

# GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

MTN/3D/2

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## Multilateral Trade Negotiations

### GROUP 3(d) - SAFEGUARDS FOR MAINTENANCE OF ACCESS

#### Factual Note by the Secretariat

##### Introduction

1. At its July meeting the Trade Negotiations Committee agreed that Group 3(d) should meet to carry out technical and analytical work on the multilateral safeguard system (document MTN/P/3, paragraph 26). The present note, which is a revised and updated version of document COM.IND/W/104 constitutes the second of two notes prepared by the secretariat to assist members of the Group in carrying out this task. The note deals with the question of safeguard provisions for ensuring the maintenance of access, including the situation with regard to Articles XXII and XXIII as well as with regard to tariff bindings.
2. One of the main aims of the General Agreement is to provide stable conditions of access to the markets of the contracting parties. The assumption is that protection should normally be provided by the customs tariff, which would be reduced and bound against increase in successive negotiations (Articles II, XVIII, XIX, XXVIII, XXVIII bis). Quantitative restrictions are forbidden except in defined circumstances and subject to specified conditions (Articles X, XII, XIII, XIV, XVIII, XIX, XX, XXI). Further provisions are designed to ensure that other measures, which are not intended to be instruments of commercial policy, do not limit access (Articles III, VIII, IX, X, XV, XVI, XVII). Changes in conditions of access for third countries resulting from the creation of customs unions and free-trade areas are regulated by Article XXIV. The General Agreement also contains provisions relating to conditions of access for exports of developing countries (Articles XVIII, XXVII:1, XXVIII).
3. The General Agreement also contains provisions designed to safeguard these conditions of access. Article XIX, for instance, contains provisions which are designed to ensure that the rules it lays down are observed or, if they are not, to provide for compensation to be granted or the balance of advantage to be re-established. Article XXVIII also contains provisions which are designed to safeguard the interests

of supplying countries as regards bindings. The main GATT provisions designed to safeguard the maintenance of access are, however, Articles XXII and XXIII. The relevant aspects of Article XIX have been dealt with in MTN/3D/1. This paper limits itself to dealing with the relevant aspects of Articles XXII, XXIII and XXVIII, and to giving examples of the relevant provisions of other international agreements.

#### Article XXII

4. Article XXII provides a broad general authorization for consultation in two stages, the first being individual consultation between contracting parties and the second being referral to the CONTRACTING PARTIES. Paragraph 1 of this Article reads "Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for, consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement." If it has not been possible to find a satisfactory solution under paragraph 1, "the CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter". The object of Article XXII is thus to provide for consultation, in order to reach agreement on any matter falling within the purview of the Agreement.

5. Procedures for consultations under Article XXII on questions affecting the interests of a number of contracting parties were adopted in 1958 by the CONTRACTING PARTIES (BISD, Seventh Supplement, page 24), to deal with specific and practical problems arising out of the application of the Rome Treaty (BISD, Seventh Supplement, page 70, paragraphs 3, 4 and page 71, paragraph (d); L/886, page 3; SR.13/15, page 141). These procedures were agreed "as a matter of convenience and in order to facilitate the observance of the basic principles and objectives of the General Agreement" (L/928). These procedures can also be regarded as providing a basis for ensuring that the interests of other contracting parties are taken into account in the consultations. These procedures provide that any contracting party seeking a consultation under Article XXII shall at the same time so inform the Director-General, for the information of all contracting parties. Within forty-five days of that notification any contracting party asserting a substantial trade interest in the matter may advise the consulting countries and the Director-General of its desire to be joined in the consultation. If the contracting party or parties to which the request for consultation is addressed agrees that the claim of substantial interest is well-founded, such contracting party shall be joined with the contracting parties concerned and the Director-General shall be informed. If this is not accepted, the applicant contracting party may refer its claim to the CONTRACTING PARTIES. The outcome of the consultation is communicated to the Director-General, who informs all contracting parties. Finally, the procedures provide for the Director-General to provide such assistance in the consultations as the parties may request.

6. These procedures have been relatively little used. The secretariat has records of a number of Article XXII:1 consultations being notified under them.<sup>1</sup> As to Article XXII:2, consultations were carried out in some cases by the CONTRACTING PARTIES, the Intersessional Committee or by the Council. In seven other cases the CONTRACTING PARTIES have conducted consultations under Article XXII:2 within a Working Party. The first of these cases dates back to December 1960, when the United States requested consultations regarding Italian import restrictions.<sup>2</sup> A similar case, also relating to Italian import restrictions was brought by Israel in the following year.<sup>3</sup> In both cases Italy liberalized a number of items. In 1965 the United Kingdom requested consultations with Turkey regarding the application of paragraphs 5(a) and 6 of Article XXIV when tariffs were reduced in the course of forming a customs union with the European Economic Community. As a result of the consultation Turkey stated that it would "give due consideration to the equitable rights of contracting parties who are not members of the Ankara Agreement when it comes to implementing differential tariff treatment in favour of the EEC".<sup>4</sup> A working party was set up in 1967 to conduct a consultation on behalf of the CONTRACTING PARTIES concerning the British Steel Corporation sheet steel loyalty rebate but this was inconclusive.<sup>5</sup> In the same year an Article XXII:2 consultation was held concerning an export subsidy granted by the United States on unmanufactured tobacco which did not lead to a satisfactory settlement.<sup>6</sup> The subsidy has recently been terminated.<sup>7</sup>

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<sup>1</sup>Under this procedure, joint consultations were held with the EEC on cocoa (L/994), tobacco (L/995), tea (L/996), coffee (L/1007), bananas (L/1008), and bauxite, alumina and metal (L/1129). In addition, there were a few other notifications under this procedure, e.g., German Import Restrictions (L/949), Italian Import Restrictions (L/1222), Austrian Import Restrictions (L/2046), Norwegian Import Restrictions (L/2675), United States Tobacco Subsidy (L/2715). Currently the United States and other interested contracting parties are holding Article XXII:1 consultations with the EEC and with the EFTA countries and Finland in regard to the rules of origin which apply to trade between the European Communities and each EFTA country plus Finland, as well as the rules of origin which apply to intra-EFTA trade (L/3992).

<sup>2</sup>BISD, 10th Supplement, page 117

<sup>3</sup>BISD, 10th Supplement, page 130

<sup>4</sup>BISD, 14th Supplement, page 64

<sup>5</sup>C/M/43, page 5. The practice has been discontinued.

<sup>6</sup>BISD, 15th Supplement, page 116

<sup>7</sup>L/3655/Add.14/Supplement 1

7. At the twenty-fourth session held in November 1967 the CONTRACTING PARTIES agreed that GATT procedures, including those under Article XXII, provided an adequate context for discussion of problems in the agricultural sector which should be given immediate attention and that "the discussions should be conducted not in a spirit of confrontation but as a means of arriving at mutually acceptable solutions".<sup>1</sup> Shortly after this the Council established the Working Party on Dairy Products "to conduct on behalf of the CONTRACTING PARTIES, consultations under Article XXII:2 on urgent problems in international trade in dairy products with a view to arriving at mutually acceptable solutions to these problems and to report to the Council".<sup>2</sup> The Working Party drew up the Arrangement Concerning Certain Dairy Products which fixes minimum export prices for skimmed milk powder in order to restore stability to the world market for this product.<sup>3</sup> The Working Party has also drawn up a Protocol Relating to Milk Fat.<sup>4</sup> Both Arrangements continue to work satisfactorily and by May 1975 the former will have been in force for five years and the latter for two years. The two Arrangements are extended automatically each year for a period of twelve months unless either Management Committee should decide otherwise eighty days prior to the expiry date.

8. Shortly after the establishment of the Working Party on Dairy Products the Council established a similar Working Party to conduct Article XXII:2 consultations on problems in international trade in poultry.<sup>5</sup> The Working Party held three meetings but was not able to arrive at a generally acceptable solution to these problems.

#### Article XXIII

9. Action may be taken under this Article "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

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<sup>1</sup>BISD, 15th Supplement, page 70

<sup>2</sup>C/M/43, page 3

<sup>3</sup>BISD, 17th Supplement, page 59

<sup>4</sup>L/3835 and L/3837

<sup>5</sup>C/M/45, page 1

- (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".

10. There is no instance of a contracting party bringing an Article XXIII action because it considered that the attainment of an objective of the Agreement was being impeded, nor because of situations referred to in paragraph 1(c) of the Article. It seems clear that the drafters of the General Agreement included these provisions in order, inter alia, to enable a contracting party to bring an Article XXIII action if the measures adopted by another contracting party to deal with "widespread unemployment or a serious decline in demand ... had not produced the effects which they were designed to achieve".<sup>1</sup>

11. In practice, therefore, recourses to Article XXIII have arisen in general only when a benefit accruing to a contracting party under the General Agreement was being nullified or impaired. In cases where there is a clear infringement of the provisions of the General Agreement, or in other words, where measures are not permitted under the terms of the relevant protocol under which the GATT is applied by the contracting party, the action is considered, prima facie, to constitute a case of nullification or impairment.<sup>2</sup> The situation is different in cases where measures infringing the provisions of the GATT have been legalized by the granting of a waiver. In the case of many waivers it is specifically laid down that the granting of the waiver would not debar any individual contracting party from having recourse to the provisions of Article XXIII.<sup>3</sup> However, 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. If a contracting party brings an Article XXIII case in respect of measures which do not conflict with the provisions of the General Agreement it would be called upon to provide a detailed justification. In the Australian fertilizer case<sup>4</sup>, the CONTRACTING PARTIES agreed that Chile was justified in its Article XXIII action because the action taken by Australia which nullified or impaired the value of the tariff binding, although not in conflict with the provisions of the General Agreement, could not reasonably have been anticipated by the Chilean Government at the time it negotiated the binding. The notion of "reasonable expectation" is found in other Article XXIII cases and in the account of discussions during the drafting of the Article at Havana.

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<sup>1</sup>Analytical Index, 1970, page 125, paragraph 3

<sup>2</sup>Uruguayan case (Annex, No. 16), BISD, 11th Supplement, page 99, paragraph 15

<sup>3</sup>See Analytical Index 1970, page 125

<sup>4</sup>See Annex, Case No. 3

12. Paragraph 1 of Article XXIII goes on to lay down that "the contracting party may, with a view to the satisfactory adjustment of the matter [i.e., the nullification or impairment of a benefit], 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". Article XXIII, paragraph 2, provides that if no satisfactory adjustment is reached within a reasonable time under paragraph 1, or if the difficulty is of the type described in paragraph 1(c), the matter may be referred to the CONTRACTING PARTIES.

13. The CONTRACTING PARTIES at their seventeenth session in 1960 agreed that "a consultation held under paragraph 1 of Article XXII would be considered by the CONTRACTING PARTIES as fulfilling the conditions of paragraph 1 of Article XXIII".<sup>1</sup> Similarly, the CONTRACTING PARTIES agreed in April 1966<sup>2</sup> that "consultations held under paragraph 2 of Article XXXVII:2 in respect of restrictions for which there is no authority under any provisions of the General Agreement will be considered by the CONTRACTING PARTIES as fulfilling the conditions of paragraph 1 of Article XXIII if the parties to the consultations so agree".

14. Paragraph 2 of the Article goes on to provide that "The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate intergovernmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the CONTRACTING PARTIES of its intention to withdraw from the Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

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<sup>1</sup>Analytical Index, 1970, page 130, paragraph 13; BISD, 9th Supplement, pages 18-20, paragraph 9

<sup>2</sup>BISD, 14th Supplement, pages 18-20, paragraph 11

15. In 1966 the CONTRACTING PARTIES adopted a decision laying down procedures for Article XXIII consultations between a developing contracting party and a developed contracting party.<sup>1</sup> These provide inter alia, that the Director-General may use his good offices with a view to facilitating a solution, provide for the appointment of a panel of experts to examine the matter with a view to recommending appropriate solutions and lay down time-limits by which different stages of the procedure must be completed. These procedures have in the past never been used.

16. No procedure is laid down in Article XXIII:2 whether a working party or panel should deal with specific cases. Since 1952, however, the CONTRACTING PARTIES have normally established a panel rather than a working party to assist them in the examinations of matters raised under paragraph 2 of Article XXIII. A panel is more likely to arrive at an objective assessment of the facts than a working party since the parties to the dispute are normally members of a working party but are not represented on a panel, which is composed of individuals appointed in their personal capacity and not as representatives of their governments. An objective assessment of the facts is desirable since the matter is referred to the CONTRACTING PARTIES under paragraph 2 only if the parties to the dispute have not themselves been able to reach agreement on these facts. The panel's job is normally limited to that of making factual findings and suggesting solutions that will assist the CONTRACTING PARTIES in making appropriate recommendations or giving a ruling as provided for in the Article.

17. The ultimate remedy which Article XXIII offers to exporting countries is the possibility of discriminatory retaliation against the offending contracting party where this is authorized by the CONTRACTING PARTIES. It has been emphasized, however, that the first objective should be the withdrawal of the measures complained of, in cases where these were inconsistent with the General Agreement; and that 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>2</sup> For example, in the case brought by the United States in 1962 with respect to French import restrictions, the Panel recommended that the United States refrain from suspending concessions for a reasonable period of time.<sup>3</sup>

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<sup>1</sup>BISD, 14th Supplement, pages 18-20

<sup>2</sup>BISD, 3rd Supplement, page 251, paragraph 64

<sup>3</sup>See Annex, case No. 15. The recommendation to the United States was preceded by a recommendation to France to abolish the import restrictions. The United States returned to the case in September 1972 and subsequently a settlement was reached.

18. Only one case of Article XXIII action has led to retaliatory action.<sup>1</sup> In 1952 the CONTRACTING PARTIES authorized "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". This decision was extended by a series of decisions which ended in 1959.

19. Article XXIII:2 has not been used very frequently in the last twenty-five years, although it has recently been used more often.<sup>2</sup> The reluctance of contracting parties to use the Article may result from the feeling that the use of the Article is potentially destructive, since the final remedy which it offers to exporting countries is retaliation, and that retaliation, once resorted to, may snowball. There has therefore been a tendency to negotiate about disputed matters rather than to resort to the quasi-judicial provisions of Article XXIII. On the other hand, the importance of the Article cannot be judged only by the number of times which its provisions have been used. There is little doubt that knowledge that the provisions of Article XXIII are always available to exporting countries acts to safeguard their interests.

#### Article XXVIII

20. Article XXVIII lays down the conditions for the modification or the withdrawal of concessions previously granted by a contracting party. To raise bound rates, therefore, contracting parties must go through the procedures of Article XXVIII while unbound rates may be increased at any time. The percentage of tariff lines in the industrial sector which have been bound under GATT by the contracting parties covered by the tariff study and the percentage of most-favoured-nation imports which enter under these bound items are shown in the following table:

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<sup>1</sup>See Annex, case No. 6.

<sup>2</sup>See Annex, cases Nos. 15, 19, 20, 21, 22 and 23.

STATUS OF BINDINGS<sup>1</sup>

	<u>% of tariff lines bound</u>	<u>% of m.f.n. imports under bound items</u>
Austria	85	84
Australia	6	9
Canada	80	61
EEC (nine countries)	98	99
Finland	91	96
Japan	90	60
New Zealand	27	46
Norway	79	53
Sweden	93	96
Switzerland	98	85
United States	99	90
Eleven tariffs combined	77	81

Other countries, especially developing countries, have bound a smaller percentage of their industrial tariff.

21. The Article in its present form, i.e. as redrafted at the Review Session in 1955, lays down procedures for the modification or withdrawal of a concession included in the appropriate Schedule, under three types of negotiation; first, under the normal three-year (open-season) renegotiations (paragraph 1); secondly, under the special circumstances renegotiations (paragraph 4); and thirdly under the reserved renegotiations (paragraph 5).

22. Paragraph 1 of the Article says "On the first day of each three-year period the first period beginning on 1 January 1958 (or on the first day of any other period that may be specified by the CONTRACTING PARTIES by two-thirds of the votes cast) a contracting party (hereafter in this Article referred to as the 'applicant contracting party') may negotiate an agreement with any contracting party with which such concession was initially negotiated and with any other contracting party determined by the CONTRACTING PARTIES to have a principle supplying interest (which two preceding categories of contracting parties, together with the applicant contracting party, are in this Article hereinafter referred to as the 'contracting parties primarily concerned'), and subject to consultation with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest in such concession, modify or withdraw a concession included in the appropriate Schedule annexed to this Agreement." The latest date for

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<sup>1</sup>Source: Basic documentation of the Tariff Study on industrial products (BTN Ch. 25-99). The figures are based on data for 1971 and relate to items wholly bound. The inclusion of partly bound items would alter the picture only marginally.

modifications or withdrawal of concessions under paragraph 1 was 1 January 1973 and the next one would be 1 January 1976. A contracting party wishing to modify or withdraw concessions under the procedures of Article XXVIII:1 must notify the CONTRACTING PARTIES between 1 July and 30 September in the final year of the current three-year period. (See Ad Article XXVIII:1, paragraph 3.)

23. Under paragraph 4, "the CONTRACTING PARTIES may, at any time in special circumstances, authorize a contracting party to enter into negotiations for modification or withdrawal of a concession included in the appropriate Schedule annexed to this Agreement subject to procedures and conditions specified in (a), (b), (c) and (d) of the same paragraph."

24. Finally, under paragraph 5, "before 1 January 1958 and before the end of any period envisaged in paragraph 1 a contracting party may elect by notifying the CONTRACTING PARTIES to reserve the right, for the duration of the next period, to modify the appropriate Schedule in accordance with the procedures of paragraphs 1 to 3". The latest date on which such notifications could be made was 1 January 1973, for the period 1973-1976. Twelve notifications were received from Australia, Austria, Denmark, EEC, Finland, India, Israel, New Zealand, South Africa, Turkey and the United States of America. The number of countries reserving the right to use this Article has increased recently.

25. On the other hand, Article XXVIII contains provisions which are designed, when a contracting party takes action under paragraph 1, 4 or 5, to protect the rights of exporters affected by the measures. The contracting parties with which the concessions were originally negotiated, or which are determined by the CONTRACTING PARTIES to have a principal supplying interest, have the right to negotiate with (paragraph 1) and to seek compensatory adjustments (paragraph 2) from the withdrawing party, and the parties determined to have a substantial interest have the right to consult with the same (paragraph 1).

26. If no agreement is reached during the negotiations or consultations the withdrawing party is free to go ahead with its proposed measure but the affected parties as defined above have the right to have recourse to retaliatory measures (paragraph 5). The procedures set out under paragraphs 1 to 3 inclusive are generally applicable to the three types of renegotiations. Under paragraph 5, both the withdrawing party and the other contracting parties reserve the right to withdraw or modify concessions initially negotiated with the other party. However, under paragraph 4, prior authorization to negotiate must be given by the CONTRACTING PARTIES and if no agreement is reached within 60 days after such authorization, the matter may be referred to the CONTRACTING PARTIES which will act under the procedure of paragraph 4(d).

27. An Interpretative Note to Article XXVIII (Volume IV, 1969, page 73) gives precise details as to the procedures to be followed under paragraphs 1 and 4 i.e. the notification of proposed measures, the determination by the CONTRACTING PARTIES of the parties primarily concerned and those having a substantial interest, the secrecy of the negotiations, the timing of the various stages. Two points are worth mentioning in this respect. The first one is paragraph 5 of the Interpretative Note to paragraph 1 of the Article which says that "The CONTRACTING PARTIES may exceptionally determine that a contracting party has the principal supplying interest if the concession in question affects trade which constitutes a major part of the total exports of such contracting party." The other point is contained in paragraph 5 of the Interpretative Note to paragraph 4 of the Article and says that "In determining under paragraph 4(d) whether an applicant contracting party has unreasonably failed to offer adequate compensation, it is understood that the CONTRACTING PARTIES will take due account of the special position of a contracting party which has bound a high proportion of its tariffs at very low rates of duty and to this extent has less scope than other contracting parties to make compensatory adjustment."

28. Some 185 notifications<sup>1</sup> that contracting parties wished to renegotiate tariff bindings and which have led to the use of this right under Article XXVIII have been recorded in GATT since 1948. One hundred and sixty-one such cases have arisen since the Article was redrafted at the Review Session. Of these, some ninety-nine cases were brought under paragraph 1, forty-six under paragraph 4 and sixteen under paragraph 5 of Article XXVIII. It can therefore be seen that the number of times countries have actually used this right under paragraph 5, is relatively small.

29. In the majority of Article XXVIII cases, a satisfactory agreement was reached between the parties concerned with the effect that until the mid-sixties there was no reported case of retaliatory action. Since that date only one case seems to have involved retaliation proper; i.e., the EEC withdrawal of concessions on certain types of cheese notified under Article XXVIII:1 in July 1966, which led to retaliatory action by Australia under XXVIII:3 on 5 February 1968.<sup>2</sup> An element of unilateral modification having retaliatory effects can be

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<sup>1</sup>It should be noted that each notification relates to one or more tariff bindings. In practice most notifications have related to a very limited number of bindings; in a few exceptional cases, however, notifications have covered up to 400 tariff lines.

<sup>2</sup>Secret, Australia 165/Add.2.

found in the Canada/EEC dispute on aluminium (BTN 76.03) in December 1969.<sup>1</sup> It would therefore seem that Article XXVIII:3 has hardly ever been used primarily because negotiations were successful and, no doubt, partly because of the difficulty involved in finding appropriate concessions with regard to which retaliatory measures could be taken.

30. Considering the thousands of bindings in GATT, the relatively small number of cases brought before GATT shows that where bindings exist they have provided an element of stability. The Article can thus be considered to have served a useful means of safeguarding access for exporters.

#### Some other international agreements

31. Clauses whereby governments reserved their right under certain circumstances and conditions which impair or nullify benefits, or threaten to do so, to seek adjustment or compensation or to retaliate, and whereby procedures are laid down to this effect, have been included in most multilateral, regional or bilateral trade agreements. The following section reviews briefly some of these clauses.

#### European free-trade agreement

32. For the purpose of this paper the relevant Article is Article 31 of the Stockholm Convention, which lays down a procedure for general consultations and complaints, and provides for safeguarding the interests of Member States. Paragraph 1 states that "if any Member State considers that any benefit conferred upon it by this Convention or any objective of the Association is being or may be frustrated, and if no satisfactory settlement is reached between the Member States concerned, any of those Member States may refer the matter to the Council". After prompt examination by the Council or by an examining committee, the Council may make appropriate recommendations. If a Member State does not, or is unable to comply, the Council may authorize suspension of the application of such obligations under the Convention as it considers appropriate. Moreover, "any Member State may, at any time while the matter is under consideration, request the Council to authorize, as a matter of urgency, interim measures to safeguard its position...".

#### Treaty of Rome - European Economic Community

33. In the context of this paper, the main relevant Article is Article 170 which states that "Any Member State which considers that another Member State has failed to fulfil any of its obligations under this Treaty may refer the

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<sup>1</sup>Secret, 165/Add.5.

matter to the Court of Justice." The Court's competence relates to "any ... obligations". The same Article says also that "before a Member State institutes against another Member State, proceedings relating to an alleged infringement of the obligations under this Treaty, it shall refer the matter to the Commission. The Commission shall give a reasoned opinion after the States concerned have been required to submit their comments in written and oral pleadings. If the Commission, within a period of three months after the date of reference of the matter to it, has not given an opinion, reference to the Court of Justice shall not thereby be prevented".

34. Article 171 lays down that "if the Court of Justice finds that a Member State has failed to fulfil any of its obligations under this Treaty, such State shall take the measures required for the implementation of the judgment of the Court". It would appear, therefore, that the Court's decisions are binding. This is qualified by Article 187 which says that the judgments of the Court of Justice shall be enforceable under certain conditions specified in Article 192. These conditions relate to decisions which contain pecuniary obligations on persons other than States.

35. The relevant Articles of the Rome Treaty are not specifically designed to deal with conflicts arising from trade measures. They could, nevertheless, be invoked by exporting Member States whose trade benefits under the Treaty are being impaired or nullified by measures imposed or to be imposed by another or other Member States.

#### Free-Trade Agreement between EEC and EFTA Countries

36. Article 22 of the Agreement between the EEC and Switzerland and Liechtenstein<sup>1</sup> contains a provision for safeguarding the interests of the parties concerned in cases where a party has failed to fulfil an obligation under the Agreement. The last part of paragraph 2 of the Article reads as follows: "If either contracting party considers that the other contracting party has failed to fulfil an obligation under the Agreement, it may take appropriate measures under the conditions and in accordance with the procedures laid down in Article 27." These conditions and procedures, in so far as they relate to Article 22, are contained in paragraph 2 of Article 27, which reads "In the cases specified in Articles 22 to 26, before taking the measures provided for therein ..., as soon as possible, the contracting party in question shall supply the Joint Committee with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the CONTRACTING PARTIES. "

"In the selection of measures, priority must be given to those which least disturb the functioning of the Agreement."

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<sup>1</sup>L/3758, Add.1

37. Similar provisions for safeguarding the maintenance of access can be found in the Agreements between EEC and Austria<sup>1</sup>, Finland<sup>2</sup>, Iceland<sup>3</sup>, Norway<sup>4</sup>, Portugal<sup>5</sup>, and Sweden.<sup>6</sup>

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<sup>1</sup>L/3783, Add.1 (Articles 22 and 27)

<sup>2</sup>L/3973 and Corr.1 (Articles 22 and 27)

<sup>3</sup>L/3780, Add.1 (Articles 23 and 28)

<sup>4</sup>L/3872 (Articles 22 and 27)

<sup>5</sup>L/3781, Add.1 (Articles 25 and 30)

<sup>6</sup>L/3782, Add.1 (Articles 22 and 27)

ANNEX

Tabular Analysis of Article XXIII Cases

No.	Description of case	Date of measure or complaint	Complaint by/versus	Referred to	Action taken	Reference
1	Internal taxes	1948, 1950	France/ Brazil	W.P. <sup>1</sup>	Brazil was asked to liberalize and to report further. Rights of France under XXIII were confirmed. Measure was abolished August 1958.	II/181, 25/25; 45/21; 55/37
2	Export restrictions	June 1949	Czechoslovakia/ United States	C.P.'s	The Contracting Parties rejected the complaint.	II/28
3	Subsidy on ammonium sulphate	July 1949	Chile/ Australia	W.P.	Australia disagreed with the findings whereby a subsidy was defined as a <u>prima facie</u> case of nullification or impairment and therefore had to be removed. Agreement reached 6 November 1950.	II/195, 138, CP.5/SR.6
4	Family allowances	March 1951	Norway/ Denmark/ Belgium	Panel <sup>2</sup>	The Belgian legislation was found inconsistent with Article I (and possibly III:2) and based on a concept inconsistent with the spirit of the Agreement. W.P. recommended to expedite changes in the legislation. Measure was terminated by a new law on 6 March 1954.	I3/59; 25/18 L/187

<sup>1</sup>W.P. stands for Working Party

<sup>2</sup>Panel on complaints

No.	Description of case	Date of measure or complaint	Complaint by/versus	Referred to	Action taken	Reference
5	Import duties on starch and potato flour	1951	Benelux/ Fed. Rep. of Germany	Panel	Fed. Rep. of Germany proposed tariff concessions which were found acceptable.	3S/77
6	Import restrictions on dairy products	June 1951	Nether-lands/ United States	W.P.	The United States were asked to remove restrictions within a reasonable time-limit and report further to the C.P.'s. Failing progress, the C.P.'s authorized Netherlands to avail itself of Article XXIII:2 benefits. Concessions were suspended by the Netherlands on wheat flour, subject to annual "determination" by the C.P.'s.	II/16 IS/31, 32, 62 2S/28 3S/46; 4S/31, 99; 5S/28, 142; 6S/14, 157; 7S/23, 128
7	Treatment of sardines imports	July 1952	Norway/ Fed. Rep. of Germany	Panel <sup>1</sup>	The Panel recommended that Fed. Rep. of Germany considers ways of removing the competitive inequality between different types of sardines imports as regards the imposition of duties and taxes. The case was disposed of in 1953.	IS/30, 53
8	Discrimination against imported agricultural machinery	July 1952	United Kingdom/ Italy	Panel <sup>1</sup>	Recommendation to eliminate adverse effects of farmers credit facilities Agreement between parties reached in November 1958. Matters subsequently discussed in 17th session.	7S/23, 60 SR/13/18 L/1294 SR 17/5
9	Increase of imports duties (coefficient for currency conversion)	July 1952	United Kingdom/ Greece	Panel <sup>1</sup>	Measure was rescinded, 20 July 1953.	IS/23, 51; SR.8/7

<sup>1</sup>Panel for consultations

No.	Description of case	Date of measure or complaint	Complaint by/versus	Referred to	Action taken	Reference
10	Special import taxes ("contribution" levied on certain imports)	October 1952	France/Greece	Panel <sup>1</sup>	Decision was deferred and matter referred to C.P.'s for decision on principles. Measure was terminated April 1952.	IS/48 SR.8/7
11	Anti-dumping duties	May, October 1954	Italy/Sweden	Panel <sup>2</sup>	Recommendation made to Italy and Sweden to consult. Decision deferred pending bilateral inquiry. Measure abrogated 20 July 1955.	3S/81 L/386
12	Special temporary compensation tax	1954	Italy/France	Panel	Measure was partially removed as first step, abolished August 1957, and replaced by other measures.	3S/26; 4S/20; 5S/27; SR.12/5
13	Assistance to exports of wheat flour	1958	Australia/France	Panel <sup>2</sup>	Recommendation for a revision of the methods of financing or for consultations between parties before new contracts were concluded by France. Agreement between the parties reached in April 1960.	7S/22, 46 L/1323 L/1548
14	Imports of potatoes (Value for duties)	October 1962	United States/Canada	Panel	C.P.'s recommended that Canada withdraw the additional charge or effect satisfactory adjustment of the impaired benefit. Measure abolished 2 January 1973.	IIS/55, 88 L/1968

<sup>1</sup>Panel on complaints

<sup>2</sup>Panel for consultations

No.	Description of case	Date of measure or complaint	Complaint by/versus	Referred to	Action taken	Reference
15	Import restrictions	November 1962	United States/ France	Panel	Rights to XXIII benefits for United States were recognized. United States was however asked to refrain from suspending concessions for a reasonable length of time. The United States returned to the case in September 1972 and subsequently a settlement was reached.	IIS/55, 94 L/3744 C/M/80, 81, 83
16	Recourse of Article XXIII (Primary products)	November 1962	Uruguay/ 15 developed countries	Panel	Panel made recommendations to the individual countries to submit information. Seven countries reported back, in 1963, their full compliance with GATT. Panel then made recommendation to seven others to give immediate consideration to removal of certain impairing or nullifying measures.	IIS/56, 95 13S/35
17	Import restrictions on grains	September 1970	United States/ Denmark	Council	Following notification of the dispute to the Council, the Parties reached an agreement in October 1970.	L/3436 C/M/64
18	Margins of preference	March 1971	United States/ Jamaica	Panel	On 2 March 1971 the CONTRACTING PARTIES granted a waiver to Jamaica changing the base date for calculation of margins of preference to 1 August 1962. At the same time Jamaica undertook to restore all margins of preference to the 1962 level.	18S/33 18S/183 L/3485

No.	Description of case	Date of measure or complaint	Complaint by/versus	Referred to	Action taken	Reference
19	Compensatory taxes on imports	June 1972	United States/EEC	Council	Compensatory taxes on large number of items abolished. United States agreed to defer further action.	L/3715 and Add.1 C/M/80
20	Restrictions on cotton textiles	October 1972	Israel/United Kingdom	Panel	Parties reached an agreement in January 1973	L/3812
21	Dollar area quotas	October 1972	United States/United Kingdom	Panel	Parties reached agreement on phasing out of quotas.	L/3843 L/3890 L/3891
22	Tax legislation (DISC)	May 1973	EEC/United States	Panel	(Pending)	L/3851 C/M/87 and Corr.1 C/M/89
23	(a) Income Tax Policies	May 1973	United States/Finland	Panel	(Pending)	L/3860
	(b) Income Tax Policies	May 1973	United States/Uruguay	Panel	(Pending)	C/M/87
	(c) Income Tax Policies	May 1973	United States/Member-States	Panel	(Pending)	C/M/89