, on the occasion of the request by the United States for the establishment of a panel concerning EEC tariff treatment of imports of citrus and citrus products.<sup>624</sup> At the October 1982 Council meeting, the Director-General reported that he had met a number of times with the two parties and had made a proposal on the basis of which the two parties might open negotiations, but on the basis of the response to his proposal he had concluded that no purpose would be served to continue the process of good offices, as it did not appear to be possible to conciliate the outstanding differences between the parties.<sup>625</sup>

<sup>620</sup>DS32/4.

<sup>621</sup>C/M/261, p. 45; see *ibid.* p. 47 for contents of report.

<sup>622</sup>C/M/261, p. 46-48.

<sup>623</sup>DS32/R (unadopted), dated 3 June 1993.

<sup>624</sup>C/M/160, p. 20-22.

<sup>625</sup>C/M/161, p. 6.

Paragraph (i) of the 1982 Ministerial Decision further provides that

“With reference to paragraph 8 of the Understanding, if a dispute is not resolved through consultations, any party to a dispute may, with the agreement of the other party, seek the good offices of the Director-General or of an individual or group of persons nominated by the Director-General. This conciliatory process would be carried out expeditiously, and the Director-General would inform the Council of the outcome of the conciliatory process. Conciliation proceedings, and in particular positions taken by the parties to the dispute during consultations, shall be confidential, and without prejudice to the rights of either party in any further proceedings under Article XXIII:2. It would remain open at any time during any conciliatory process for either party to the dispute to refer the matter to the CONTRACTING PARTIES”.

In 1988 the Director-General confirmed that the first sentence of this paragraph means that the Director-General may designate a personal representative to conduct good offices.<sup>626</sup>

At the Forty-third Session in December 1987, the Director-General informed the CONTRACTING PARTIES that the EEC and Japan had jointly requested conciliation by the Director-General under paragraph 8 of the 1979 Understanding in their dispute concerning certain pricing and trading practices for copper in Japan.<sup>627</sup> Mr. Gardner Patterson was nominated as the Personal Representative of the Director-General and was assisted in establishing factual information by an independent expert on the copper market. The Good Offices Report by the Personal Representative was circulated to the parties on 16 December 1988 and to contracting parties on 31 January 1988; it provides a number of factual conclusions and (as requested by the parties) an advisory opinion, that the parties resolve the dispute by entering into reciprocal and mutually advantageous negotiations with a view to reduction or elimination of this tariff on an m.f.n. basis, in the context of the Uruguay Round.<sup>628</sup>

At the special meeting of the Council in October 1988 to review developments in the trading system, the Director-General informed the Council that in April 1988, Canada and the EC had asked him, with reference to paragraph 8 of the 1979 Understanding, to render an advisory opinion on whether a tariff concession granted by Portugal to Canada in 1961 was applicable to wet salted cod. This issue had arisen in tariff negotiations between Canada and the EC under Article XXIV:6. He had agreed on 15 April to render such an opinion and on 15 July had made it available to the two parties concerned.<sup>629</sup>

Paragraph D of the 1989 Improvements provides as follows:

“1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree. They may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once terminated, the complaining party can then proceed with a request for the establishment of a panel or a working party under Article XXIII:2. When good offices, conciliation or mediation are entered into within sixty days of a request for consultations, the complaining party must allow a period of sixty days from the date of the request for consultations before requesting the establishment of a panel or working party. The complaining party may request a panel or a working party during the sixty days if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.

“2. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel or working party process proceeds.

“3. The Director-General may, acting in an *ex officio* capacity, offer his good offices, conciliation or mediation with the view to assisting contracting parties to settle a dispute”.

---

<sup>626</sup>C/M/223, p. 23.

<sup>627</sup>SR.43/4.

<sup>628</sup>L/6456, dated 31 January 1989, 36S/199, 201-202.

<sup>629</sup>C/M/225, p. 2.

### 3. Arbitration

Paragraph E of the 1989 Improvements provides as follows:

“1. Expeditious arbitration within GATT as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.

“2. Resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all contracting parties sufficiently in advance of the actual commencement of the arbitration process.

“3. Other contracting parties may become party to an arbitration proceeding upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award”.

Paragraph B of the 1989 Improvements provides that “... arbitration awards within GATT ... must be notified to the Council where any contracting party may raise any point relating thereto”.

In March 1990, Canada requested a panel under Article XXIII:2 in respect of Canada’s rights related to the export of grains to the EEC arising out of the introduction of the common agricultural policy and two 1962 bilateral agreements on wheat with the EEC.<sup>630</sup> On 16 July 1990, Canada and the EC notified that they had agreed to have recourse to arbitration in respect of this dispute on the basis of agreed terms of reference; the terms of reference, the texts of the agreements and the name of the agreed arbitrator (Mr. Gardner Patterson, former Deputy Director-General of GATT) were included in the notification.<sup>631</sup> The arbitration award was circulated in October 1990. At the November Council meeting, the EC representative stated that “the arbitration proceeding had been a positive experience. The rules of the game of arbitration required that parties to the proceedings agree to abide by the arbitration award; whether the Community liked the results or not, it would abide by the rules”.<sup>632</sup>

At the November 1993 meeting of the Committee on Technical Barriers to Trade, the representative of Canada reported that her authorities were seeking to resolve a ban by Mexico on imports of seed potatoes, and noted that in February 1993, Canada and Mexico had agreed to a process whereby the issue had been referred to a third party for binding arbitration; the arbitrator had issued his report in early April, but a number of technical issues remained unresolved.<sup>633</sup>

See also references to arbitration under Article XXVIII:3.

### III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

In the US Draft Charter, the article on consultation in the commercial policy chapter (Article 30) included both provisions on consultation and provisions on nullification or impairment. In the London and New York drafts of the Charter these provisions appeared as two separate paragraphs of Article 35, still in the commercial policy chapter. During discussions in Geneva, it was decided to move the provisions on nullification or impairment to Articles 89 and 90 in Chapter VIII of the Charter, and to expand their scope to cover the entire Charter. The provisions on consultation remained in Article 41.

Article XXIII:1 in the 30 October 1947 text of the General Agreement was identical to Article 89 of the Geneva Draft Charter, except that Article 89 referred to “Members” of the ITO, benefits under the Charter, and attainment of the objectives in Article 1 of the Charter, and Article 89 required that the Members concerned keep the Director-General generally informed of any discussions undertaken. Article XXIII:2 was closely similar to

<sup>630</sup>DS12/2, dated 23 March 1990.

<sup>631</sup>DS12/3, dated 8 August 1990.

<sup>632</sup>C/M/246, p. 25, discussing DS12/R (reprinted at 37S/80).

<sup>633</sup>TBT/M/45, para. 63.

Article 90 of the Geneva Draft, except that Article 90 provided for investigation by the Executive Board or the Conference of the ITO, provided for review of Executive Board rulings by a resolution of the Conference of the ITO, and provided for referral of matters to arbitration by the Executive Board with the consent of the Members concerned. Article 91 of the Geneva Draft provided that the Conference or the Executive Board could request advisory opinions from the International Court of Justice regarding legal questions within the scope of the activities of the ITO; it also provided that Conference resolutions under Article 90 and Conference decisions under any other Article would be subject to review by the International Court of Justice through a request by the ITO for an advisory opinion under the Statute of the International Court of Justice. The provisions of Article 91 were not included in the General Agreement at all.

Articles 89-92 of the Geneva Draft Charter was replaced at Havana by Chapter VIII (Articles 92-97) on "Settlement of Differences" in the Havana Charter. The main changes in the Havana Charter were the following:

- (a) The wording of paragraphs 1(a) and 1(b) of Article 89 of the Geneva Draft was substantially changed in Article 93:1 of the Havana Charter.
- (b) The provisions on arbitration were further developed in 2 and 3 of Article 93.
- (c) Paragraph 2 of Article 94 provided a detailed list of possible actions of the Executive Board on having determined whether a nullification or impairment existed.
- (d) Additional procedural provisions were added in the Havana Charter which do not appear in the GATT.

The Charter dispute settlement provisions as modified at Havana were not taken into the General Agreement. The Report of the Sub-Committee on Supersession, which was appointed at the First Session of the CONTRACTING PARTIES to consider Article XXIX, proposed the insertion of Article XXIX:4 providing that if the Charter should cease to be in force after it had entered into force, the provisions of Part II of the General Agreement would again enter into force, and that except for Article XXIII the provisions of Part II would be replaced by the corresponding Charter provisions. The Report of the Sub-Committee notes in explanation that "it is considered that the form in which [this Article] appear[s] in the Charter is not suitable for the General Agreement".<sup>634</sup>

In the Review Session of 1954 a number of proposals for amendment of Article XXIII were considered and rejected: see page 690 above. It was agreed that upon entry into force of the Agreement on the Organization for Trade Cooperation (which included dispute settlement provisions in Article 14) Article XXIII would be amended by deleting all but the first sentence<sup>635</sup>; however, the Agreement never entered into force. Some minor amendments to paragraph 2, suggested by the Legal and Drafting Committee, were also agreed: "concession(s) or other obligation(s)" were substituted for "obligation(s) or concession(s)" in the fourth and fifth sentences, and "Executive Secretary to the CONTRACTING PARTIES" was substituted for "Secretary General of the United Nations" in the fifth sentence, consequential to a change made in the deposit provisions of Article XXVI.<sup>636</sup> These amendments were effected through the Protocol Amending the Preamble and Parts II and III, and entered into force 7 October 1957.

Proposals to amend Article XXIII were also considered in 1965-66, but instead it was decided to adopt the 1966 Procedures as a Decision of the CONTRACTING PARTIES; see references to this work in the chapter on Part IV and at pages 683 and 764 above.

<sup>634</sup>GATT/1/21, p. 3.

<sup>635</sup>See 3S/251, para. 65.

<sup>636</sup>W.9/236/Add.3.

## IV. RELEVANT DOCUMENTS

*London*

Other: EPCT/C.V/35

*New York*

Discussion: EPCT/C.6/29, 40, 81, 90, 105  
 Other: EPCT/C.6/80, 104/Rev.1  
 EPCT/C.6/W/83

*Geneva*

Charter articles:

Discussion: EPCT/A/SR/5, 6, 12, 13, 35  
 EPCT/A/PV/5, 6, 12, 13, 35  
 EPCT/B/SR/18+Corr.1-2, 33  
 EPCT/EC/PV.2/22  
 Reports: EPCT/139+Corr.1, 159,  
 180+Corr.1-9, 186+Corr.1  
 Other: EPCT/42  
 EPCT/W/64, 161, 163, 168, 170,  
 172, 175, 210/Rev.1, 224, 230,  
 233, 243, 248, 257, 299, 307

GATT Article XXIII:

Discussion: EPCT/TAC/SR/11, 22  
 EPCT/TAC/PV/13 (p. 40), 18 (p.  
 42), 28  
 Reports: EPCT/135, 189, 196, 212,  
 214/Rev.1/Add.1

*Havana*

Discussion: E/CONF.2/C.6/SR.30  
 Reports: E/CONF.2/23 (p. 3), 83  
 +Corr.1.

*Review Session*

Discussion: SR.9/38  
 Reports: W.9/164, 198, 215, 236/Add.3  
 L/327, 3S/231  
 Other: L/273, 275, 276, 292  
 W.9/113, 129, 215/Add.1  
 Spec/27/55, 37/55, 120/55

## V. TABLE OF DISPUTES

### *Definitions*

*Title* indicates the title of the dispute. Where there is a report reprinted in the Basic Instruments and Selected Documents (BISD) series, the title corresponds to the title of the report in the BISD. Where the report is not reprinted in the BISD, the title corresponds to the title in the document cited. Where no formal title for a dispute is indicated in a GATT document (for instance, in the case of bilateral consultations under Article XXIII:1 referred to in session records), a title has been composed for the purposes of this table from the name of the defendant contracting party and the measure in question.

*Applicant* indicates the contracting party or parties having invoked Article XXIII.

*Consultations* indicates the date of the request for consultations and the relevant document reference. The date indicated is the date of the GATT document recording a request for consultations, or if there is no such document, then the date of the meeting at which a request for consultations was made. If a reference to a consultation only appears in minutes of a meeting held after the date that the consultation took place, the date in this column is the date of the consultation, or as a last resort the date of that meeting. In some instances the date of the request is not indicated, either because there is no formal record in a GATT document of consultations having been requested or held; or because consultations were held under Article XXII:1 (see the separate table under Article XXII); or because a claim was brought directly under Article XXIII:2, or under Article XXIII:1(c).

*Referral* indicates the date of a request for a panel or working party or for a ruling under Article XXIII:2. The date indicated is the date of the GATT document recording the request or the date of the meeting at which the request was made. The date of referral may be the same as the date in the consultations column when the only record of consultations under Article XXIII:1 is a reference in the panel request to the fact that such consultations had been held. The distinction between consultation requests and referrals under Article XXIII:2 is clearest since 1989.

*Panel established* refers to the date of the decision to establish a panel or working party. *Report circulated* refers to the circulation of the panel or working party report to all contracting parties, and provides references to the original GATT document in question and its republication, if any, in the Basic Instruments and Selected Documents (BISD) series published by the Secretariat. *Report adopted* gives the date of adoption of the report and the document recording the decision. *Other references* are GATT documents referring to the dispute in question which were issued on or after the date of referral to the CONTRACTING PARTIES.

This table has been updated to January 1995. It concerns only disputes under Article XXIII of the GATT 1947 and does not cover disputes under the multilateral agreements negotiated in the Tokyo Round. No disputes have been brought under either the GATT 1947 or the Tokyo Round agreements since entry into force of the WTO Agreement on 1 January 1995. The Legal Affairs Division of the Secretariat maintains a database concerning current and past disputes under the GATT, the Tokyo Round agreements and the WTO Agreement.

Title	Applicant	Consultations	Referral	Panel established	Report circulated	Report adopted	Other references
1. Cuba - Consular taxes	Netherlands	19-Jul-48, CP.2/9	24-Aug-48, CP.2/SR.11			24-Aug-48, II/12	CP.2/SR.11, CP.2/9
2. India - Tax rebates on exports	Pakistan	21-Feb-49, CP.3/6	24-Aug-48, CP.2/SR.11			24-Aug-48, II/12	CP.3/6, SR.19
3. Report of Working Party 7 on the Cuban schedule	United States	9-Sep-48, CP.2/W/13	9-Sep-48, CP.2/W/13	10-Sep-48, CP.2/SR.23	13-Sep-48, CP.2/43	14-Sep-48, CP.2/SR.25	CP.2/SR.22
4. Brazilian internal taxes	France	25-Apr-49, CP.3/SR.9	25-Apr-49, CP.3/SR.9	26-Apr-49, CP.3/SR.10	27-Jun-49, CP.3/42, II/181	30-Jun-49, CP.3/SR.30	CP.3/4; CP.4/SR.20; CP.5/SR.6; CP.5/37, II/186
5. Report of Working Party 8 on Cuban textiles	United States	14-May-49, CP.3/SR.12	14-May-49, CP.3/SR.12	18-May-49, CP.3/SR.13	10-Aug-49, CP.3/82		CP.3/23; CP.3/SR.12, 13
6. United States - Restrictions on exports to Czechoslovakia	Czechoslovakia	30-May-49, CP.3/33	30-May-49, CP.3/33			8-Jun-49, II/28	CP.3/SR.18, 20, 22
7. United States - Margins of preference	Cuba	9-Aug-49, CP.3/SR.38	26-Jul-49, CP.3/69			9-Aug-49, II/11	CP.3/SR.34, 35, 36, 37, 38
8. Australian subsidy on ammonium sulphate	Chile	27-Jul-49, CP.3/61	27-Jul-49, CP.3/61	14-Mar-50, CP.4/SR.15	31-Mar-50, CP.4/39, II/188	3-Apr-50, CP.4/SR.21	CP.4/23; CP.4/SR.15; CP.5/SR.6
9. France - Export restrictions on hides and skins	United States	7-Oct-50, CP.5/1/Rev.1					CP.5/SR.5, CP.5/27
10. France - Quantitative restrictions	Belgium	7-Oct-50, CP.5/1/Rev.1					CP.5/SR.16, 25
11. United Kingdom - Purchase tax exemptions	Netherlands		26-Oct-50, CP.5/12				CP.5/SR.20; CP.6/SR.7; CP.7/SR.5; G/18
12. United States - Withdrawal of a tariff concession under Article XIX	Czechoslovakia	7-Nov-50, CP.5/22	7-Nov-50, CP.5/22	15-Dec-50, CP.5/SR.23	27-Mar-51, CP/106	22-Oct-51, CP.6/SR.19	CP.5/SR.21-23
13. United States - Withdrawal of concessions negotiated with China	Haiti		10-Sep-51, CP/115/Add.2				CP.6/SR.9, CP.6/42
14. Belgium - Family allowances (Allocations familiales)	Norway, Denmark	19-Sep-51, CP.6/25 and Add.1	19-Sep-51, CP.6/25 and Add.1	29-Mar-52, SR.7/11	6-Nov-52, G/32, 1S/59	7-Nov-52, SR.7/14	CP.6/25, CP.6/SR.11, 21, L/187
15. United States - Restrictions on dairy products	Denmark	21-Sep-51, CP.6/28	21-Sep-51, CP.6/28				CP.6/26, 51; SR.7/10, 16; L/19, 59, 61, 433; 1S/31, 32, 62; 2S/28; 3S/46, 4S/31; SR.15/7

Title	Applicant	Consultations	Referral	Panel established	Report circulated	Report adopted	Other references
16. United States - Restrictions on dairy products	Netherlands	19-Sep-51, CP.6/26	28-Oct-52, SR.7/10	19-Sep-51, CP.6/26	7-Nov-52, L/61, 1S/62	8-Nov-52, SR.7/16	CP.6/28 and Add.1, 51; SR.7/16; 1S/31, 32; 2S/28; 3S/46; L/19, 59, 433; 4S/31
17. Belgium - Restrictions on imports from the dollar area	United States	22-Oct-51, CP.6/50	22-Feb-52, IC/7	26-Feb-52, IC/SR.3			SR.7/11
18. Schedule XXV - Greece - Increase of import duties	United Kingdom	3-Sep-52, L/15		17-Oct-52, SR.7/9	30-Oct-52, G/25, 27; 1S/51	3-Nov-52, SR.7/13	1S/23; SR.8/7, G/51
19. Treatment by Germany of imports of sardines	Norway	4-Sep-52, L/16	4-Sep-52, L/16	9-Oct-52, SR.7/7	30-Oct-52, G/26, 1S/53	31-Oct-52, SR.7/12	1S/30, G/52/Add.1
20. Special import taxes instituted by Greece	France	27-Sep-52, L/26	27-Sep-52, L/26	15-Oct-52, SR.7/8	31-Oct-52, G/25, 1S/48	3-Nov-52, SR.7/13	L/88; SR.8/7
21. Pakistan - Licence fee and duty on exports of jute	India	3-Oct-52, L/41	18-Oct-52, SR.7/7				L/41/Add.1, SR.7/7, SR.7/13, IC/SR.7, L/82/ and Add.1
22. United States - Article XIX action on dried figs	Greece		4-Oct-52, L/40				SR.7/7, 11, 15; SR.8/12; SR.9/40; 1S/28; 2S/26, L/284; SR.9/40
23. United States - Article XIX action on dried figs	Turkey		9-Oct-52, L/44				
24. France - Statistical tax on imports and exports	United States	7-Nov-52, L/64					SR.8/7, SR.9/28
25. United States - Import restrictions on filberts	Turkey	13-Aug-53, G/46/Add.3					SR.8/7, SR.8/12
26. Brazil - Compensatory concessions	United States United Kingdom	15-Sep-53, G/46/Add.4					SR.8/7, SR.9/27
27. United States - Export subsidies on oranges	Italy	5-Oct-53, SR.8/12	12-Sep-53, L/122				L/266, SR.9/6, 40, SR.10/1, 3
28. France - Special temporary import tax	Italy	29-Jul-54, L/213	29-Jul-54, L/213			17-Jan-55, SR.9/29, 3S/26	SR.9/28; 4S/20; 5S/27; IC/SR.32; L/366, 406, 412, 585, 622, 643, 657, 671, 708; SR.12/5
29. Swedish anti-dumping duties	Italy	29-Jul-54, L/215, 4-Nov-54, SR.9/7	29-Jul-54, L/215	5-Nov-54, SR.9/7	23-Feb-55, L/328, 3S/81	26-Feb-55, SR.9/37	L/386, 7S/69
30. Turkey - Import taxes and export bonuses	Italy	30-Jul-54, L/214	30-Jul-54, L/214	5-Nov-54, SR.9/7			SR.9/40

Title	Applicant	Consultations	Referral	Panel established	Report circulated	Report adopted	Other references
31. Peru - Embargo on imports from Czechoslovakia	Czechoslovakia	4-Oct-54, L/235					SR.9/27
32. Greece - Luxury tax on imports	Italy	5-Oct-54, L/234					SR.9/7, 30
33. West Germany - Import restrictions on coal	United States	11-Oct-54, L/242					SR.9/40, SR.10/1
34. France - Customs stamp tax on imports, increase to 2 per cent	United States	13-Oct-54, L/245					SR.9/28
35. Belgium - Import restrictions on coal	United States	26-Oct-54, L/258					SR.9/42
36. German import duties on starch and potato flour	Benelux	26-Oct-54, L/260	18-Jan-55, SR.9/30	18-Jan-55, SR.9/30	7-Feb-55, W.9/178, 3S/77		SR.9/34
37. France - Customs stamp tax on imports, further increase to 3 per cent	United States	26-Sep-55, L/410	26-Sep-55, L/410			1-Nov-55, SR.10/5	L/569, 720, 1412; SR.10/5; SR.11/4; C/M/4
38. United States - Hawaiian regulations affecting imported eggs	Australia	28-Sep-55, L/411	28-Sep-55, L/411				L/411/Add.1; SR.10/13
39. Italy - Turnover tax on pharmaceutical products	United Kingdom	11-Oct-55, L/421					SR.10/5, 19
40. Italy - Import duties on cheese	Denmark		25-Oct-55, L/417/Add.1				SR.10.20
41. France - Auto taxes	United States	16-Nov-56, SR.11/16	12-Sep-56, L/520	16-Nov-56, SR.11/16			
42. West Germany - Turnover tax on printing	Netherlands	16-Nov-56, SR.11/16	23-Oct-56, L/562				
43. Greece - Increase in bound duties on LP phonograph records	West Germany		2-Nov-56, L/575	5-Nov-56, SR.11/12	9-Nov-56, L/580		L/575, 765; SR.11/16; IC/SR.31, 34; SR.12/21
44. United States - Export subsidy on poultry	Denmark	16-Nov-56, SR.11/16	12-Nov-56, L/586				L/586; SR.11/16

Title	Applicant	Consultations	Referral	Panel established	Report circulated	Report adopted	Other references
45. Chile - Auto taxes	United States	16-Nov-56, L/599	16-Nov-56, L/599				IC/SR.31; SR.11/18
46. United Kingdom - Export of subsidized eggs	Denmark		24-Apr-57, L/627	24-Apr-57, IC/SR.31			IC/SR.34
47. Italy - Discrimination against imported agricultural machinery	United Kingdom	24-Oct-57, SR.12/5	29-Jul-57, L/649	14-Apr-58, IC/SR.38	15-Jul-58, L/833, 7S/60	23-Oct-58, SR.13/8	L/1294; SR.12/19; SR.13/18; 7S/23; SR.17/5
48. France - Discrimination against imported agricultural machinery	United Kingdom		3-Oct-57, L/695				SR.12/5, 19, 21; IC/SR.41; SR.13/7
49. United States - Article XIX action on spring clothespins	Denmark, Sweden		28-Nov-57, L/758				L/757; SR.12/21; IC/SR.38
50. France - Assistance to exports of wheat and wheat flour	Australia		14-Apr-58, IC/SR.38	14-Apr-58, IC/SR.38	20-Nov-58, L/924, 7S/46	21-Nov-58, SR.13/20	L/1323, SR.13/8
51. Italy - Assistance to exports of flour	Australia		12-Sep-58, L/853	24-Sep-58, IC/SR.41			SR.13/17
52. Italy - Measures in favour of domestic production of ships plates	Austria		9-Oct-58, L/875				SR.13/12; SR.15/17; SR.16/9; SR.17/5; SR.18/4
53. United Kingdom - Increase in margin of preference of ornamental pottery	West Germany		12-Mar-59, IC/SR.44	12-Mar-59, IC/SR.44	19-Mar-59, SECRET/105		SECRET/103
54. Uruguayan recourse to Article XXIII	Uruguay	23-Nov-61, L/1647	23-Nov-61, L/1647	22-Feb-62, CIM/9	15-Nov-62, L/1923, 11S/95	16-Nov-62, SR.20/13	CIM/23; L/1662, 1679, 1739, 2278/Add.1; L/2074; 13S/35; L/2278, 13S/45; SR.22/2
55. United Kingdom - Increase in margin of preferences on bananas	Brazil		9-Dec-61, SR.19/12	22-Feb-62, CIM/9	11-Apr-62, L/1749		CIM/10; SR.20/2
56. France - Import restrictions	United States	3-May-62, L/1899	20-Sep-62, L/1830, 8-Nov-62, L/1899	9-Nov-62, SR.20/8	14-Nov-62, L/1921, 11S/94	14-Nov-62, SR.20/10, 11S/55	SR.20/3; CIM/80; L/3744
57. Exports of potatoes to Canada	United States	9-Nov-62, SR.20/8	9-Nov-62, SR.20/8	9-Nov-62, SR.20/8	16-Nov-62, L/1927, 11S/88	16-Nov-62, SR.20/13, 11S/55	L/1968

Title	Applicant	Consultations	Referral	Panel established	Report circulated	Report adopted	Other references
58. US/EEC negotiation on poultry	EEC/US		18-Oct-63, GATT/AIR/352	29-Oct-63, C/M/18	21-Nov-63, L/2088, 12S/65		C/M/59
59. Italy - Administrative and statistical fees	United States	1-Dec-69, L/3269	1-Dec-69, L/3279				
60. Greece - Preferential tariff quotas to the USSR	United States	16-Apr-70, L/3384	16-Apr-70, L/3384				L/3406, 3447, 3387/Corr.1; C/M/62, 63, 65
61. EEC - Emergency action on table apples	Australia	28-Apr-70, C/M/62	28-Apr-70, C/M/62				C/M/63
62. Denmark - Import restrictions on grains	United States	14-Sep-70, L/3436	14-Sep-70, L/3436				C/M/64
63. Jamaica - Margins of preference	United States	18-Sep-70, L/3440	18-Sep-70, L/3440	29-Sep-70, C/M/64	20-Jan-71, L/3485, 18S/183	2-Feb-71, C/M/66	18S/33
64. EEC - Compensatory taxes on imports	United States	30-Jun-72, L/3715	30-Jun-72, L/3715				C/M/79-80
65. United Kingdom - Import restrictions on cotton textiles	Israel	1-Sep-72, L/3741	1-Sep-72, L/3741	25-Oct-72, C/M/79	26-Jan-73, L/3812, 20S/237	5-Feb-73, C/M/84	C/M/80; L/3770
66. France - Import restrictions	United States		12-Sep-72, L/3744				C/M/80
67. United Kingdom - Dollar area quotas	United States	17-Oct-72, L/3753	17-Oct-72, L/3753	19-Dec-72, C/M/83	20-Jul-73, L/3891, 20S/236	30-Jul-73, C/M/89	C/M/89; L/3816, 3843, 3890; 20S/230
68. United States - Income tax legislation	EEC		1-May-73, L/3851	30-Jul-73, C/M/89	12-Nov-76, L/4422, 23S/98	7-Dec-81, C/M/154, 28S/114	C/M/110, 112, 117, 119-120, 122, 124, 145, 149, 151-153, 157, 159-161, 165-166, 168, 180, 183, 185; C/W/384, 392
69. Income tax practices maintained by Belgium	United States		17-May-73, L/3860	30-Jul-73, C/M/89	12-Nov-76, L/4424, 23S/127	7-Dec-81, C/M/154, 28S/114	28S/114; C/98, 98/Add.1, 115; C/M/110, 112, 117, 119-120, 122, 124, 145-146, 148-149, 151-153
70. Income tax practices maintained by France	United States		17-May-73, L/3860	30-Jul-73, C/M/89	12-Nov-76, L/4423, 23S/114	7-Dec-81, C/M/154, 28S/114	28S/114; C/97/Rev.1, C/97/Add.1, C/114; C/M/110, 112, 117, 119-120, 122, 124, 145-146, 148-149, 151-153
71. Income tax practices maintained by the Netherlands	United States		17-May-73, L/3860	30-Jul-73, C/M/89	12-Nov-76, L/4425, 23S/137	7-Dec-81, C/M/154, 28S/114	28S/114; C/99, C/116; C/M/110, 112, 117, 119-120, 122, 124, 145-146, 148-149, 151-153

Title	Applicant	Consultations	Referral	Panel established	Report circulated	Report adopted	Other references
72. EEC - Adequacy of compensation in Article XXIV:6 negotiations	Canada		4-Nov-74, L/4107	29-Nov-74, C/M/102			C/M/101, C/W/259, DS12/1, DS/R
73. Canadian import quotas on eggs	United States		10-Sep-75, L/4223	25-Sep-75, C/M/108	12-Dec-75, L/4279, 23S/91	17-Feb-76, C/M/112	L/4207, L/4319
74. EEC - Programme of minimum import prices (MIPS), licences, and surety deposits for certain processed fruits and vegetables	United States	29-Mar-76, L/4321	14-Jun-76, C/M/114	15-Jul-76, C/M/115	4-Oct-78, L/4687, 25S/68	18-Oct-78, C/M/128	L/4322, C/M/113, C/M/117
75. EEC - Licenses and surety deposits on canned peaches and pears	Australia	30-Mar-76, L/4322					L/4321
76. EEC - Measures on animal feed proteins	United States	27-Apr-76, C/M/113	15-Jul-76, C/M/115	17-Sep-76, C/M/116	2-Dec-77, L/4599, 25S/49	14-Mar-78, C/M/124	C/M/113, 119
77. Canada - Withdrawal of tariff concessions	EEC	2-Nov-76, L/4432	2-Nov-76, L/4432	12-Nov-76, C/M/117	28-Apr-78, L/4636, 25S/42	17-May-78, C/M/125	C/M/119, 126-128
78. Japan - Measures on imports of thrown silk yarn	United States	26-Jul-77, L/4530	26-Jul-77, L/4530	26-Jul-77, C/M/122	3-Mar-78, L/4637, 25S/107	17-May-78, C/M/125	C/M/123
79. EEC - export refunds on malted barley	Chile	1-Nov-77, L/4588					C/M/125, SCMM/3, SCMM/9
80. Norway - Restrictions on imports of certain textile products	United Kingdom (for Hong Kong)	17-May-78, C/M/125; 13-Jul-79, L/4815	1-Jun-78, L/4671; 13-Jul-79, L/4815	22-Jun-78, C/M/126, 25-Jul-79, C/M/134	24-Mar-80, L/4959, 27S/119	18-Jun-80, C/M/141	C/M/135, 139, 144, L/4692/Add.12, Add.19
81. Japanese measures on imports of leather	United States	20-Jul-78, L/4691	20-Jul-78, L/4691	18-Oct-78, C/M/128	16-Mar-79, L/4789	6-Nov-79, C/M/135	C/M/127, 132-133, 139
82. EEC - Refunds on exports of sugar	Australia	25-Sep-78, L/4701; 18-Oct-78, C/M/128	27-Sep-78, L/4701	6-Nov-78, C/M/129	25-Oct-79, L/4833, 26S/290	6-Nov-79, C/M/135	C/M/130, 138-139, 143, 144, 148, 150; 28S/80, 29S/82
83. EEC - Refunds on exports of sugar	Brazil	14-Nov-78, L/4722	14-Nov-78, L/4722	27-Nov-78, SR.34/1	7-Oct-80, L/5011, 27S/69	10-Nov-80, C/M/144	C/M/130, 132, 135, 148-150; SR.34/1; 28S/80, 29S/82
84. United States - Application of countervailing duties	EEC	13-Dec-78, L/4745					L/4745/Add.1

Title	Applicant	Consultations	Referral	Panel established	Report circulated	Report adopted	Other references
85. EEC - Restrictions on imports of apples from Chile (I)	Chile	19-Jun-79, L/4805	16-Jul-79, L/4816	25-Jul-79, C/M/134	31-Oct-80, L/5047, 27S/98	10-Nov-80, C/M/144	C/M/135, 138; L/4805
86. Japan's measures on imports of leather	Canada	26-Oct-79, L/4856	26-Oct-79, L/4856	16-Nov-79, C/M/136	20-Oct-80, L/5042, 27S/118	10-Nov-80, C/M/144	C/M/135, 139
87. Spain - Measures concerning the domestic sale of soyabean oil	United States	1-Nov-79, L/4859	1-Nov-79, L/4859	29-Jan-80, C/M/138	17-Jun-81, L/5142		C/M/136, 138-139, 152; L/5161, 5188, 5509, 5519
88. Japan - Restraints on imports of manufactured tobacco from the United States	United States	8-Nov-79, L/4871	8-Nov-79, L/4871	16-Nov-79, C/M/136	15-May-81, L/5140, 28S/100	11-Jun-81, C/M/148	C/M/139
89. United States - Prohibition of imports of tuna and tuna products from Canada	Canada	25-Jan-80, L/4931	25-Jan-80, L/4931	26-Mar-80, C/M/139	22-Dec-81, L/5198, 29S/91	22-Feb-82, C/M/155	C/M/141, 144, 154, 156, 159
90. Spain - Tariff treatment of unroasted coffee	Brazil	29-Feb-80, L/4948	6-May-80, L/4974	18-Jun-80, C/M/141	27-Apr-81, L/5135, 28S/102	11-Jun-81, C/M/148	L/4832, C/M/151; L/5284
91. EEC - Imports of beef from Canada	Canada	26-Mar-80, C/M/139	6-Jun-80, L/4987	18-Jun-80, C/M/141	23-Jan-81, L/5099, 28S/92	10-Mar-81, C/M/146	C/M/143
92. EEC - United Kingdom application of EEC directives to imports of poultry from the United States	United States	8-Aug-80, L/5013	29-Sep-80, L/5033	9-Oct-80, C/M/143	3-Jun-81, L/5155, 28S/90	11-Jun-81, C/M/148	L/5033, C/M/145; L/5040, 5149; TBT/M/3, TBT/M/4
93. Panel on United States countervailing duties	India	29-Sep-80, L/5028	31-Oct-80, L/5062	10-Nov-80, C/M/144	30-Sep-81, L/5192, 28S/113	3-Nov-81, C/M/152	C/M/148; L/5062/Add.1; SCM/20, SC/M/11, SCM/Spec/M/7, SC/M/19
94. EEC - Accession of Greece - Relevance of variable levies to Article XXIV	Australia		10-Mar-81, L/5124				L/5117, C/M/146
95. Panel on vitamins [US duties on Vitamin B12]	EEC	30-Mar-81, L/5129	4-Jun-81, L/5157	11-Jun-81, C/M/148	18-Jun-82, L/5331, 29S/110	1-Oct-82, C/M/161	C/121, C/M/149, 166
96. EEC - Production subsidies on canned fruit	Australia	11-Jun-81, C/M/148					SR.36/1, L/5778
97. United States - Imports of certain automotive spring assemblies	Canada	30-Sep-81, L/5195	3-Nov-81, C/M/152	8-Dec-81, C/M/154	11-Jun-82, L/5333, 30S/107	26-May-83, C/M/168	L/5195 and Add.1, C/M/151, 155, 160-162, 165, 167

Title	Applicant	Consultations	Referral	Panel established	Report circulated	Report adopted	Other references
98. EEC - Quantitative restrictions against imports of certain products from Hong Kong	United Kingdom (for Hong Kong)	7-Dec-81, C/M/154	3-Sep-82, L/5362	1-Oct-82, C/M/161	1-Jul-83, L/5511, 30S/129	12-Jul-83, C/M/170	C/M/161, 165, 171, 173-174, 178, 210
99. EEC - Production aids granted on canned peaches, canned pears, canned fruit cocktail and dried grapes	United States	19-Mar-82, L/5306	19-Mar-82, L/5306	31-Mar-82, C/M/156	20-Feb-85, L/5778		C/M/159, 186-188, 190-192, 194-195, C/W/476
100. Canada - Administration of the Foreign Investment Review Act	United States		26-Mar-82, L/5308	31-Mar-82, C/M/156	25-Jun-83, L/5504, 30S/140	7-Feb-84, C/M/174	C/M/162, 168, 171, 173, 194
101. EEC - Sugar regime	Argentina, Australia, Brazil, Colombia, Cuba, Dominican Rep., India, Nicaragua, Peru, Philippines	8-Apr-82, L/5309					L/5309/Add.2-5, C/M/161, 166, SR.39/2
102. EEC - Tariff treatment of citrus products from certain mediterranean countries	United States	18-Jun-82, L/5337	18-Jun-82, L/5337, 1-Oct-82, C/M/161	2-Nov-82, C/M/162	7-Feb-85, L/5776		C/M/170, 186-187, 190; C/W/462, 465; L/5339
103. Finland - Internal regulations having an effect on imports of certain parts of footwear	EEC	28-Sep-82, L/5369	27-Oct-82, L/5394	2-Nov-82, C/M/162			C/M/161; C/124
104. Switzerland - Imports of table grapes	EEC	8-Oct-82, L/5371					L/5364
105. EEC - Import restrictive measures on video tape recorders	Japan	21-Dec-82, L/5427					
106. Panel on Japanese measures on imports of leather	United States	5-Jan-83, L/5440	25-Feb-83, L/5462	20-Apr-83, C/M/167	2-Mar-84, L/5623, 31S/94	15-May-84, C/M/178	C/M/166, 170, 176, 183, 186-187, 190, 191, L/5978
107. United States manufacturing clause	EEC	8-Mar-83, L/5467	8-Mar-83, L/5467	20-Apr-83, C/M/167	1-Mar-84, L/5609, 31S/74	15-May-84, C/M/178	L/5968; C/M/170, 176, 196, 198, 200-201, 210
108. Japan - Nullification and impairment of benefits and impediment to the attainment of GATT objectives	EEC	8-Apr-83, L/5479	8-Apr-83, L/5479				C/M/167

Title	Applicant	Consultations	Referral	Panel established	Report circulated	Report adopted	Other references
109. United States - Imports of sugar from Nicaragua	Nicaragua	15-May-83, L/5492	1-Jul-83, L/5513	12-Jul-83, C/M/170	2-Mar-84, L/5607, 31S/67	13-Mar-84, C/M/176	C/M/171, 178, 183, 240
110. United States - Tariff reclassification of machine-threshed tobacco	EEC	30-Sept-83, L/5541					
111. EEC - Panel on newsprint	Canada	12-Jan-84, L/5589	2-Mar-84, L/5628	13-Mar-84, C/M/176	17-Oct-84, L/5680, 31S/114	20-Nov-84, C/M/183	C/127; C/M/178-179
112. Chile - Import measures on certain dairy products	EEC	14-May-84, L/5653					
113. Canada - Measures affecting the sale of gold coins	South Africa	3-Jul-84, L/5662	26-Oct-84, L/5711	20-Nov-84, C/M/183	17-Sep-85, L/5863		C/131, C/139; C/M/185, 192, 194-195, 198, 253
114. New Zealand - Imports of electrical transformers from Finland	Finland	11-Jul-84, C/M/180	21-Sep-84, L/5682	2-Oct-84, C/M/181	19-Jun-85, L/5814, 32S/55	18-Jul-85, C/M/191	C/M/180, 183; C/136
115. EEC - Operation of beef and veal regime	Australia	26-Oct-84, L/5715					C/M/183
116. United States - Prohibition of imports of steel pipe and tube from the EC	EEC	10-Dec-84, L/5747					C/M/184, 185
117. Canada - Import, distribution and sale of alcoholic drinks by provincial marketing authorities	EEC	12-Feb-85, L/5777	12-Feb-85, L/5777	12-Mar-85, C/M/186	5-Feb-88, L/6304, 35S/37	22-Mar-88, C/M/218	C/143; C/M/195, 198, 227, 244-246; C/W/646, DS17/1-10, DS17R
118. United States - Restrictions on imports of certain sugar-containing products	Canada	1-Mar-85, L/5783	1-Mar-85, L/5783	12-Mar-85, C/M/186			L/5787/Add.1, C/M/253
119. Japan - Quantitative restrictions on imports of leather footwear	United States	12-Mar-85, C/M/186	5-Jul-85, L/5826	17-Jul-85, C/M/191			L/5826/Add.1
120. United States - Trade measures affecting Nicaragua	Nicaragua		17-Jul-85, C/M/191	10-Oct-85, C/M/192	13-Oct-86, L/6053		C/137; C/M/196, 204, 208, 212, 234, 240; C/W/475, 524-525; L/5802, 6661

Title	Applicant	Consultations	Referral	Panel established	Report circulated	Report adopted	Other references
121. United States - Restrictions on imports of cotton pillowcases and bedsheets	Portugal	2-Sep-85, L/5859					
122. EEC - Ban on importation of skins of certain seal pups and related products	Canada	19-Dec-85, L/5940					
123. United States - Measures on imports of non-beverage ethyl alcohol	Brazil	13-May-86, L/5993					
124. Japan - Restrictions on imports of certain agricultural products	United States	15-Jul-86, C/M/201	20-Aug-86, L/6037	27-Oct-86, C/M/202	18-Nov-87, L/6253, 35S/163	2-Feb-88, C/M/217	C/145, C/M/205, 206, 218-220, 222, 247-253; 258, 260-262, 266, 267; DS25/1-4; L/6370, 6389, 7087; SR.47/2
125. Japan - Restrictions on imports of herring, pollock and surimi	United States	24-Oct-86, L/6070	24-Oct-86, L/6070				C/M/204-207
126. United States - Taxes on petroleum and certain imported substances	Canada	27-Oct-86, C/M/202	20-Jan-87, L/6121	4-Feb-87, C/M/206	5-Jun-87, L/6175, 34S/136	17-Jun-87, C/M/211	C/146, L/6080, 6085; C/M/213, 217-218, 220, 222-224, 226-228, 231-232, 234-237; C/M/540/Add.1; SR.45/2
	EEC		22-Jan-87, L/6123				
	Mexico	10-Nov-86, L/6093	27-Jan-87, L/6114				
127. United States - Customs user fee	Canada	27-Oct-86, C/M/202	20-Feb-87, L/6131	4-Mar-87, C/M/207	25-Nov-87, L/6264, 35S/245	2-Feb-88, C/M/217	C/147; C/M/228, 232, 234, 237, 245, 248; L/6822
	EEC		20-Feb-87, L/6130				
128. Japan - Customs duties, taxes and labelling practices on imported wines and alcoholic beverages	EEC		5-Nov-86, L/6078	4-Feb-87, C/M/206	13-Oct-87, L/6216, 34S/63	10-Nov-87, C/M/215	C/M/204, 205, 217, 206, 218, 228, 230, 264, 266, 276; L/6465
129. Canada - Restrictions on exports of uranium	United States	12-Dec-86, L/6104					
130. Japan - Trade in semi-conductors	EEC		20-Feb-87, L/6129	15-Apr-87, C/M/208	24-Mar-88, L/6309, 35S/116	4-May-88, C/M/220	C/149; C/M/209, 226-228, 230, 234

Title	Applicant	Consultations	Referral	Panel established	Report circulated	Report adopted	Other references
131. Canada - Measures affecting exports of unprocessed herring and salmon	United States	20-Feb-87, L/6132	20-Feb-87, L/6132	4-Mar-87, C/M/207	20-Nov-87, L/6268, 35S/98	22-Mar-88, C/M/218	C/M/208, 217, 220, 227-228, 232
132. United States - Tax reform legislation for small passenger aircraft	EEC		9-Apr-87, L/6153				C/M/208, 209
133. United States - Unilateral measures on imports of certain Japanese products	Japan	21-Apr-87, L/6159					C/M/211, 213, 215
134. United States - Section 337 of the Tariff Act of 1930	EEC	29-Apr-87, L/6160	3-Jul-87, L/6198	7-Oct-87, C/M/213	16-Jan-89, L/6439, 36S/345	7-Nov-89, C/M/237	C/153; C/M/228, 230-232, 234-236, 248-249; 251, 253, 258; L/6439/Add.1; SR.47/2; SR.48/2
135. India - Import restrictions on almonds	United States	17-Jun-87, C/M/211	3-Jul-87, L/6197				C/154, 154/Add.1; C/M/213, 218; L/C/W/37, L/C/M/19, L/C/14, L/C/15
136. EEC - Enlargement of EEC	Argentina		8-Jul-87, L/6201				C/M/212, 213
137. United States - Section 337 action on cellular mobile telephones	Canada	15-Sep-87, L/6213					
138. EEC - Directive on third-country meat imports	United States	29-Sep-87, L/6218	29-Sep-87, L/6218; 10-Nov-87, C/M/215	3-Dec-87, SR.43/5			C/M/251, L/6128/Add.1, DS20/1-3
139. Canada/Japan: Tariff on imports of spruce, pine, fir, (SPF) dimension lumber	Canada	18-Nov-87, L/6262	11-Mar-88, L/6315	22-Mar-88, C/M/218	26-Apr-89, L/6470, 36S/167	19-Jul-89, C/M/235	L/6528; C/M/222, 232, 234
140. United States - Tariff increase and import prohibition on Brazilian products	Brazil	27-Nov-87, L/6274					L/6274/Add.1
141. Norway - Restrictions on imports of apples and pears	United States	9-Mar-88, L/6311	22-Jan-88, L/6300; 11-Mar-88, L/6311	22-Mar-88, C/M/218	19-Apr-89, L/6474	21-Jun-89, C/M/234	C/M/222, 232, 234, 240, 251; L/6651; DS16/1
142. Sweden - Restrictions on imports of apples and pears	United States		22-Jan-88, L/6300; 22-Apr-88, L/6330; 19-Oct-88, C/M/226				C/M/222; SR.44/2

Title	Applicant	Consultations	Referral	Panel established	Report circulated	Report adopted	Other references
143. Republic of Korea - Restrictions on imports of beef	United States	11-Mar-88, L/6316	11-Mar-88, L/6316; 8-Apr-88, C/M/219	4-May-88, C/M/220	24-May-89, L/6503, 36S/268	7-Nov-89, C/M/237	L/6697, 7270; C/M/219, 223-224, 234-236, 238-240, 251, 253, 260, 264
144. Republic of Korea - Restrictions on imports of beef	Australia	22-Mar-88, L/6332, C/M/218	22-Mar-88, L/6332	4-May-88, C/M/220	24-May-89, L/6504, 36S/202	7-Nov-89, C/M/237	L/6697, 7270; C/M/224, 234-236, 238-241, 251, 253, 258, 260-262, 264-265
145. Republic of Korea - Restrictions on imports of beef	New Zealand	27-Apr-88, L/6335	3-Jun-88, L/6354	22-Sep-88, C/M/224	24-May-89, L/6505, 36S/234	7-Nov-89, C/M/237	L/6337, 6354/Add.1, 6395, 6697, 7270; C/M/226, 234-236, 238-241, 243, 251, 253, 258, 260-262, 264-265
146. EEC - Prohibition on imports of almonds by Greece	United States	22-Mar-88, C/M/218	22-Apr-88, L/6327				C/M/220
147. Japan - Restrictions on imports of beef and citrus products	United States	29-Mar-88, L/6322	29-Mar-88, L/6322	4-May-88, C/M/220			C/M/219, 222, 223; L/6322/Add.1
148. Japan - Restrictions on imports of beef	Australia	8-Apr-88, C/M/219	8-Apr-88, L/6333				L/6333/Add.1
149. Japan - Restrictions on imports of beef	New Zealand	2-May-88, L/6340	3-Jun-88, L/6355				L/6354 + Add.1, L/6355/Add.1, C/M/220, 222, 223
150. United States - Quality standards for grapes	Chile	22-Apr-88, L/6324					
151. EEC - Payments and subsidies paid to processors and producers of oilseeds and related animal-feed proteins	United States	22-Apr-88, L/6328	22-Apr-88, L/6328	15-Jun-88, C/M/222	14-Dec-89, L/6627, 37S/86	25-Jan-90, C/M/238	L/6636, 6933; C/166; C/M/220, 224, 249-252, 256-257, 259-264; DS28R, 1-4; W.47/22, SR.47/1
152. EEC - Restrictions on imports of dessert apples - Complaint by Chile	Chile	22-Apr-88, L/6329	3-May-88, L/6329/Add.1	4-May-88, C/M/220	18-Apr-89, L/6491, 36S/93	22-Jun-89, C/M/234	L/6337, L/6339, C/158; C/M/232; C/M/601
153. EEC - Restrictions on imports of apples	New Zealand	27-Apr-88, L/6336	3-Jun-88, L/6357				L/6337
154. EEC - Restrictions on imports of apples - Complaint by the United States	United States	4-May-88, C/M/220	8-Jul-88, L/6371	22-Sep-88, C/M/224	9-Jun-89, L/6513, 36S/135	22-Jun-89, C/M/234	C/M/223, 226

Title	Applicant	Consultations	Referral	Panel established	Report circulated	Report adopted	Other references
155. United States - Restrictions on the importation of sugar and sugar-containing products applied under the 1955 Waiver and under the Headnote to the Schedule of tariff concessions	EEC	16-Jun-88, C/M/222	12-Sep-88, L/6393	21-Jun-89, C/M/234	22-Jan-90, L/6631, 37S/228	7-Nov-90, C/M/246	C/M/226-228, 230, 232, 239-241, 243-245
156. United States - Restrictions on imports of sugar	Australia		19-Jul-88, L/6373	22-Sep-88, C/M/224	9-Jun-89, L/6514, 36S/331	22-Jun-89, C/M/234	C/M/223, 227, 238, 241, 245, 251, 253, 258, 260-262; L/6742
157. EEC - Regulation on imports of parts and components	Japan	8-Aug-88, L/6381	7-Oct-88, L/6410	19-Oct-88, C/M/226	22-Mar-90, L/6657, 37S/132	16-May-90, C/M/241	C/165; C/M/240, 253, 258; L/6676; SR.48/2; ADP/39, ADP/MI/24
158. United States - Import restrictions on certain products from Brazil	Brazil	24-Aug-88, L/6386	7-Dec-88, L/6386/Add.1	21-Feb-89, C/M/229			C/M/227, 228, 234; C/169 and Add.1
159. United States - Increase in duty on certain products from the European Community	EEC		28-Nov-88, L/6438				C/M/228-32, 234, SR.45/2
160. United States - Import prohibition on ice cream from Canada	Canada	9-Dec-88, L/6444					
161. Canada - Import restrictions on ice cream and yoghurt	United States		9-Dec-88, L/6445	20-Dec-88, C/M/227	27-Sep-89, L/6588, 36S/68	5-Dec-89, SR.45/2	C/164; C/M/227, 230, 236-237, 243-244, 246-247; L/6694, 6698
162. EEC - Restraints on exports of copper scrap	United States	8-Jun-89, L/6518	8-Jun-89, L/6518	19-Jul-89, C/M/235	5-Feb-90, DS5/R, 37S/200	20-Feb-90, C/M/238	C/M/234; DS5/1, R; SR.45/2
163. United States - Determination under Sections 304 and 305 of the Trade Act of 1974 in respect of the EEC's subsidies for producers and processors of oilseeds and animal-feed proteins	EEC	18-Jul-89, DS2/1					
164. EC - Subsidies for producers and processors of oilseeds	Canada	1-Sep-89, DS3/1					
165. Finland - Restrictions on imports of apples and pears	United States	18-Sep-89, DS1/2					DS1/3

Title	Applicant	Consultations	Referral	Panel established	Report circulated	Report adopted	Other references
166. United States - Countervailing duties on fresh, chilled and frozen pork from Canada	Canada	28-Sep-89, DS7/1	27-Oct-89, L/6583	4-Dec-89, SR.45/2	18-Sep-90, DS7/R, 38S/30	11-Jul-91, C/M/251	C/M/239, 246-250; DS7/3; SR.46/1
167. Brazil - Restrictions on the import of certain agricultural and manufactured products	United States	11-Oct-89, DS8/1	12-Jan-90, DS8/2				C/M/251
168. Chile - Internal taxes on spirits	EEC	8-Nov-89, DS9/1					
169. Thailand - Restrictions on importation of and internal taxes on cigarettes	United States	3-Jan-90, DS10/1	8-Feb-90, DS10/2	3-Apr-90, C/M/240	5-Oct-90, DS10/R, 37S/200	7-Nov-90, C/M/246	C/M/241, 246
170. United States - Measures under the Export Enhancement Programme affecting soya-bean exports by Brazil	Brazil	9-Feb-90, DS13/1					
171. EEC - Restrictions and charges on imports of ovine meat	Chile	23-Mar-90, DS15/1					C/M/240
172. Norway - Restrictions on imports of apples and pears	United States	17-May-90, DS16/1					L/6474, L/6651
173. Canada - import, distribution and sale of certain alcoholic drinks by provincial marketing agencies	United States	4-Jul-90, DS17/1	6-Dec-90, DS17/2	6-Feb-91, C/M/247	16-Oct-91, DS17/R	18-Feb-92, C/M/254	C/M/247, 257-259, 266; DS17/3-10; SR.47/1
174. United States - Denial of most-favoured-nation treatment as to non-rubber footwear from Brazil	Brazil	28-Sep-90, DS18/1	1-Mar-91, DS18/2	24-Apr-91, C/M/249	10-Jan-92, DS18/R	19-Jun-92, C/M/257	C/M/254-256, 258-259, 261-267, 272-275; DS18/3-4; GPR/DS1/R; SR.48/2, SR.50/2
175. United States - Restrictions on imports of tuna	Mexico	5-Nov-90, C/M/246	25-Jan-91, DS21/1	6-Feb-91, C/M/247	3-Sep-91, DS21/R		DS21/2, C/M/248, 254-256; SR.48/2
176. EEC - Restrictions on imports of pork and beef under the third country meat directive	United States	8-Nov-90, DS20/1	17-Jun-91, DS20/2				DS20/3, L/6218/Add.1
177. Indonesia - Import restrictions and charges on bound items	United States	8-Feb-91, DS22/1					

Title	Applicant	Consultations	Referral	Panel established	Report circulated	Report adopted	Other references
178. United States - Measures affecting alcoholic and malt beverages	Canada	11-Feb-91, DS23/1	12-Apr-91, DS23/2	27-May-91, C/M/250	16-Mar-92, DS23/R	19-Jun-92, C/M/257	C/M/256, 262-268, 272-276; DS23/3-19, SR-48/2, SR-50/2
179. United States - Countervailing duty and anti-dumping actions on salmon	Norway	18-Apr-91, DS24/2					
180. EEC - Measures affecting imports of corn gluten feed	United States	17-Sep-91, DS26/1					
181. EEC - Trade measures taken for non-economic reasons	Yugoslavia	13-Jan-92, DS27/1	10-Feb-92, DS27/2	18-Mar-92, C/M/255			
182. United States - Restrictions on imports of tuna	EEC	20-Mar-92, DS29/1	5-Jun-92, DS29/2	14-Jul-92, C/M/258	10-Jun-94, DS29/R		C/M/257, C/M/274-276; DS29/3-5; DS33/1
	Netherlands	10-Jul-92, D33/1	14-Jul-92, DS29/3				
183. United States - Harbour maintenance fees	EEC	21-Feb-92, DS30/1					
184. United States - Taxes affecting imported automobiles	EEC	20-May-92, DS31/1	12-Mar-93, DS31/2	12-May-93, C/M/263			C/M/262-263; DS31/3-4
185. EEC - Negotiating rights of Argentina in connection with the renegotiation of oilseed concessions by the European Communities	Argentina		18-Sep-92, DS34/1 4-Nov-92, C/M/260				C/M/259-260
186. Argentina - Countervailing duties on dairy products from the EC	EEC	7-Dec-92, DS35/1					
187. Argentina - countervailing duties on canned peaches from Greece	EEC	6-Jan-93, DS36/1					
188. EEC - Member states' import regimes for bananas	Colombia, Costa Rica, Guatemala, Nicaragua, Venezuela		8-Feb-93, DS32/4	10-Feb-93, C/M/261	3-Jun-93, DS32/R		C/M/258, 264-270, 272-276; DS32/1-3, 5-9; SR-48/2

Title	Applicant	Consultations	Referral	Panel established	Report circulated	Report adopted	Other references
189. EEC - Import regime for bananas	Colombia, Costa Rica, Guatemala, Nicaragua, Venezuela		30-Apr-93, DS38/6	12-Jun-93, C/M/264	11-Feb-94, DS38/R		C/M/261-263, 272-276; W.50/22; DS38/1-5, 7, 9-13; DS36/8
190. EEC - Restrictions on imports of apples	Chile	16-Jun-93, C/M/264	21-Jul-93, C/M/265	22-Sep-93, C/M/266	20-Jun-94, DS39/R		C/M/264, DS39/2-3, DS41/2, Spec(93)22
191. EEC - Charges on imports of apples originating in Chile	Chile	29-Jun-93, DS41/1					C/COM/1
192. EEC - Regulations affecting the sale of imported bovine semen in Italy	Canada	16-Jul-93, DS42/1					C/M/276
193. United States - Measures affecting the importation and internal sale of tobacco	Argentina, Brazil, Colombia, El Salvador, Guatemala, Thailand, Zimbabwe	7-Sep-93, DS44/1	7-Dec-93, DS44/5 +Corr.1 (Brazil, Chile, Colombia, El Salvador, Guatemala, Thailand, Zimbabwe); 11-Feb-94, DS44/8 (Argentina)	25-Jan-94, SR.49/1 (Brazil, Canada, Chile, Colombia, El Salvador, Guatemala, Thailand, Zimbabwe); 22-Feb-94, C/M/270 (Argentina added)	12-Aug-94, DS44/R	4-Oct-94, C/M/275	C/M/265-268; DS44/7; DS44/9+Rev.1
	Chile	8-Sep-93, DS44/2					
194. EEC - Countervailing charges on lemons	Canada	27-Sep-93, DS44/4	25-Jan-94, DS44/6 +Corr.1				
	EEC	6-Oct-93, DS44/3					
195. United States - Standards for reformulated and conventional gasoline	Argentina	20-Jun-94, DS45/2					DS45/1
	Venezuela		11-Mar-94, DS47/2; 23-Sept-94, DS47/3	4-Oct-94, C/M/275			DS47/4
196. Poland - Import regime for automobiles originating in the European Communities	India		28-Oct-94, DS40/2 + Add.1	10-Nov-94, C/M/276			DS40/3