1 March 1984

THE UNITED STATES MANUFACTURING CLAUSE

Report of the Panel adopted on 15/16 May 1984
(L/5609 - 31S/74)

I. Introduction

1. At its meeting of 21 July 1982, the Council was informed that consultations were taking place between the European Communities and the United States in regard to the Manufacturing Clause of the United States copyright legislation (C/M/160, item 12). In a communication dated 8 March 1983 (L/5467), the European Communities outlined the nature of their complaint on this matter and indicated their intention to have recourse to the provisions of Article XXIII of the General Agreement.

2. At the Council's meeting of 20 April 1983 (C/M/167, item 11), the European Communities informed the Council that the Communities and the United States had held several rounds of consultations under Articles XXII and XXIII which had mainly concentrated on the question of prejudice caused by the legislation, but without a satisfactory result. The Communities therefore asked the Council to establish a panel to examine the United States measure under the provisions of Article XXIII and in particular to concentrate on the amount of prejudice involved and on the amount of compensation which would be appropriate. The United States said that consultations had been held with the Communities under Article XXIII:1 on the extension of the Manufacturing Clause, in a spirit of co-operation aimed at reaching a mutually satisfactory solution, but without prejudice to the legal position of either party concerning any aspect of this matter. During those consultations the trade effects of the measure had been examined. The United States said that if a panel were to be set up, it should be along the lines followed in the past, i.e., to determine if an action was consistent or not with the Articles of the General Agreement. Any question of compensation or retaliation should be taken up at a later stage in the proceedings. The Council agreed to establish a panel to examine the complaint by the European Communities, and authorized the Chairman, in consultation with the two parties concerned and with other contracting parties which had expressed an interest, to decide on appropriate terms of reference, and, in consultation with the two parties concerned, to designate the members of the Panel.

3. At the Council's meeting of 12 July 1983 (C/M/170, item 15), the Chairman of the Council informed the Council that following such consultations the composition and terms of reference of the Panel were as follows:

Composition

Chairman: Mr. P. Rantanen

Members: Mr. S. Haron
Mr. N. Kemmochi

Terms of reference

"To examine, in the light of the relevant GATT provisions and related GATT documents, the matter referred to the CONTRACTING PARTIES by the European Communities relating to Section 601 of Title 17 of the United States Code (the "Manufacturing Clause") as extended by the United States Public Law 97-215 (L/5467 and C/M/167, page 15, paragraph 2), and to make such findings, in particular in relation to possible impairment of benefits, as will assist the CONTRACTING PARTIES in making the recommendations or rulings provided for in Article XXIII:2."

II. Factual Aspects

4. The Manufacturing Clause - Section 601 of Title 17 of the United States Code, as extended by Public Law 97-215 of 13 July 1982 - prohibits, with certain exceptions, the importation into or public distribution in the United States of a copyrighted work consisting preponderantly of non-dramatic literary material in the English language, the author of which is a United States domiciliary, unless the portions consisting of such material have been manufactured in the United States or Canada. The law defines "manufacture" as including typesetting if the materials are produced directly from type or plates made from type, making lithographic or photo-engraved plates, and printing and binding. The United States Customs Service may seize materials imported in violation of the Section. In addition, an infringer of a copyright has a complete defence in court if the infringer produced the infringing materials in the United States and can show that the copyright owner imported materials in violation of the Manufacturing Clause. The text of the Manufacturing Clause is reproduced in the annex to this report.

5. The Chace Act of 3 March 1891, that permitted foreign nationals to obtain copyright protection in the United States for the first time, added the original Manufacturing Clause to United States copyright law. Fearing that the then infant United States printing and publishing industries would be overwhelmed by foreign competition, the United States Congress specified that copyright protection in the United States would only be granted if manufacture took place in the United States. The Congress ensured adherence to the Manufacturing Clause by prohibiting for the term of the copyright importation of all copyrighted materials produced abroad.

6. As a result of amendments in 1909, 1919, 1949, 1952 and 1976, the coverage of the Manufacturing Clause has been progressively reduced. The Manufacturing Clause was given its present form in 1976 by Public Law 94-553, a comprehensive revision of the United States copyright law. Among the amendments then made, manufacture in Canada was for the first time treated as meeting the manufacturing requirements of the Clause. The 1976 amendment also provided for the first time an expiry date for the Manufacturing Clause by specifying that it was to be applied "prior to 1 July 1982".

7. On 30 June 1982, both Houses of the United States Congress passed a bill changing the date prior to which the Manufacturing Clause was to be applied from 1 July 1982 to 1 July 1986. The United States President returned the unsigned bill to Congress on 8 July 1982 with a statement of his objections to its enactment. On 13 July 1982, each of the Houses of Congress repassed the bill by the two-thirds majority necessary to enact a bill notwithstanding the objections of the President. The bill thus became law (Public Law 97-215) on 13 July 1982.

III. Main Arguments

8. The European Communities requested the Panel to make the following findings:

(i) that the Manufacturing Clause as re-enacted in 1982 was contrary to Articles XI and XIII of the GATT, and was not covered by the Protocol of Provisional Application;

(ii) that re-enactment of the Manufacturing Clause in 1982 was contrary to understandings reached between the United States and the European Communities during the Tokyo Round and therefore unbalanced the final equilibrium of concessions reached;

(iii) that, in consequence of the renewal of the Manufacturing Clause in July 1982, benefits which would otherwise have accrued to the Community under the GATT had been nullified and impaired;

(iv) that the CONTRACTING PARTIES should recommend that the United States Government should terminate the prohibition of imports of publications falling under the scope of the Manufacturing Clause.

9. The United States requested the Panel to find that:

(i) the application of the Manufacturing Clause by the United States was not inconsistent with the General Agreement because the Manufacturing Clause was "existing legislation", relating to Part II of the General Agreement, within the meaning of paragraph 1(b) of the Protocol of Provisional Application;

(ii) there was no prima facie case of impairment of any negotiated benefit accruing to the European Communities under the General Agreement because the United States had not committed itself to elimination of the Manufacturing Clause and had received no concessions in relation to the possible expiration of the Clause;

(iii) even if the Panel were to find nullification or impairment of a benefit accruing to the European Communities under the General Agreement, the circumstances were not serious enough to justify authorization of the suspension of concessions or other obligations because the European Communities had not suffered economic harm.

(a) Articles XI and XIII

10. The European Communities maintained that the Manufacturing Clause, as re-enacted on 13 July 1982, constituted a breach of paragraph 1 of Article XI, which specifically forbids import prohibitions or restrictions. The European Communities also contended that the Manufacturing Clause, in providing an exemption from the prohibition on imports in respect of goods manufactured in Canada, was discriminatory and therefore in breach of Article XIII of the General Agreement.

11. The United States did not contest the position taken by the European Communities in regard to the consistency of the Manufacturing Clause with Articles XI and XIII. The United States pointed out that the inconsistency of the Manufacturing Clause with Article XI of the GATT had been notified to the CONTRACTING PARTIES in January 1955 in the context of the exercise undertaken at that time to compile information on legislation covered by the Protocol of Provisional Application (L/309/Add.2). The inconsistency with Article XIII had not been notified at that time because printed matter produced in Canada had been regarded as meeting the manufacturing requirement of the Manufacturing Clause only since 1976.

(b) The Protocol of Provisional Application

(i) Extension of "existing legislation" after an expiry date

12. The European Communities contended that the Manufacturing Clause as presently enacted was not "existing legislation" within the meaning of paragraph 1(b) of the Protocol of Provisional Application, because it was "new" legislation. Since an expiry date had been set in the 1976 Act, new legislation in the form of Public Law 97-215 had been required in July 1982 to extend the period of application of the Manufacturing Clause. The Community complaint was limited to the Manufacturing Clause as represented by the legislation enacted in 1982, which was "new legislation", and not to previous versions of the Clause.

13. The European Communities maintained that an interpretation of the Protocol of Provisional Application that would consider the extension of "existing legislation" by new legislative action after an expiry date as covered by the Protocol of Provisional Application would be inconsistent with the basic purpose of that Protocol as conceived by its drafters. The Protocol had been intended to enable governments to put the General Agreement into effect provisionally without having to change or violate existing legislation that was inconsistent with Part II of the GATT. Hence legislation existing in 1947 could not be extended by any further legislative initiative once an expiry date had been fixed in the law; and no amendments to such legislation could be introduced which would create further departures from GATT rules. If a contracting party had discretion as to whether to act consistently with the GATT or not, it was expected to act consistently. This interpretation of the Protocol of Provisional Application had been reflected in the subsequent interpretation given to "existing legislation", namely that it should be "mandatory" in character. The United States had been faced in 1982 with the choice of either to come fully into line with the General Agreement or to perpetuate an inconsistency; this option to come into line with Part II had been available without changing existing legislation or violating it. Since the enactment of Public Law 97-215 extending the Manufacturing Clause had not been obligatory but a matter of choice, the United States could no longer claim the re-enacted Manufacturing Clause as "existing legislation" under the Protocol of Provisional Application.

14. The United States maintained that the Manufacturing Clause was "existing legislation" within the meaning of paragraph 1(b) of the Protocol of Provisional Application. The Manufacturing Clause met the two requirements for "existing legislation"; it was "mandatory" in its terms and expressed intent, i.e. it left no discretion to the executive agency responsible for its enforcement, and it had been part of United States law on 30 October 1947. Although over the years the scope of the Manufacturing Clause had been narrowed, it had been retained continuously as part of United States copyright law since 1891 (except for a brief period in 1904 to enable goods affected to be displayed at the St. Louis World Fair). The extension of "existing legislation" beyond an expiry date inserted unilaterally by a contracting party did not constitute enactment of "new" legislation that must conform with Part II of the GATT.

15. The United States said that it would flow from the Communities' position that, if a given amendment of "existing legislation" was not mandatory - that is, the actual change made to law was not required by some superior provision of law, presumably the constitution - then enacting that amendment would constitute "new" legislation that must conform to the obligations of Part II of the GATT. This would apply to any amendment, even one that liberalized a provision. The United States found no indication in the original intent of the Protocol of Provisional Application, or in the interpretations of provisional application adopted by CONTRACTING PARTIES that would support that interpretation. The recommendations of working parties and panels relating to the word "mandatory", that had been adopted by the CONTRACTING PARTIES (BISD, Vol.II/62; BISD, 1S/59; BISD, 6S/55; BISD, 7S/99), related to the terms and the intent of the legislation involved, not to whether a contracting party was required to amend that legislation by some superior provision of law. The CONTRACTING PARTIES had accepted modifications of "existing legislation", so long as the modifications did not increase the degree of non-conformity with the General Agreement. They had adopted a Working Party report that had found such modifications, in the form of indirect tax increases, to be permissible so long as the amendment did not increase the absolute margin of difference between the tax applied to imported goods and that on domestic goods (Brazilian Internal Taxes, Report adopted by the CONTRACTING PARTIES on 30 June 1949, BISD, Vol.II/181).

16. The United States maintained that it would be detrimental to the interests all contracting parties had in the elimination of "existing legislation" if the extension of such legislation beyond an expiry date added subsequent to the date of the Protocol of Provisional Application or in the relevant protocol of accession were interpreted as enactment of "new" legislation. A contracting party that wished to provide unilaterally for the expiration of such a law would be unlikely to do so if such unilateral action were to be considered an international commitment and, should the contracting party in question consider that changed conditions justified extension of the provisions beyond the expiry date, it could be subject to claims for compensation under GATT.

17. The European Communities maintained that, given the purpose of the Protocol of Provisional Application, contracting parties benefiting from it had a basic obligation to respect Part II of the General Agreement, with a specific exception accorded pro tempore. Since in these circumstances there could be no question of reciprocal concessions being accorded in return for a decision to bring GATT inconsistent legislation into line with the GATT, such a decision could only be taken unilaterally. But once taken and announced, such a decision created reasonable expectations and had to be considered, in a certain sense, tantamount to a multilateral obligation vis-à-vis other contracting parties. Such "reasonable expectations" were pivotal in the case of the Manufacturing Clause because of the drafting of the law and the interpretations given to it, as well as the discussions in GATT during the Tokyo Round (see paragraphs 24-29 below). They had not existed in the case of the Brazilian Internal Taxes which had involved no expiry date; also the Brazilian Internal Taxes case had concerned a developing country which could expect a more flexible approach to GATT rules. The European Communities believed that the arguments of the United States in paragraph 16, if acted upon, would tend to undermine the GATT as a framework for conducting trade on the basis of recognised and durable rules to be relied on by all contracting parties. If contracting parties were free to reverse moves bringing their practices into line with the GATT, there would no longer be any certainty that restrictive measures abandoned over the years would not be reintroduced at some time in the future on the grounds that such reintroduction was no more than a continuation of legislation which existed on 30 October 1947. This would create unstable relationships between contracting parties and a constant risk of a disequilibrium of concessions between them.

18. The United States pointed out that all contracting parties with the exception of Haiti had chosen to continue applying the General Agreement on a provisional basis even when invited to deposit an instrument of accession under Article XXVI containing a reservation for "existing legislation" as provided for in the 7 March 1955 Resolution of the CONTRACTING PARTIES (BISD, 3S/48). The United States believed that the dangers envisioned by the Community would not arise if the Panel were to adopt the following interpretation regarding notified "existing legislation" in relation to the Protocol of Provisional Application:

> "When a contracting party (i) has provided an expiration date on an unilateral basis for its 'existing legislation', and (ii) extends the legislation beyond that date, it has not enacted 'new' legislation, for purposes of the relevant Protocol".

The United States considered that such an interpretation would not undermine the General Agreement since few provisions of law had been notified as "existing legislation" by contracting parties and some provisions which had been notified had been eliminated either unilaterally or as a result of negotiations. The United States also pointed out that a contracting party that could show economic harm resulting from changes to "existing legislation" made by another contracting party could have recourse to Article XXIII, under paragraph 1(b) or (c).

(ii) "Existing legislation" and a period of non-application

19. The European Communities maintained that a further reason why the Manufacturing Clause had lost the benefit of the "existing legislation" provision of the Protocol of Provisional Application was that it had lapsed on 1 July 1982 and that the new legislation enforcing it had not been passed until 13 July 1982; there had thus been a period during which no legislation on the Manufacturing Clause had been in force. In the Communities' view, the matter had to be considered by the Panel from the perspective of the international obligations under GATT of the United States; the internal procedures of the United States Government were not relevant.

20. The United States said that the Manufacturing Clause had remained in the United States Code during the period 1-13 July 1982; all that had lapsed was the authority to enforce it. This was the reason it had been possible to reactivate application of the Clause with a bill that said only that "Section 601(a) of Chapter 6 of Title 17 of the United States Code is amended by striking out '1982' and inserting in lieu thereof '1986' ". There had thus been no "new" legislation. Moreover, the effective date of the extension had become 1 July 1982 automatically because the only change made to the statute was to the year in which expiration was to occur. Had any non-conforming materials been entered during the period 1-13 July 1982, the United States customs would have been obliged to seize the goods after 13 July 1982. In practice, however, customs would have delayed completion of the necessary paperwork to release the materials for domestic consumption until the outcome of the Presidential veto and the reaction of Congress to it had become known.

(iii) The exemption of Canada

21. The European Communities further argued that, without prejudice to its view that the re-enacted Manufacturing Clause could not be regarded as "existing legislation", the element of discrimination in the Manufacturing Clause resulting from the exemption of Canada from the import prohibition provided for in it, which was inconsistent with GATT Article XIII, could not be justified under the Protocol of Provisional Application since it had not existed in 1947. On this aspect of the complaint, the question of "existing legislation" therefore did not arise.

22. The United States maintained that "existing legislation" within the meaning of paragraph 1(b) of the Protocol of Provisional Application could be amended provided that the degree of preference to the domestic industry was not increased. The exemption of Canada was one of a series of liberalizing steps taken over the years that had progressively narrowed the scope of the Manufacturing Clause.

23. The European Communities said that, if the argument of the United States on this matter were pursued to its logical conclusion, contracting parties could maintain that they had the right to make discriminatory exemptions in favour of one or other country for particular reasons. This would clearly be contrary to the MFN principle and to Article XIII in particular.

(c) The balance of Tokyo Round concessions

24. The European Communities contended that the extension of the Manufacturing Clause by the United States beyond 1 July 1982 was contrary to understandings reached between the United States and the European Communities during the Tokyo Round, and had thereby unbalanced the exchange of concessions between the two in those negotiations. During the Tokyo Round, the Communities had made a request on the Manufacturing Clause in the context of the request/offer procedures for non-tariff measures adopted in July 1977 (MTN/NTM/R/4 of 11 November 1977, page 17). The Communities said that, in view of the assurances obtained from the United States which had confirmed that the Manufacturing Clause would expire on 1 July 1982, negotiations had not been pressed to the point of a specific conclusion and agreement with the United States. There had therefore been no agreed minutes signed by the Communities and the United States recording the understanding on the Manufacturing Clause. Asked about the reciprocal concessions made in exchange for the understanding, the Communities said that as a matter of principle they believed that no concessions were due on their part in return for the removal by trading partners of GATT inconsistent legislation justified under the Protocol of Provisional Application. As for the treatment of the Manufacturing Clause in the Tokyo Round, the assurances given by the United States regarding its expiry meant that there had been no need to pursue the negotiations and that there had been no question of any reciprocal concessions by the Communities.

25. The European Communities maintained that, on the basis of the understanding reached in the Tokyo Round, they had a "reasonable expectation" that the Manufacturing Clause would expire on 1 July 1982, and that they had indeed been given ample reason to anticipate that it would not be extended. In support of this, the Communities provided the following evidence:

- Statement of C. Michael Hathaway, Deputy General Counsel, Office of the United States Trade Representative, before the House Judiciary Committee on 4 March 1982, referring to Tokyo Round requests on the Manufacturing Clause:

  > "The United States did not pursue negotiations since the clause was scheduled to expire in 1982."

- Letter of 17 August 1981 from the United States Mission in Geneva on the Non-Tariff Measures Inventory notification of the European Communities concerning the Manufacturing Clause:

  > "The United States requests withdrawal of this notification because the Copyright Act of 1976 under Section 601(a) lifts the restriction … effective July 1, 1982."

- "Study of the Economic Effects of Terminating the Manufacturing Clause of the Copyright Law", Report to the Committee on Ways and Means, United States House of Representatives, on Investigation No. 332-145 under Section 332 of the Tariff Act of 1930, USITC Publication 1402, July 1983, page xi:

  > "During the Multilateral Trade Negotiations (MTN), the European Community (EC) suggested that the subject of the manufacturing clause be added to the non-tariff barrier negotiations, but did not pursue the matter after United States officials assured it that the clause was scheduled to be eliminated on July 1, 1982."

- Statement made on the floor of the House of Representatives by Congressman Frenzel on 14 June 1982 during the debate on bill H.R. 6198:

  > "Our trading partners have repeatedly raised the GATT illegality of the Manufacturing Clause. The United States has stated just as repeatedly that the clause was not an appropriate topic for negotiations because it was going to expire this year. During the MTN negotiations concluded in 1979 we simply said that it is going to expire anyway, we cannot negotiate it away. … I do not think our trading partners are going to accept another 4-year extension without a formal challenge that will lead to retaliation against United States exports."

- Report of the House of Representatives accompanying the bill that subsequently became the 1976 Copyright Act:

  > "The Committee recognizes that immediate repeal of the manufacturing requirement might have damaging effects in some segments of the United States printing industry. It has therefore amended Section 601 to retain the liberalized requirement through the end of 1980, but to repeal it definitively as of January 1, 1981". (In the Act, only the date of repeal was changed.)

26. The United States maintained that the Communities had no case under Article XXIII on the grounds advanced in relation to the Tokyo Round because:

(i) there was no negotiated benefit accruing to the European Communities under the General Agreement that had been nullified or impaired by the extension of the Manufacturing Clause; and

(ii) the Communities could reasonably have anticipated the possibility of action by the United States to extend the Manufacturing Clause.

27. The United States contended that the Communities had given no explanation of the content or the context of any understanding reached between the two in the Tokyo Round on the Manufacturing Clause, nor had they claimed that they had made concessions in return for such an understanding. The documents that the Communities had provided did not provide any relevant evidence. All but one of them post-dated the end of the Tokyo Round by at least one year, and could have no bearing on the expectations that the Communities could reasonably have had as a result of the Tokyo Round. During the Tokyo Round, the United States had made no commitment that the Manufacturing Clause would expire, nor was it aware that any of the concessions it had received from other contracting parties had been extended on the basis of the scheduled expiration. The legislative history of the 1976 revision of United States copyright law was such that the United States Administration could not have been confident that Congress would allow the Manufacturing Clause to lapse definitively on 1 July 1982. The Senate had passed in 1976 the bill to amend the copyright law without any expiry date for the Manufacturing Clause. The House of Representatives had provided an expiry date of 1 January 1981 in its version of the bill. A conference committee made up of members of both Houses had then worked out a compromise version of the bill for action containing the 1 July 1982 expiry date. In the discussions on the report of the conference committee in the Senate, Senator Hugh Scott had said:

> "Another issue that was subject to controversy was the so-called manufacturing clause. The Senate bill had preserved this provision to safeguard the United States printing industry. The House, however, chose to delete it, while agreeing to an extension of the phase-out date. The extra time will enable Congress to take a close look at the dangers faced by the printing industry in this country.
>
> "To insure that Congress has adequate and accurate information on which to base its reassessment before the phase-out takes place, Senator McClellan and I have written to the Register of Copyrights requesting that such a study be timely undertaken."

The text of the letter to the Register of Copyrights had referred expressly to possible amendment of the copyright law to extend applicability of the Manufacturing Clause if the study's conclusions suggested that extension would be appropriate.

28. The United States provided copies of its negotiating documents that, in the view of the United States, indicated that the United States negotiators had been aware that they could not provide assurances that the Manufacturing Clause would not be prolonged beyond 1 July 1982 without a commitment in the context of the Tokyo Round from Congress; negotiations relating to non-tariff barriers, such as the Manufacturing Clause, had been authorized under Section 102 of the Trade Act of 1974 but implementation had required action by Congress. The briefing documents used by the United States negotiators during the Tokyo Round indicated that the United States had responded to several requests regarding the Manufacturing Clause. The documents instructed the negotiators to point out the substantial modifications of the measure that had been already made, including the provision for expiration. The documents further instructed the United States negotiators to offer to discuss any remaining issues. None of the countries that had raised the issue had chosen to pursue it. In the view of the United States, these countries very likely had not wished to provide additional concessions in exchange for the expiration of the Manufacturing Clause which the United States might allow to expire unilaterally.

29. The United States further maintained that, in the absence of a negotiated commitment, contracting parties could reasonably have anticipated a possible extension of the Manufacturing Clause, since the United States had been under no obligation to eliminate it.

(d) The economic effects of the Manufacturing Clause

30. The European Communities agreed with the view of the United States (see paragraph 2) that the Panel would first have to consider the question of GATT conformity in terms of paragraph 5 of the Community's complaint circulated on 8 March 1983 (L/5467). Consideration of whether the circumstances of the case were serious enough to justify authorization of a suspension of obligations or concessions (Article XXIII:2) could not be addressed before the basic issue of conformity had been resolved. The Communities said that a finding by the Panel that the United States had acted inconsistently with its GATT obligations in extending the Manufacturing Clause would, according to GATT practice, establish a prima facie case of nullification or impairment. The question of degree of economic harm was a secondary issue at this stage and would only need to be considered if the United States would not remedy the situation.

31. Nevertheless, the European Communities informed the Panel that it considered that the Manufacturing Clause was a serious impediment to exports to the United States by the Community printing industry and did not simply represent a theoretical trade barrier. The decision of the United States Congress to override a Presidential veto suggested that the United States must have taken a similar view. The Communities argued that they had an efficient and well-established printing industry, which was an important supplier to third countries of the types of publications covered by the Manufacturing Clause.

32. The United States maintained that the European Communities had suffered no economic harm from the extension of the Manufacturing Clause; and that, therefore, 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.

33. In arguing its position, the United States first presented to the Panel statistics showing the portion of the United States market for printed materials that it estimated consisted of products falling within the scope of the Manufacturing Clause. The United States calculated that out of a total value of United States printed product shipments in 1981 of US$75,491 million, some US$9,402.3 million concerned products to which the manufacturing requirements of the United States copyright law applied, the remainder consisting of products not covered by sub-section (a) of the Manufacturing Clause or expressly excluded from it under sub-section (b). The United States then estimated the value of the portion of the market in 1981 for printed materials covered by the Manufacturing Clause for which foreign printing firms, wherever located, might have been able to compete, by subtracting those portions of each sector in which, in its view, United States printers had an overwhelming competitive advantage because of their proximity to the market, to the publishers of the materials involved, and to adequate supplies of competitively priced raw materials. The resulting figure totalled US$778.1 million. In order to assess the share of this market that the printing industry of the European Communities might have been able to capture, the United States looked at the performance of Community exports in the United States market for bibles and prayer books. Bibles and prayer books are not covered by the Manufacturing Clause, but according to the United States they are materials similar to the books and catalogues that are covered: they are primarily textual; the printing equipment and materials for "manufacturing" bibles and prayer books are the same as those for other books; the printing and binding labour skills are the same; the distribution methods also are similar to those used for distribution of Manufacturing Clause covered books. The United States maintained that this market was particularly favourable to foreign printers because it was predictable and not subject to sudden shifts in consumer taste; it was, therefore, one in which short delivery times were less important than for most printed goods. The United States said that the Communities had gained a share of the United States market of only 2.3 per cent in this sector in 1981. In the light of this, and taking into account the greater need for timeliness and close working relations between publishers and printers for most products covered by the Manufacturing Clause as well as the high degree of competitiveness and efficiency of the United States printing industry, the United States contended that it was not possible to support a claim that

the printing industry of the European Communities would have achieved any penetration of the United States market for printed materials covered by the Manufacturing Clause had it expired.

IV. Findings

(a) Article XI

34. The Panel first considered whether the Manufacturing Clause was consistent with Article XI of the General Agreement. It found that the prohibition of imports of certain printed matter provided for in the Manufacturing Clause was inconsistent with paragraph 1 of Article XI. The Panel noted that the United States had neither contested this nor attempted to justify the Manufacturing Clause under any of the exceptions to Article XI:1 contained in the General Agreement.

(b) The Protocol of Provisional Application

35. The Panel then examined whether this inconsistency with Article XI could be justified under the Protocol of Provisional Application, under which the United States applies the General Agreement (BISD, Vol.IV/77). It noted that, according to paragraph 1(b) of the Protocol, Part II of the General Agreement is to be applied "to the fullest extent not inconsistent with existing legislation", that is mandatory legislation in force on 30 October 1947 (BISD, Vol.II/35 and 62). It also noted that the central point of difference between the two parties to the dispute related to whether the Manufacturing Clause, despite the postponement by legislation of July 1982 of the expiry date of 1 July 1982 inserted in the Clause in 1976, could still qualify as "existing legislation" under the Protocol of Provisional Application.

36. In order to examine the arguments advanced by the two parties on this matter (see paragraphs 12-18 above), the Panel, noting that the Manufacturing Clause had been amended on 13 July 1982, first asked itself whether the mere fact that the Clause had been amended after 30 October 1947 meant that it had lost the cover of the "existing legislation" provision of the Protocol of Provisional Application. The Panel noted that in the case of the Brazilian internal taxes (BISD, Vol. II/181) the CONTRACTING PARTIES had accepted that legislation inconsistent with Part II of the GATT could be modified without losing its status of "existing legislation" provided the degree of inconsistency with the General Agreement was not increased. The Panel further noted that one of the basic purposes of the provisional application of Part II of the GATT had been to ensure that the value of tariff concessions was not undermined by new protective legislation. To permit changes to "existing legislation" that did not increase the degree of inconsistency of such legislation with the General Agreement would thus be in accordance with this purpose of the Protocol of Provisional Application. The Panel therefore considered that changes to the Manufacturing Clause that did not alter its degree of inconsistency with the General Agreement, or which constituted a move towards a greater degree of consistency, would not cause it to cease to qualify as "existing legislation" in terms of paragraph 1(b) of the Protocol of Provisional Application. In this regard, the Panel noted with satisfaction that certain of the amendments made by the United States since 1947 to the Manufacturing Clause had reduced its degree of inconsistency with the General Agreement.

37. The Panel then asked itself whether or not the legislation of 13 July 1982 postponing the expiry date of the Manufacturing Clause had merely amended the Manufacturing Clause without increasing its degree of inconsistency with the General Agreement. The Panel considered that the answer to this question depended on whether the introduction by the United States in 1976 of an expiry date of 1 July 1982 for the Manufacturing Clause had constituted a move towards GATT conformity, which had been reversed by the 1982 legislation, or whether the 1976 amendment had represented only an announcement of the possibility of a future move. The Panel considered that the response to this question depended in turn on whether, in the circumstances of the particular case, the insertion of the expiry date could justifiably have been considered by trading partners as a change in United States policy (with delayed implementation) or merely as the announcement of the possibility of a future change

in policy. After a careful evaluation of the evidence before it, in particular of the evidence in paragraphs 24-29, and having regard to the fact that the expiry date inserted in the Clause in 1976 was the first such provision introduced since the legislation came into force in 1891, the Panel found that the European Communities had been justified in reaching the conclusion that the expiry date inserted in 1976 had constituted a policy change. The Panel therefore found that the insertion of the expiry date of 1 July 1982 for the Manufacturing Clause by Public Law 94-553 had represented a move towards greater GATT conformity. In consequence, the Panel further found that the legislation of 13 July 1982 postponing this expiry date had, in the circumstances of this particular case, constituted a reversal of this move towards greater GATT conformity and, therefore, increased the degree of inconsistency with the General Agreement of the Manufacturing Clause.

38. The Panel then considered whether this increase in the degree of inconsistency with the General Agreement of the Manufacturing Clause could be justified in terms of paragraph 1(b) of the Protocol of Provisional Application because the postponement of the expiry date had not increased the degree of inconsistency to a level in excess of that which had existed on 30 October 1947. The Panel was of the view that the basic issue in this respect was whether the "existing legislation" provision of the Protocol of Provisional Application should be interpreted as opening a "one-way street" permitting only movements from the situation on 30 October 1947 to the situation required by Part II of the GATT or a "two-way street" permitting also movements back towards the 1947 situation.

39. Since the text of the Protocol itself and previous decisions of the CONTRACTING PARTIES concerning the Protocol are not clear on this point, the Panel examined which of these two interpretations would be in accordance with the purposes of the Protocol of Provisional Application and of the General Agreement. It noted that the Protocol had been conceived of as providing a temporary dispensation to enable contracting parties to apply Part II of the General Agreement without changing existing legislation or acting inconsistently with it. Given this purpose of the Protocol, the Panel believed that, once a contracting party had reduced the degree of inconsistency of "existing legislation" with the General Agreement, there could be no justification for a subsequent move to increase the degree of GATT inconsistency of such legislation, albeit to a level not exceeding that which had existed on 30 October 1947. The Panel further noted that one of the basic aims of the General Agreement was security and predictability in trade relations among contracting parties. The Panel believed that it would not be consistent with this aim if contracting parties were free to reverse steps that had brought legislation inconsistent with GATT and justified under the Protocol of Provisional Application into line with the provisions of the General Agreement. The Panel therefore found that the Protocol of Provisional Application did not authorize contracting parties to enact legislation increasing the degree of GATT inconsistency of "existing legislation", even if that degree of inconsistency remained not in excess of that which had obtained on 30 October 1947. The Panel therefore found that the United States legislation of 13 July 1982 postponing the expiry date of the Manufacturing Clause could not be justified under the Protocol of Provisional Application.

(c) Other arguments presented to the Panel

40. In the light of the above findings, the Panel considered that it was unnecessary to examine the arguments presented to it relating to Article XIII and the balance of Tokyo Round concessions.

41. 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 (see paragraph 30 above).

V. Conclusions

42. The Panel found that:

(i) the Manufacturing Clause was inconsistent with Article XI of the General Agreement;

(ii) the extension of the Manufacturing Clause beyond 1 July 1982 could not be justified under the Protocol of Provisional Application;

(iii) the United States was therefore acting in this respect inconsistently with its obligations under the General Agreement, as applied pursuant to the Protocol of Provisional Application; and

(iv) the extension of the Manufacturing Clause beyond 1 July 1982 consequently had to be considered prima facie to nullify or impair benefits accruing to the European Communities under the GATT.

43. In the light of the above, the Panel suggests that the CONTRACTING PARTIES recommend that the United States bring the Manufacturing Clause into line with its obligations under the General Agreement.

ANNEX

Text of the Manufacturing Clause

(Section 601 of Title 17 of the United States Code
- Public Law 94-553 of 1976)

CHAPTER 6 - MANUFACTURING REQUIREMENTS AND IMPORTATION

Sec.

§ 601. Manufacture, importation, and public distribution of certain copies

(a) Prior to 1 July 1982,* and except as provided by subsection (b), the importation into or public distribution in the United States of copies of a work consisting preponderantly of nondramtic[1] literary material that is in the English language and is protected under this title is prohibited unless the portions consisting of such material have been manufactured in the United States or Canada.

(b) The provisions of subsection (a) do not apply -

(1) where, on the date when importation is sought or public distribution in the United States is made, the author of any substantial part of such material is neither a national nor a domiciliary of the United States or, if such author is a national of the United States, he or she has been domiciled outside the United States for a continuous period of at least one year immediately preceding that date; in the case of a work made for hire, the exemption provided by this clause does not apply unless a substantial part of the work was prepared for an employer or other person who is not a national or domiciliary of the United States or a domestic corporation or enterprise;

(2) where the United States Customs Service is presented with an import statement issued under the seal of the Copyright Office, in which case a total of no more than two thousand copies of any one such work shall be allowed entry; the import statement shall be issued upon request to the copyright owner or to a person designated by such owner at the time of registration for the work under section 408 or at any time thereafter;

(3) where importation is sought under the authority or for the use, other than in schools, of the Government of the United States or of any State or political subdivision of a State;

(4) where importation, for use and not for sale, is sought -

(A) by any person with respect to no more than one copy of any work at any one time;

(B) by any person arriving from outside the United States, with respect to copies forming part of such person's personal baggage; or

(C) by an organization operated for scholarly, educational, or religious purposes and not for private gain, with respect to copies intended to form a part of its library;

---

*"1982" replaced by "1986", by Public Law 97-215 of 13 July 1982.

[1]So in original. Probably should read "nondramatic".

(5) where the copies are reproduced in raised characters for the use of the blind; or

(6) where, in addition to copies imported under clauses (3) and (4) of this subsection, no more than two thousand copies of any one such work, which have not been manufactured in the United States or Canada, are publicly distributed in the United States; or

(7) where, on the date when importation is sought or public distribution in the United States is made -

(A) the author of any substantial part of such material is an individual and receives compensation for the transfer or license of the right to distribute the work in the United States; and

(B) the first publication of the work has previously taken place outside the United States under a transfer or license granted by such author to a transferee or licensee who was not a national or domiciliary of the United States or a domestic corporation or enterprise; and

(C) there has been no publication of an authorized edition of the work of which the copies were manufactured in the United States; and

(D) the copies were reproduced under a transfer or license granted by such author or by the transferee or licensee of the right of first publication as mentioned in subclause (B), and the transferee or the licensee of the right of reproduction was not a national or domiciliary of the United States or a domestic corporation or enterprise.

(c) The requirement of this section that copies be manufactured in the United States or Canada is satisfied if -

(1) in the case where the copies are printed directly from type that has been set, or directly from plates made from such type, the setting of the type and the making of the plates have been performed in the United States or Canada; or

(2) in the case where the making of plates by a lithographic or photoengraving process is a final or intermediate step preceding the printing of the copies, the making of the plates has been performed in the United States or Canada; and

(3) in any case, the printing or other final process of producing multiple copies and any binding of the copies have been performed in the United States or Canada.

(d) Importation or public distribution of copies in violation of this section does not invalidate protection for a work under this title. However, in any civil action or criminal proceeding for infringement of the exclusive rights to reproduce and distribute copies of the work, the infringer has a complete defense with respect to all of the nondramatic literary material comprised in the work and any other parts of the work in which the exclusive rights to reproduce and distribute copies are owned by the same person who owns such exclusive rights in the nondramatic literary material, if the infringer proves -

(1) that copies of the work have been imported into or publicly distributed in the United States in violation of this section by or with the authority of the owner of such exclusive rights; and

(2) that the infringing copies were manufactured in the United States or Canada in accordance with the provisions of subsection (c); and

(3) that the infringement was commenced before the effective date of registration for an authorized edition of the work, the copies of which have been manufactured in the United States or Canada in accordance with the provisions of subsection (c).

(e) In any action for infringement of the exclusive rights to reproduce and distribute copies of a work containing material required by this section to be manufactured in the United States or Canada, the copyright owner shall set forth in the complaint the names of the persons or organizations who performed the processes specified by subsection (c) with respect to that material, and the places where those processes were performed.

Pub.L. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2588.